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THE
CODE OF CIVIL PROCEDURE

(ACT V OF 1908)

WITH
EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

BY
V. V. CHITALEY, B.A., LL.B.
High Court Vakil, and Editor,
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VOLUME III

SCHEDULE I
ORDER XXXI TO ORDER LI
THE SECOND AND THIRD SCHEDULES
AND
APPENDICES

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THE CODE OF CIVIL PROCEDURE, 1908
(ACT V of 1908)

VOLUME III

CONTENTS.

THE FIRST SCHEDULE—(*Continued*).

ORDER XXXI.

SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS.

RULES. PAGE.
1. Representation of beneficiaries in suits concerning property vested in trustees, etc. .. 2477
2 Joinder of trustees, executors and administrators .. 2479
3. Husband of married executrix not to join .. 2480

ORDER XXXII.

SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND.

1. Minor to sue by next friend .. 2482
2. Where suit is instituted without next friends, plaint to be taken off the file .. 2488
3. Guardian for the suit to be appointed by Court for minor defendant .. 2490
4. Who may act as next friend or be appointed guardian for the suit .. 2504
5. Representation of minor by next friend or guardian for the suit .. 2514
6. Receipt by next friend or guardian for the suit of property under decree for minor .. 2515
7. Agreement or compromise by next friend or guardian for the suit .. 2517
8. Retirement of next friend .. 2529
9. Removal of next friend .. 2529
10. Stay of proceedings on removal, etc., of next friend .. 2531
11. Retirement, removal or death of guardian for the suit .. 2531
12. Course to be followed by minor plaintiff or applicant on attaining majority .. 2533
13. Where minor co-plaintiff attaining majority desires to repudiate suit .. 2535
14. Unreasonable or improper suit .. 2535

RULES. PAGE.
15. Application of rules to persons of unsound mind .. 2536
16. Saving for Princes and Chiefs .. 2539

ORDER XXXIII.

SUITS BY PAUPERS.

1. Suits may be instituted in *forma pauperis* .. 2539
2. Contents of application .. 2546
3. Presentation of application .. 2548
4. Examination of applicant .. 2549
If presented by agent, Court may order applicant to be examined by commission .. 2549
5. Rejection of application .. 2550
6. Notice of day for receiving evidence of applicant's pauperism. 2554
7. Procedure at hearing .. 2554
8. Procedure if application admitted .. 2559
9. Dispaupering .. 2560
10. Costs where pauper succeeds .. 2562
11. Procedure where pauper fails .. 2567
12. Government may apply for payment of Court-fees .. 2568
13. Government to be deemed a party .. 2569
14. Copy of decree to be sent to Collector .. 2569
15. Refusal to allow applicant to sue as pauper to bar subsequent application of like nature .. 2570
16. Costs .. 2572

ORDER XXXIV.

SUITS RELATING TO MORTGAGES OF IMMOVEABLE PROPERTY.

1. Parties to suits for foreclosure, sale and redemption .. 2572
2. Preliminary decree in foreclosure suit .. 2601
3. Final decree in foreclosure suit .. 2613
4. Preliminary decree in suit for sale .. 2619
Power to decree sale in foreclosure suit .. 2620
5. Final decree in suit for sale .. 2628
6. Recovery of balance due on mortgage in suit for sale .. 2646
7. Preliminary decree in redemption suit .. 2661
8. Final decree in redemption suit .. 2669
8-A. Recovery of balance due on mortgage in suit for redemption .. 2675
9. Decree where nothing is found due or where mortgagee has been overpaid .. 2676
10. Costs of mortgagee subsequent to decree .. 2677
11. Payment of interest .. 2679
12. Sale of property subject to prior mortgage .. 2686
13. Application of proceeds .. 2688
14 Suit for sale necessary to bring mortgaged property to sale. 2790
15. Mortgages by the deposit of title-deeds and charges ... 2701

RULES. PAGE.

ORDER XXXV.

INTERPLEADER.

1. Plaint in interpleader suit .. 2704
2. Payment of thing claimed into Court .. 2705
3. Procedure where defendant is suing plaintiff .. 2706
4. Procedure at first hearing .. 2706
5. Agents and tenants may not institute interpleader suits .. 2708
6. Charge for plaintiff's costs .. 2709

ORDER XXXVI.

SPECIAL CASE.

1. Power to state case for Court's opinion .. 2709
2. Where value of subject-matter must be stated .. 2711
3. Agreement to be filed and registered as suit .. 2712
4. Parties to be subject to Court's jurisdiction .. 2712
5. Hearing and disposal of case .. 2712

ORDER XXXVII.

SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS.

1. Application of Order .. 2713
2. Institution of summary suits upon bills of exchange, etc. .. 2715
3. Defendant showing defence on merits to have leave to appear. 2719
4. Power to set aside decree .. 2721
5. Power to order bill, etc., to be deposited with officer of Court. 2722
6. Recovery of cost of noting non-acceptance of dishonoured bill or note .. 2722
7. Procedure in suits .. 2722

ORDER XXXVIII.

ARREST AND ATTACHMENT BEFORE JUDGMENT.

Arrest before Judgment.

1. Where defendant may be called upon to furnish security for appearance .. 2723
2. Security .. 2726
3 Procedure on application by surety to be discharged .. 2728
4. Procedure where defendant fails to furnish security or find fresh security .. 2729

ATTACHMENT BEFORE JUDGMENT.

5. Where defendant may be called upon to furnish security for production of property .. 2729
6. Attachment where cause not shown or security not furnished. 2738
7. Mode of making attachment .. 2740
8. Investigation of claim to property attached before judgment. 2740
9. Removal of attachment when security furnished or suit dismissed .. 2741

RULES. PAGE.
10. Attachment before judgment not to affect right of strangers, nor bar decree-holder from applying for sale .. 2742
11. Property attached before judgment not to be re-attached in execution of decree .. 2744
12. Agricultural produce not attachable before judgment .. 2745
13. Small Cause Court not to attach immoveable property .. 2745

ORDER XXXIX.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

Temporary Injunctions.

1. Cases in which temporary injunction may be granted .. 2746
2 Injunction to restrain repetition or continuance of breach .. 2761
3. Before granting injunction, Court to direct notice to opposite party .. 2769
4. Order for injunction may be discharged, varied or set aside .. 2769
5. Injunction to corporation binding on its officers .. 2770

INTERLOCUTORY ORDERS.

6. Power to order interim sale .. 2770
7. Detention, preservation, inspection, etc., of subject-matter of suit .. 2771
8. Application for such orders to be after notice .. 2773
9. When party may be put in immediate possession of land the subject-matter of suit .. 2773
10. Deposit of money, etc., in Court .. 2774

ORDER XL.

APPOINTMENT OF RECEIVERS.

1. Appointment of receivers .. 2775
2. Remuneration .. 2813
3. Duties .. 2815
4. Enforcement of receiver's duties .. 2818
5 When Collector may be appointed receiver .. 2821

ORDER XLI.

APPEALS FROM ORIGINAL DECREES.

1. Form of appeal .. 2821
What to accompany memorandum .. 2821
Contents of memorandum .. 2821
2. Grounds which may be taken in appeal .. 2839
3. Rejection or amendment of memorandum .. 2843
4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all. 2846

STAY OF PROCEEDINGS AND OF EXECUTION.

5. Stay by Appellate Court .. 2853
Stay by Court which passed the decree .. 2854

LES. PAGE.

6. Security in case of order for execution of decree appealed from .. 2865
7. No security to be required from the Government or a public officer in certain cases .. 2868
8. Exercise of powers in appeal from order made in execution of decree .. 2868

PROCEDURE ON ADMISSION OF APPEAL.

9. Registry of memorandum of appeal .. 2869
Register of appeals .. 2869
10. Appellate Court may require appellant to furnish security for costs .. 2870
Where appellant resides out of British India .. 2870
11. Power to dismiss appeal without sending notice to Lower Court. 2878
12. Day for hearing appeal .. 2883
13. Appellate Court to give notice to Court whose decree appealed from .. 2884
Transmission of papers to Appellate Court .. 2884
Copies of exhibits in Court whose decree appealed from .. 2884
14. Publication and service of notice of day for hearing appeal .. 2885
Appellate Court may itself cause notice to be served .. 2885
15. Contents of notice .. 2888

PROCEDURE ON HEARING.

16. Right to begin .. 2888
17. Dismissal of appeal for appellant's default .. 2890
Hearing appeal *ex parte* .. 2890
18. Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs .. 2896
19. Re-admission of appeal dismissed for default .. 2897
20. Power to adjourn hearing, and direct persons appearing interested to be made respondents .. 2902
21. Re-hearing on application of respondent against whom *ex parte* decree made .. 2910
22. Upon hearing, respondent may object to decree as if he had preferred separate appeal .. 2912
Form of objection and provisions applicable thereto .. 2912
23. Remand of case by Appellate Court .. 2926
24 Where evidence on record sufficient, Appellate Court may determine case finally .. 2955
25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from .. 2957
26. Findings and evidence to be put on record .. 2963
Objections to finding .. 2963
Determination of appeal .. 2963
27. Production of additional evidence in Appellate Court .. 2966
28. Mode of taking additional evidence .. 2980
29. Points to be defined and recorded .. 2980

RULES. PAGE.

JUDGMENT IN APPEAL.

30. Judgment when and where pronounced .. 2981
31. Contents, date and signature of judgment .. 2982
32. What judgment may direct .. 2991
33. Power of Court of Appeal .. 2992
34. Dissent to be recorded .. 3007

DECREE IN APPEAL.

35 Date and contents of decree .. 3007
Judge dissenting from judgment need not sign decree .. 3008
36. Copies of judgment and decree to be furnished to parties .. 3010
37. Certified copy of decree to be sent to Court whose decree appealed from .. 3010

ORDER XLII.

APPEALS FROM APPELLATE DECREES.

1 Procedure .. 3014

ORDER XLIII.

APPEALS FROM ORDERS.

1. Appeals from orders .. 3016
2. Procedure .. 3019

ORDER XLIV.

PAUPER APPEALS.

1. Who may appeal as pauper .. 3020
Procedure on application for admission of appeal ... 3020
2. Inquiry into pauperism .. 3025

ORDER XLV.

APPEALS TO THE KING IN COUNCIL.

1. "Decree" defined .. 3025
2. Application to Court whose decree complained of .. 3026
3. Certificate as to value or fitness .. 3027
4. Consolidation of suits .. 3030
5. Remission of dispute to Court of first instance .. 3032
6. Effect of refusal of certificate .. 3033
7. Security and deposit required on grant of certificate .. 3033
8. Admission of appeal and procedure thereon .. 3038
9. Revocation of acceptance of security .. 3039
9-A. Power to dispense with notices in case of deceased parties. 3039
10. Power to order further security or payment .. 3040
11. Effect of failure to comply with order .. 3040
12. Refund of balance deposit .. 3040
13. Powers of Court pending appeal .. 3041
14 Increase of security found inadequate .. 3046

RULES. PAGE.
15. Procedure to enforce orders of King in Council .. 3046
16. Appeal from order relating to execution .. 3052

ORDER XLVI.

REFERENCE.

1. Reference of question to High Court .. 3052
2. Court may pass decree contingent upon decision of High Court. 3056
3. Judgment of High Court to be transmitted, and case disposed of accordingly .. 3057
4. Costs of reference to High Court .. 3057
5. Power to alter, etc., decree of Court making reference .. 3058
6. Power to refer to High Court questions as to jurisdiction in small causes .. 3058
7. Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes .. 3058

ORDER XLVII.

REVIEW.

1. Application for review of judgment .. 3061
2. To whom applications for review may be made .. 3085
3. Form of applications for review .. 3088
4. Application where rejected .. 3089
Application where granted .. 3089
5. Application for review in Court consisting of two or more Judges .. 3092
6. Application where rejected .. 3094
7. Order of rejection not appealable .. 3094
Objections to order granting application .. 3094
8. Registry of application granted, and order for re-hearing .. 3101
9. Bar of certain applications .. 3103

ORDER XLVIII.

MISCELLANEOUS.

1. Process to be served at expense of party issuing .. 3104
Costs of service .. 3104
2. Orders and notices how served .. 3105
3. Use of forms in appendices .. 3105

ORDER XLIX.

CHARTERED HIGH COURTS.

1. Who may serve process of High Courts .. 3106
2. Saving in respect of Chartered High Courts .. 3106
3. Application of rules .. 3107

ORDER L.

PROVINCIAL SMALL CAUSE COURTS.

1. Provincial Small Cause Courts .. 3108

RULES. PAGE.

ORDER LI.

PRESIDENCY SMALL CAUSE COURTS.

1. Presidency Small Cause Courts .. 3109

APPENDICES TO THE FIRST SCHEDULE.

FORMS.

A.—PLEADINGS .. 3110
  1. Titles of suits .. 3110
  2. Description of parties in particular cases .. 3110
  3. Plaints .. 3111
  4. Written statements .. 3129
B.—PROCESS .. 3134
C.—DISCOVERY, INSPECTION AND ADMISSION .. 3149
D.—DECREES .. 3153
E.—EXECUTION .. 3180
F.—SUPPLEMENTAL PROCEEDINGS .. 3201
G.—APPEAL, REFERENCE AND REVIEW .. 3209
H.—MISCELLANEOUS .. 3217

THE SECOND SCHEDULE.

ARBITRATION.

Arbitration in Suits.

PARAS

1. Parties to suit may apply for order of reference .. 3234
2. Appointment of arbitrator .. 3245
3. Order of reference .. 3246
4 Where reference is to two or more to provide for difference of opinion .. 3249
5. Power of Court to appoint arbitrator in certain cases .. 3251
6 Powers of arbitrator or umpire appointed under Para. 4 or 5 .. 3255
7. Summoning witness and default .. 3256
8. Extension of time for making award .. 3257
9. Where umpire may arbitrate in lieu of arbitrators .. 3259
10. Award to be signed and filed .. 3260
11. Statement of special case by arbitrators or umpire .. 3263
12. Power to modify or correct award .. 3264
13 Order as to costs of arbitration .. 3267
14. Where award or matter referred to arbitration may be remitted. 3268
15 Grounds for setting aside award .. 3274
16. Judgment to be according to award .. 3289

Order of reference on agreements to refer.

17. Application to file in Court agreement to refer to arbitration. 3301
18. Stay of suit where there is an agreement to refer to arbitration. 3309
19. Provisions applicable to proceedings under Para. 17 .. 3314

ARAS. PAGE.

Arbitration without the intervention of a Court.

20. Filing award in matter referred to arbitration without intervention of Court .. 3315
21. Filing and enforcement of such award .. 3322
22. Exclusion of certain words in the Specific Relief Act, 1872 .. 3330

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTOR.

1. Powers of Collector .. 3333
2. Procedure of Collector in special cases .. 3335
3. Notice to be given to decree-holders and to persons having claims on property .. 3336
4. Amount of decrees for payment of money to be ascertained and immovable property available for their satisfaction .. 3337
5 Where District Court may issue notices and hold inquiry .. 3338
6. Effect of decision of Court as to dispute .. 3339
7. Scheme for liquidation for decrees for payment of money .. 3339
8. Recovery of balance (if any) after letting or management .. 3341
9. Collector to render accounts to Court .. 3341
10. Sales how to be conducted .. 3343
11. Restrictions as to alienation by judgment-debtor or his representative and prosecution of remedies by decree-holders .. 3344
12. Provision where property is in several districts .. 3348
13. Powers of Collector to compel attendance and production .. 3348

THE FOURTH SCHEDULE.

Enactments amended .. 3349

APPENDICES.

I. High Courts Act (1861) .. 3351
II. Government of India Act, 1915 .. 3355
III. Despatch from the Secretary of State .. 3375
Letters Patent—Calcutta, Madras and Bombay .. 3383
Letters Patent—Allahabad .. 3438
Letters Patent—Patna .. 3444
Letters Patent—Lahore .. 3453
Letters Patent—Rangoon .. 3458
IV. Rules of the Judicial Committee of the Privy Council .. 3466
V. Statement of Objects and Reasons .. 3482
Notes on Clauses .. 3487
Report of the Select Committee .. 3500

GENERAL INDEX .. 3505

[redacted] [redacted] **Acc. No.** [redacted]

Class No. [redacted] **Book No.** [redacted]

Author [redacted] [redacted]

Title [redacted] [redacted]

[redacted] [redacted] [redacted] [redacted]

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LOCAL AMENDMENTS (SUPPLEMENT)

Page 2601, O. 34, R. 4.

ALLAHABAD.

4. (2) After the words "the Court may" *insert* the words "of its own motion, or."

Page 1562, O. 7, R. 9.

BENGAL.

Cancel Clause 1 (*a*) (ii) and *substitute* the following:—

"(ii) draft forms of summons and fees for the service thereof.".

Page 1568, O. 9, R. 9.

BENGAL.

Re-number sub-rule (2) as sub-rule (3) and *insert* after the words "notice of the application" the words "with a copy thereof (or concise statement as the case may be)".

Insert the following as sub-rule (2):—

"The plaintiff shall, for service on the Opposite Parties, present along with his application under this rule either—

(i) as many copies thereof on plain paper as there are Opposite Parties, or,

(ii) if the Court by reason of the length of the application or the number of Opposite Parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements."

Page 1668, O. 9, R. 13.

BENGAL.

Re-number Rule 13, Rule 13(1) and *add* the following as Rule 13(2):—

"The defendant shall, for service on the Opposite Party, present along with his application under this rule either—

(i) as many copies thereof on plain paper as there are Opposite Parties, or,

(ii) if the Court by reason of the length of the application or the number of the Opposite Parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements."

Page 1601, O. 9, R. 14.

BENGAL.

Cancel the word "thereof" and *substitute* therefor the following words:—

"together with the copy thereof (or concise statement as the case may be)".

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Accession No. [redacted] [redacted]

Call No. [redacted] [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date
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Page 1892, O. 21, R. 16.

BENGAL.

In the first proviso *cancel* the words "and the decree shall not be executed until the Court has heard their objections (if any) to its execution" and *substitute* therefor the following words:—

"and until the Court has heard their objections (if any) the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferor admitting the transfer or an instrument of transfer duly registered be filed, the Court may proceed with the execution of the decree pending the hearing of such objections."

Page 1909, O. 21, R. 17.

BENGAL.

In sub-rule (1), *cancel* the words "the Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it" and *substitute* therefor the following:—

"the Court shall allow the defect to be remedied then and there or within a time to be fixed by it. If the defect is not remedied within the time fixed the Court may reject the application."

Page 1926, O. 21, R. 22.

BENGAL.

Add the following sub-rule (3):—

(3) "Omission to issue a notice in a case where notice is required under sub-rule (1) or to record reasons in a case where notice is dispensed with under sub-rule (2) shall not affect the jurisdiction of the Court in executing the decree."

Page 1940, O. 21, R. 24.

BENGAL.

Add the following to sub-rule (3):—

"and a day shall also be specified on or before which it shall be returned to the Court."

Page 1944, O. 21, R. 26.

BENGAL.

In sub-rule (3) *cancel* the words "the Court may require such security from, or impose such conditions upon the judgment-debtor as it thinks fit" and *substitute* therefor the following words:—

"the Court shall require security from the judgment-debtor unless sufficient cause is shown to the contrary."

Page 1951, O. 21, R. 31.

BENGAL.

In sub-rules (2) and (3) *substitute* the words "three months" for the words "six months."

Page 1954, O. 21, R. 32.

BENGAL.

In sub-rule (3) *substitute* the words "three months" for the words "one year."

Page 1975, O. 21, R. 39.

BENGAL.

Omit the words "in the civil prison" in sub-rule (5).

Page 1990, O. 21, R. 45.

BENGAL.

Add the following to sub-rule (1):—

"and the applicant shall deposit in Court such sum as the Court shall require in order to defray the cost of watching or tending the crop till such time."

Page 2017, O. 21, R. 53.

BENGAL.

In sub-rule (1) (*b*) after the words "to such other Court" *insert* the words "and to any Court to which it has been transferred for execution"; also insert therein the words "or Courts" after the words "requesting such other Court".

In sub-rule 1(*b*) (ii) *cancel* the words "to execute its own decree" and *substitute* therefor the words "to execute the attached decree with the consent of the said decree-holder expressed in writing or the permission of the attaching Court".

In sub-rule (4) *insert* after the words "by sending to such other Court" the words "and to any Court to which it has been transferred for execution".

In sub-rule (6) *substitute* the words "in contravention of the said order with knowledge thereof" for the words "in contravention of such order after the receipt of notice thereof".

Page 2025, O. 21, R. 54.

BENGAL.

Add the following as sub-rule (3):—

"(3) Such order shall take effect, where there is no consideration for such transfer, or charge, from the date of the order, and where there is consideration for such transfer, or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged, or from the date when the order is proclaimed under sub-rule (2) whichever is earlier "

Page 2033, O. 21, R. 57.

BENGAL.

Add the following words at the end of R. 57, O. 21:—

"Unless the Court shall make an order to the contrary".

Page 2039, O. 21, R. 58.

BENGAL.

Add the following words at the end of sub-rule (2):—

"upon such terms as to security, or otherwise, as to the Court shall seem fit".

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Page 2104, O. 21, R. 69.

BENGAL.

Substitute the words "one calendar month" for the words "seven days" in sub-rule (2).

Page 2127, O. 21, R. 75.

BENGAL.

In sub-rule (2) after the words "where the crop from its nature does not admit of being stored" *insert*:—

"or can be sold to greater advantage in an unripe state (*e.g.*, as green wheat)".

In sub-rule (2) *cancel* the word "and" between the words "tending" and "cutting" and *substitute* the word "or".

Page 2146, O. 21, R. 89.

BENGAL.

In sub-rule (1) *cancel* the words "either owning such property or holding an interest therein by virtue of a title acquired before such a sale" and *substitute* the words "whose interest is affected by such sale, (provided that such interest has not been voluntarily acquired by him after such sale)".

Page 2165, O. 21, R. 90.

BENGAL.

Add the following to sub-rule (1):—

"or on the ground of failure to issue notice to him as required by R. 22 of this Order".

Cancel the proviso to R. 90 (1) and *substitute* therefor the following:—

"Provided—

(i) that no sale shall be set aside on the ground of such irregularity, fraud or failure unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure,

(ii) that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at the time in respect of the defect relied upon".

Page 2240, O. 21, R. 98.

BENGAL.

Insert the words "or on his behalf" after the words "at his instigation" occurring twice in the rule.

Page 2620, O. 21, R. 99.

BENGAL.

Insert the words "to have a right" after the words "in good faith".

Page 2243, O. 34, R. 4.

BENGAL.

Re-number sub-rules (3) and (4) as sub-rules (4) and (5) respectively and *insert* the following as sub-rule (3):—

"(3) The Court may in its discretion direct in the decree for sale that if the proceeds of the sale are not sufficient to pay the mortgage debt, the mortgagor shall pay the balance personally".

Page 2746, O. 39, R. 1.

BENGAL.

Re-number R. 1 as R. 1(1) and *add* the following as sub-rules (2) and (3):—

"(2) In case of disobedience, or of breach of the terms of such temporary injunction or order the Court granting the injunction or making such order may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the Civil Prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(3) The property attached under sub-rule (2) may, when the Court considers it fit so to direct, be sold and, out of the proceeds, the Court may award such compensation to the injured party as it finds proper and shall pay the balance, if any, to the party entitled thereto".

Page 3018, O. 43, R. 1.

BENGAL.

Insert the following after clause (1):—

"(1) (*a*) an order under R. 57 of O. XXI directing that an attachment shall cease or directing or omitting to direct that an attachment shall continue".

Page 3226, Sch. I, App. H, Form 14—Register of Civil Suits.

BENGAL.

Cancel columns 20-27 and *substitute* the following:—

Execution.							Return of Executions.						
No. of execution application as per execution application—register and the date of application.	Relief sought. If money, amount claimed.	Order and date thereof. If portion of relief not granted, what portion.	Against whom order made.	For what, amount to be stated.	Amount of costs.	Adjustments and satisfaction reported, if any.	Amount paid into Court.	Persons arrested.	Whether judgment-debtor committed to jail, if not, why not. If committed to jail, the period of stay in it.	Minute of other return, other than arrest and payment.	Amount or relief still due and why execution petition is closed.	If petition infructuous, why and to what extent.	Appeal, if any, against order in execution and if so, the result.
20	21	22	23	24	25	26	27	28	29	30	31	32	33

Page 2843, O. 41, R. 3.

BOMBAY.

After R. 3 of O. 41, the following rule shall be *inserted*, namely:—

"3-A. Where an appellant applies for delay to be excused, notice to show cause shall at once be issued to the respondent and the matter shall be finally decided before notice is issued to the Court from whose decree the appeal is preferred under R. 13".

In sub-R. (2) of R. 3 of O. 41, after the words "to show cause why the said certificate should not be granted" the following words shall be inserted, namely:—"unless it thinks fit to refuse the certificate."

[redacted] [redacted] **Acc. No.** [redacted]

Class No. [redacted] **Book No.** [redacted]

Author [redacted] [redacted]

Title [redacted] [redacted]

[redacted] [redacted] [redacted] [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date

Title [redacted]

Author [redacted]

Accession No. [redacted] [redacted]

Call No. [redacted] [redacted] [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date
[redacted]	[redacted]		

Page 1668, O. 9, R. 13.

LAHORE.

To sub-R. (1) the following further proviso shall be *added*:—

Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced.

Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim.

Explanation:—Where a summons has been served under O. 5, R. 15 on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule.

Page 1692, O. 16, R. 1.

LAHORE.

Add the following proviso:—

"Provided that no party who has begun to call his witness shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to produce any witness not named in a list, which must be filed in Court on or before the date on which the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence, without an order of the Court made in writing and stating the reasons therefor."

Page 2713, O. 37, R. 1.

LAHORE.

Delete the full-stop after the words "Delhi Province" in clause (*e*) and *add*:—

"and the Courts of the District Judges and the Subordinate Judges of the first class in the Civil Districts of Lahore and Amritsar in the province of the Punjab".

Page 2821, O. 41, R. 1.

LAHORE.

Add the following proviso to sub-R. (1):—

"Provided that when two or more cases are tried together and decided by the same judgment and two or more appeals are filed against the decrees, whether by the same or different appellants, the officer appointed in this behalf may, if satisfied that the questions for decisions are analogous in each appeal, dispense with the production of more than one copy of the judgment."

Page 1332, O. 3, R. 4.

MADRAS.

In sub-Rr. (1) and (2) to R. 4 *substitute* the words "a document subscribed with his signature in his own hand" *for* "in writing signed".

Insert as Cl. (6) to O. 3, R. 4:—

"(6) No Government or other pleader appearing on behalf of the Secretary of State for India in Council, or on behalf of any public servant sued in his official capacity, shall be required to present any document empowering him to act".

Page 1667, O. 13, R. 9.

MADRAS.

Add the following as sub-R. (4):—

"(4) Subject to the provisions of R. 8 above, where a document is produced by a person who is not a party to the suit and such person applies for the return of the document as hereinbefore provided and undertakes to produce it whenever required to do so, the Court shall, except for reasons to be recorded by it in writing, require the party on whose behalf the document was produced, to substitute with the least possible delay a certified copy for the original, and shall thereupon cause the original document to be returned to the applicant and may further make such order as to costs and charges in this behalf as it thinks fit. If the copy is not so provided within the time fixed by the Court, the original document shall be returned to the applicant without further delay."

Page 1839, O. 21, R. 2.

MADRAS.

After "judgment-debtor" *insert* "or his legal representative or his surety for the decree debt."

Substitute the following *for* the existing R. 2(2):—

"Any party to the suit or his legal representatives or any person who has become surety for the decree debt also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly".

Page 2436, O. 26, R. 15.

MADRAS.

Re-number the existing R. 15 in O. 26 as R. 15 (1) and *insert* the following as sub-R. (2):—

"(2) Before executing and returning any commission issued by foreign Courts under the provisions of S. 78, the Court or the Commissioner required to execute the commission may levy such fee as the High Court may from time to time prescribe in this behalf in addition to the fees prescribed for the issue of summons to witnesses and for expenses of such witnesses under R. 2 of O. 16."

Page 2515, O. 32, R. 6.

MADRAS.

Add the proviso to sub-R. (2):—

"Provided that the Court may, in its discretion, dispense with such security in cases where the next friend or guardian for the suit is the manager of a joint Hindu family or the karnavan of a Malabar Tarwad and the decree is passed in favour of the joint family or the tarwad".

Page 2869, O. 41, R. 9.

MADRAS.

Substitute the following for O. 41, R. 9 (2):—

"Registers in accordance with forms Nos. 22, 23, 24 and 25 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits specified therein.

Page 3008, O. 41, R. 35.

MADRAS.

Substitute the following for sub-R. (2):—

(2) The decree shall contain the number of the appeal, the names and description of the appellant and respondent, *their addresses for service* and a clear specification of the relief granted on other adjudication made.

[redacted] [redacted] **Acc. No.** [redacted]

Class No. [redacted] **Book No.** [redacted]

Author [redacted] [redacted]

Title [redacted] [redacted]

[redacted] [redacted] [redacted] [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date

Title [redacted]

Author [redacted] [redacted]

Accession No. [redacted]

Call No. [redacted] [redacted] [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date
[redacted]	[redacted]		

Page 1366, O. 5, R. 17.

NAGPUR.

The following proviso shall be *inserted*, namely:—

"Provided that where a special service has been issued and the defendant refuses to sign the acknowledgment it shall not be necessary to affix a copy as directed hereinbefore".

Page 1380, O. 5, R. 21.

NAGPUR.

After R. 21 the following shall be *inserted* as R. 21-A, namely:—

"21-A. The Court may, notwithstanding anything in the foregoing rules, cause the summons of its own Court or of any other Court in British India to be addressed to the defendant at the place where he ordinarily resides or carries on business and sent to him by registered post prepaid for acknowledgment provided that such place is a town or village in the Akola revenue taluq. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service".

Page 1579, O. 9, R. 13.

NAGPUR.

For the words "he was prevented by any sufficient cause from appearing" the words "there was sufficient cause for his failure to appear" shall be *substituted.*

Existing R. 13 shall be *re-numbered* as 13(1) and the following shall be *inserted* as sub-R. (2), namely:—

"(2) the provisions of S. 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub-R. (1)".

Page 1344, O. 3, R. 5.

N.W.F.P.

Add:—

"Provided that the pleader is acting and not merely pleading for the party".

Page 1363, O. 5, R. 15.

N.W.F.P.

For the words "wherein any suit the defendant cannot be found" *substitute* "where the defendant is absent from his usual place of residence".

Page 1366, O. 5, R. 17.

N.W.F.P.

Add "the signature of a headman of the village shall be obtained on the summons and proclamation shall be made by beat of drum in the neighbourhood of the said house".

Page 1346, O. 4, R. 1.

OUDH.

(1) Same as original sub-R. (1) of Allahabad High Court.

THE
CODE OF CIVIL PROCEDURE

ACT V OF 1908.

VOLUME III.

THE FIRST SCHEDULE (*Continued*).

ORDER XXXI.

SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS.

Representation of beneficiaries in suits concerning property vested in trustees, etc.

R. **1**. [S. 437] In all suits concerning property vested in a trustee, executor or administrator, *where* the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties.

[1877—S. 437; R. S. C., O. 16, R. 8. *See* S. 52, O. 1, R. 10, O. 2, R. 5 and O. 7, R. 4].

Synopsis.

1. Scope and object of the rule.
2. When beneficiaries may be added as parties.

"Administrator" definition. See the Succession Act (XXXIX of 1925), S. 2 (a).

Administrator without grant of letters of Administration. See O. 7, R. 4, Note 3, Pt. (1).

"Executor" definition. See the Succession Act (XXXIX of 1925), S. 2 (c).

Executors not taking probate—Effect. See S. 52, Note 7, Pt. (1). See also O. 7, R. 4, Note 3, Pts. (2) and (3); see also O. 31, R. 2, Note 2, Pts. (4) to (6).

Minor trustees, procedure. See O. 31, R. 2, Note 2, Pt. (2).

Property not vesting in trustees. See Note 1, F.-N. (5).

Representation of beneficiaries by trustees. See Note 1, Pts. (1) and (2).

Suits not within the section. See Note 1, Pt. (4).

"Trustee" definition. See the Indian Trusts Act (II of 1882), S. 3.

O. 31, R. 1, Notes 1—2.

1. Scope and object of the Rule.—This rule entitles a trustee to represent the beneficiaries in *all* suits concerning properties vested in the trustee, where the contention is between the beneficiaries and third persons.[1] But the Rule is an enabling one, and does not disentitle a person who happens to be a trustee from suing in his *individual* capacity at his option.[2] Nor can it be construed to mean that, for the purpose of suits under the Code of Civil Procedure, no person who is not a party can be represented by any person who is not a trustee, executor or administrator.[3]

In order that this rule may apply it is essential that

(1) the suit should be concerning *property vested* in the trustee, executor or administrator. A suit for a declaration of the plaintiff's right to worship in a temple and for an injunction restraining the defendant from interfering with such right, is not a suit concerning property vested in a trustee, executor or administrator, and the rule will not apply to such a suit[4];

(2) the contention in the suit must be between the beneficiaries and a *third* person,[5] although the beneficiaries are unascertained or unascertainable persons[6] or body of persons.[7] The rule does not apply where the contention is between the beneficiaries themselves or between the beneficiary and the trustee, executor or administrator.[8]

Under section 43 of the Specific Relief Act, 1877, a declaration granted in a suit in which any of the parties are trustees is binding on the beneficiaries.

2. When beneficiaries may be added as parties.—In suits by or against trustees, executors or administrators concerning property vested in them, it is not necessary that the beneficiaries should be impleaded as parties.[1] But the Court may, if it thinks fit, order them or any of them to be made parties. The beneficiaries may apply to be added as parties where there are reasonable

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Order 31, Rule 1—Note 1

[1] *Cowasji* v. *Bella*, (1919) 50 Ind Cas 509 (509, 510): 11 Bur L Tim 249; *Jemungs* v. *Jordan*, (1881) 6 App Cas 698 [A suit for redemption]; *Mohanand* v. *Akhoy Kumar*, (1902) 6 Cal W N 488 (489) [A decree for foreclosure obtained against an executor is binding upon the beneficiaries]; *Sakli* v. *Ram Kisan Das*, (1920) 55 Ind Cas 504 (505): 2 U P L Rep (Pat) 31 [No one but an executor is competent to prosecute a suit as representative of the deceased]; *Kunjunneri* v. *Nilakundun*, (1878-80) 2 Mad 167 (168): 5 Ind Jur 130 [*Uralers* and not "Karaima Samudayi" are entitled to sue on behalf of Malabar Devaswam]; *Rama Varar* v. *Krishnen*, (1881) 3 Mad 270 (270): 4 Ind Jur 622, (Do.); *Patinharipat* v. *Chekur*, (1882) 4 Mad 141 (143), (Do.).

[2] *Nabin Chandra* v. *Sheikh Amir*, (1911) 9 Ind Cas 132 (133) Cal [The beneficial owner can also sue even though property is vested in trustee]. See *Sidhusahu* v. *Gopicharan Das*, (1913) 18 Ind Cas 969 (970): 17 Cal L Jour 233.

[3] *Raghunadan Singh* v. *Parameshwar Dyal Singh*, (1917) 39 Ind Cas 779 (782): 2 Pat L Jour 306: 1 Pat L W 636: 1917 Pat H C C 137 [Dissenting from 28 Cal 517 (528)].

[4] *Saklat* v. *Bella*, (1921) 63 Ind Cas 968 (967): 13 Bur L Tim 183.

[5] *Sathianama* v. *Saravanabagi*, (1895) 18 Mad 266 (272): 4 Mad L Jour 223; *Beresford* v. *Ramasubba*, (1890) 13 Mad 197 (206); *Ardeshir Jehangir* v. *Hira Bai*, (1884) 8 Bom 474 (480). See also *Bai Harkar* v. *Maneckial*, (1888) 12 Bom 621 (623): 1887 Bom P J 331 [Property which has passed by survivorship does not vest in the executor].

[6] *Cardigan* v. *Curzon Howe*, (1901) 2 Ch 479: 70 L J Ch 763: 49 W R 715: 17 T L R 655.

[7] *Fussell* v. *Dowding*, (1884) 27 Ch. D 237: 51 L T 332: 53 L J Ch 924: 32 W R 790.

[8] *Advocate-General* v. *Karamally*, (1902) 4 Bom L R 857 (863); *Hamond* v. *Walker*, (1857) 3 Jur N S 686.

Note 2.

[1] *Baroda Kanta* v. *Chunder Kanta*, (1902) 29 Cal 682 (686): 6 Cal W N 706; *Ahronee Shemail* v. *Ahmed Omer*, 1931 Bom 533 (537): 33 Bom L R 1056 [Mortgage suit against executor—All beneficiaries not necessary parties—O. 34, R. 1, subject to O. 31, R. 1].

grounds to suppose that their interest will not be sufficiently represented by the trustees or will be endangered unless they are made parties. Thus the beneficiaries can be added as parties where the trustee has no interest in the case or has an interest adverse to that of beneficiaries[2] or where the question in the suit is one of accounts and the trustee is the accounting party,[3] or where the beneficiaries are absolutely entitled to a major portion of the property and complain of breach of trust on the part of the trustee,[4] or where the interest of the beneficiaries are likely to be affected by their not being impleaded in the suit.[5] The trustee, executor, or administrator may also apply in a proper case for adding the beneficiaries as parties for the purpose of protecting himself[6]; but the beneficiaries may come in only where there is a trust *admitted or proved* to exist: where the *factum* of the trust itself is in dispute the beneficiaries are not necessary parties.[7]

Where a beneficiary is added in a suit by or against trustees under this rule it does not amount to the addition or substitution of *new* plaintiff or defendant within the meaning of section 22 of Limitation Act.[8]

Where a decree has been obtained by a trustee under this Rule the beneficial owner is entitled to sue for recovery of the benefit thereunder.[9]

Joinder of *trustees*, executors and administrators.

R. 2. [S. 438.] *Where* there are several *trustees*, executors or administrators, they shall all be made parties to a suit against one or more of them:

Provided that the executors who have not proved their testator's will, and *trustees*, executors and administrators *outside British India*, need not be made parties.

[1877—S. 438. *See* S. 52, O. 2, R. 5, O. 7, R. 4.]

Synopsis.

1. **Legislative changes.**
2. **Several trustees, executors or administrators.**
3. **"Outside British India."**
4. **Administration decree.**

Proviso. See Note 2, Pts. (4) to (6). See also S. 52, Note 7, Pt. (1). See also O. 7, R. 4, Note 3, Pts. (2) and (3).

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[2] *Beresford* v. *Ramasuba*, (1890) 13 Mad 197 (202, 206); *Clegg* v. *Rowland*, (1866) L R 3 Eq 368: 36 L J Ch 137: 15 L T 385: 15 W R 251; *Payne* v. *Parker*, (1866) 1 Ch App 327; *Narayanasamy* v. *Irulappa*, (1902) 12 Mad L Jour 355 (359); *Sankaralinga* v. *Raja Rajeswara*, (1908) 31 Mad 236 (260): 12 Cal W N 946: 4 Mad L Tim 101: 8 Cal L Jour 230: 10 Bom L R 781: 18 Mad L Jour 387: 35 Ind App 176 P C.

[3] *May* v. *Newton*, (1887) 34 C D 347: 56 L J Ch 313: 56 L T 140: 35 W R 363.

[4] *Chandri* v. *Abdul*, 1927 Bom 49 (51): 28 Bom L Rep 1360: 98 Ind Cas 915: 51 Bom 16.

[5] *Pramatha Nath Sarkar* v. *Suprakash Ghosh*, (1931) 58 Cal 77 (82): 1932 Cal 337.

[6] *Purushotham* v. *Kala Govindaji*, (1902) 26 Bom 301 (304): 3 Bom L Rep 932.

[7] *William Cooper* v. *Kisson Lal*, (1902) 4 Bom L Rep 358 (360).

[8] *Janhabi* v. *Brojomohini*, (1903) 7 Cal W N 817 (820, 821).

[9] *Juggobundhoo* v. *Nil Comul*, 1864 Suth W Rep 190 (191).

O. 31, R. 2
Notes
1—4.

1. **Legislative changes.—**

1. The word "trustees" has been added before the word "executors".
2. The words "outside British India" have been substituted for the words "beyond the local limits of the jurisdiction of the Court".

2. **Several trustees, executors or administrators.**—This rule deals only with suits *against* and not with suits *by* trustees, executors or administrators. *All* executors who have proved the will or *all* administrators should be made parties.[1] Where one of them is an infant, a guardian *ad-litem* must be appointed for him, and properly served; otherwise the suit will be dismissed for defect of parties.[2] It has been held in the undermentioned case[3] that the rule applies only to *suits*, and not to *applications*, and that therefore it is competent for the Court to entertain an application for the appointment of a Receiver in a suit, even though all proving executors are not made parties thereto. The proviso to the rule clearly indicates that executors who have not proved their testators' will need not be made parties.[4] But when an executor intermeddles with the estate[5] or has acted as executor[6] he may be made a party even if he has not proved the will.

3. "**Outside British India.**"—If a defendant insists that an executor is a necessary party, the *onus* is upon him to show that the latter is living within British India.[1] A Court will be justified in refusing to add, as defendant, an executor who had absconded[2] and whose whereabouts are not known.

4. **Administration decree.**—Where general administration is sought, a general personal representative is necessary.[1] Representation by an administrator *ad-litem* or by an executor or administrator *de son tort* is insufficient.[2]

O. 31, R. 3.

Husband of married executrix not to join.

R. 3. [S. 439.] Unless the Court directs otherwise, the husband of a married *trustee*, administratrix or executrix shall not *as such* be a party to a suit by or against her.

Order 31, Rule 2—Note 2,

(1) *Latch* v. *Latch*, (1875) 10 Ch 464: 44 L J Ch 445: 23 W R 686; *Adiraju* v. *Pattu*, 1922 Mad 405 (405): 77 Ind Cas 942 [Even where there is a karar authorising one of several trustees to represent the temple in suit]; *Malappurath Paramadhathil* v. *Channazhi Krishnan*, (1912) 13 Ind Cas 234 (234): (1911) 2 Mad W N 537.

(2) *Abdul Rab Chowdhury* v. *V O Eggar*, (1908) 35 Cal 182 (184): 12 Cal W N 160.

(3) *Hafizabai* v. *Abdul Karim*, (1895) 19 Bom 83 (85).

(4) *Kumar Saradindu* v. *Dhirendra*, (1905) 2 Cal L Jour 484 (488); *Dhirendra* v. *Saradindu*, (1905) 1 Cal L Jour 28 Note.

(5) Re *Lovell*, 3 Ch D 198: *Mohideen* v. *Pitchey*, (1894) A C 437 [Executor who has neither proved nor intermeddled with the estate cannot be sued as representing the estate]. See also S. 311 of the Succession Act (XXXIX of 1925).

(6) *Vickers* v. *Bell*, (1864) 4 De G J & S 274.

Note 3.

(1) *Kumar Saradindu* v. *Dhirendra*, (1905) 2 Cal L Jour 484 (489).

(2) *Drage* v. *Hartopp*, (1885) 28 Ch D 414: 51 L T 902: 54 L J Ch 434: 33 W R 410.

Note 4.

(1) *Dowdeswell* v. *Dowdeswell*, (1878) 9 Ch D 294: 48 L J Ch 23: 38 L T 828: 27 W R 241.

(2) Re *Toleman*, (1807) 1 Ch 866: 66 L J Ch 452: 76 L T 381: 45 W R 468; *Ambler* v. *Lindsey*, (1876) 3 Ch D 198: 45 L J Ch 768: 35 L T 93: 24 W R 982.

Order XXXII—General.

Synopsis.

1. **Suits by or against minors and persons of unsound mind.**
2. **Applicability of the order to execution proceedings.**

1. **Suits by or against minors and persons of unsound mind.**—An infant is, in law, regarded as of immature intelligence and discretion[1] and, owing to his want of capacity and judgment, is disabled from binding himself, except where it is for his benefit.[2] Thus the law, will, as a general principle, treat all acts of an infant which are for his *benefit* on the same footing as those of an adult but will not permit him to do anything *prejudicial* to his own interests.[3] This principle regulates, not only the infant's capacity to acquire and dispose of property but also, his capacity in reference to legal proceedings instituted by or against him.[4] Thus a decree obtained in *favour* of a minor without his being represented by a next friend in the suit is not a nullity, whereas, no effectual or valid decree can be passed *against* a minor without his being represented by a proper guardian *ad-litem.*[5] A minor who is a party to a suit is considered to be under the protection of the Court and it is, consequently, the duty of the Court to watch his interests vigilantly and to see that he is represented by a fit and proper person.[6]

Persons who are of unsound mind or are suffering from mental infirmity and are thereby incapable of protecting their interests are placed on the same footing as minors for the purposes of legal proceedings by or against them.

This order has been made applicable to proceedings under the Ganjam and Vizagapatam Act (XXIV of 1839) (*see* R. 20) and to proceedings under the Chota Nagpur Tenancy Act [*see* Act VI of 1908, S. 265 (3)].

2. **Applicability of the order to execution proceedings.**—There is a conflict of opinion as to whether this order directly applies to execution proceedings. According to one view, this order applies only to *suits* and not directly to execution proceedings and therefore, the fact that no guardian *ad litem* is appointed for a minor party in such proceedings will not vitiate the proceedings, if, in *substance,* his interests were represented by the other parties on the record[1] and if no injury has resulted to him by such non-representation.[2] Another view is that proceedings in execution are a

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Order 32, General—Note 1.

(1) 2 Coke's Institutes 291 cited in Halsbury's Laws of England, Vol. XVII, page 43; *Daniel's Chancery Practice,* 6th Edition, page 105, cited in 22 Cal 270.

(2) *Compton* v. *Collinson,* (1788) 2 Brown's Chancery Reports, 377 cited in Halsbury's Laws of England, Vol. XVII, page 46.

(3) *Bassets' case,* 2 Dyer's reports 136, 137 cited in Halsbury's Laws of England, Vol. XVII, page 46.

(4) *See* cases cited in Note 3 to R. 2.

(5) *See* cases cited in Note 5 to R. 2.

(6) *Mt Siraj Fatima* v. *Mahmood Ali,* 1932 All 293 (300): 1932 All L J 437: 138 Ind Cas 465 F B.

Note 2.

(1) *Fani Bhusan Bhuian* v. *Surendra Nath Das,* 1921 Cal 476 (478): 35 Cal L Jour 9: 64 Ind Cas 25; *Rakhal Chandra De* v. *Mt Kumudini Debya,* 1927 Cal 930 (931): 104 Ind Cas 357; *Matiur Rasul* v. *Abdul Said,* 1926 Cal 109 (112): 48 Cal 1036: 25 Cal W N 776: 33 Cal L Jour 414: 61 Ind Cas 923. See also *Doorga Mohan Das* v. *Tahir Ally,* (1895) 22 Cal 270 (275) [O. 32, R. 11, does not apply to a suit after final decree is passed in which it only remains to proceed in execution]; *Bhansi Dhar* v. *Muhammad Suleman.* 1926 Lah 490 (493): 27 Pun L R 494: 97 Ind Cas 181: 8 Lah L Jour 464; *M L M Ramanathan Chettiar* v. *Ramanathan Chettiar,* 1929 Mad 275 (282, 283): 117 Ind Cas 705: 30 Mad L W 995; *Thakumal* v. *Balomal,* (1908) 2 Sind L R 55 F B.

(2) *Keshawe Surendra Sahi* v. *Devendra Bala Dasi,* (1915) 29 Ind Cas 211 (213) Cal; *Krishna* v. *Costa,* (1907) 5 Cal L Jour 434 (439, 440).

O. 32, General Note 2.

continuation of the suit, that this Order applies to such proceedings[3] and that a compromise entered into by the guardian in execution proceedings is not binding on the minor if no sanction as required by Rule 7 is obtained therefor.[4] It is submitted that this last view is correct. As pointed out by Wallis, C.J. in *Muthiah Chettiar* v. *Krishna Doss Varu*[5] the Code expressly provides by O. 22, R. 12 that nothing in Rr. 3, 4 and 8 of that order shall apply to execution proceedings, and in O. 23, R. 4 that nothing in that order shall apply to execution proceedings, while it contains no such provision in O. 32. It would appear to follow from this that the Code has been drafted on the basis that an application for execution is a proceeding in a suit.

ORDER XXXII.

O. 32, R. 1.

SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND.

Minor to sue by next friend.

R. 1. [S. 440.] Every suit by a minor[2] shall be instituted in his name[1] by *a* person who in such suit shall be called the next friend of the minor.

[1877—S. 440.]

Local Amendments.

LAHORE.

The following words were *added*:—

> "Such persons may be ordered to pay any costs in the suit as if he were the plaintiff."

N.-W. F. P.

The following paragraph shall be *added*:—

> "Such person may be ordered to pay any costs in the suit as if he were the plaintiff."

Synopsis.

1. Scope and object of the rule.
2. Minor, who is.
3. When a minor may sue without a next friend.
4. Minor suing as adult. See Note 2 to the next rule.

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(3) *Virupaksh* v. *Shidappa*, (1902) 26 Bom 109 (114): 3 Bom L R 565; *Muthalakkammal* v. *Narasappa Reddiar*, 1933 Mad W N 169 (189) F B; *Muthiah Chettiar* v. *Lodd Govinda Doss Krishna Doss Varu*, 1921 Mad 599 (601): 44 Mad 919: 41 Mad L Jour 316: 14 Mad L W 287: 1921 Mad W N 649: 69 Ind Cas 337 F B. See also *Cherianjan Thirumalpad* v. *Kararnamalpad*, (1919) 9 Mad L Jour 144 (146). *See also* the cases cited in foot-note 4 below. See also *Jogeshwar Narain Singh* v. *Roy Radha Raman*, (1912) 16 Ind Cas 543 (544, 545) Cal [Gross negligence in the conduct of the petition to set aside execution—Sale under O. 21, R. 90—Suit is the remedy].

(4) *Virupaksh* v. *Shiduppa*, (1902) 26 Bom 109 (114): 3 Bom L R 565; *Gurumallappa* v. *Mallappa*, (1920) 57 Ind Cas 417 (418): 22 Bom L R 725: 44 Bom 574; *Chganlal Kalidas* v. *Parasram Kurnashankar*, 1921 Bom 142 (143): 45 Bom 1128: 23 Bom L R 473: 62 Ind Cas 219; *Arunachalam* v. *Rama Nadhan*, (1906) 29 Mad 809 (310): *Davud Rowther* v. *Parmaswami Pillai*, (1916) 35 Ind Cas 70 (72): 31 Mad L Jour 207; *Sethurama Sahib* v. *Chotta Raja Sahib*, (1917) 40 Ind Cas 820 (824): 1917 Mad W N 827; *Mt Perabai* v. *Bhawani Pershad*, 1924 Nag 185 (186): 78 Ind Cas 291; *Jumnomal* v. *Gurdinomal*, 1921 Sind 61 (64): 17 Sind L R 211: 83 Ind Cas 913; *Tanuk Lal Mandar* v. *Emperor*, (1921) 60 Ind Cas 334 (335): 1920 Pat H C C 285: 22 Cr L Jour 222: 1 Pun L Tim 654 [Principle of O. 32 applies to execution proceedings]; *Ram Gulam Sahu* v. *Sham Shal Das*, (1921) 62 Ind Cas 234 (235): 6 Pat L Jour 379: 1 Pat L Tim 663: 1920 Pat H C C 358. See also *Sakharam* v. *Bivrabai*, (1918) 44 Ind Cas 164 (165) Nag; *Sitaladas Mukerjee* v. *Bhutnath Nasker*, (1921) 62 Ind Cas 688 (689) Cal; *Mani Sankar* v. *Bai Muli*, (1888) 12 Bom 686 (690).

(5) 1921 Mad 599 (601): 44 Mad 919: 41 Mad L Jour 316: 14 Mad L W 287: 1921 Mad W N 649: 69 Ind Cas 337 F B.

O.32, R.1, Note 1.

5. **Suit on behalf of an alleged minor who is not a minor in fact.**
6. **Where question of minority is in dispute.**
7. **Objection in appeal to authority of next friend.**
8. **Title of suit.**
9. **Liability of next friend for costs.**
10. **Effect of decree in suits by minors.**
11. **Estoppel.**
12. **Limitation.**
13. **Attorney's costs.**
14. **Suits for specific performance by or against minors.**
15. **Suit for possession against person in possession as guardian of minor plaintiff.**

Applicability of order to execution-proceedings. See O. 32, General Note 2.
Next friend negligent—Suit whether can be proceeded with. See R. 9, Note 2, Pt. (3).
Next friend of minor—Sanction of Court when necessary to represent and sue. See R. 4, Note 12, Pts. (1) and (2).
Next friend—Uncle of a Mahomedan infant whether competent. See R. 4, Note 5, F.-N. (3-a).
Next friend—Why necessary. See Note 1, Pt. (1).
Proof of minority—Quantum of evidence. See Note 6, Pt. (3).
"Shall be instituted in his name." See Note 1, Pts. (1-a) and (4).
Volunteer guardian—Whether has right to sue. See R. 4, Note 12, F.-N. (2).

1. **Scope and object of the rule.**—This rule provides that every suit by a minor plaintiff shall be brought in his name by a next friend.[1] The reason why no proceedings can be taken by an infant without the assistance of a next friend is "on account of the infant's supposed want of discretion and his inability to bind himself and make himself liable for costs".[1-a] But the minor is the real plaintiff; the next friend is not a party to the suit in the proper sense of the term.[2] He only represents the minor's interest and acts for him. In the course of such representation he can choose his own solicitor or even change him although he is under an obligation not to make an appointment which would be detrimental to the interests of the minor.[3]

Though the word "shall" is used in the rule, a suit by a minor without a next friend should not normally be treated as abortive but an opportunity should be given to constitute the suit in the regular manner.[4] In *Doorga Mohun Doss* v. *Tahir Ali* (I.L.R. 22 Cal. 270) Sale, J. observed: "It would seem that the rule was intended for the protection and benefit of defendants, for it has been held that when a defendant waives this benefit and protection the suit may proceed without a next friend." (*See* Note 3 to Rule 2 following.)

Order 32, Rule 1—Note 1.

[1] *Baroo Mull* v. *Chuggoo Mull*, (1872) 4 N W P 125; *Sayad Saifulla* v. *Sayad Haji Miya*, (1900) 24 Bom 238 (239): 1 Bom L R 664 [Minor can sue through next friend in Mamlatdar's Court]; *Dattatraya Kishav* v. *Vaman Govind*, (1897) 21 Bom 88 (90): 1895 P J 349, (Do); *Maliawa* v. *Shivrudraya*, 1924 Bom 114 (115): 81 Ind Cas 1052 [Suit against husband through next friend to recover property—Husband as natural guardian cannot resist the suit]; *Ramprasad* v. *Srinivas*, 1925 Bom 527 (528): 27 Bom L R 1122: 90 Ind Cas 685 [Minor can sue as bearer of *Shah Jog Hundi*].

[1-a] *Kamalakshi* v. *Ramasami*, (1896) 19 Mad 127 (129) [Quoting Daniel's Chancery Practice, 6th Edition, page 105].

[2] *Khodabux* v. *Budree Narain*, (1881) 7 Cal 137 (139): 8 Cal L Rep 306: 5 Ind Jur 644; *Bhobotarini* v. *Sree Ram*, (1883) 9 Cal 629 (630): 7 Ind Jur 604; the statement in *Bama Soonduree* v. *Grish Chunder*, (1865) 3 Suth W R Act X 138; *Hulodhur Roy* v. *Judoonath*, (1870) 14 Suth W R 162 (162) [Next friend cannot execute decree after death of minor]; *Nain Bala Dassya* v. *Jamini Sundari*, 1923 Cal 656 (656): 37 Cal L Jour 394: 70 Ind Cas 919 [Thus minor can sue in *forma pauperis* though next friend is not a pauper]; *Venkatanarasayya* v. *Achemma*, (1881) 3 Mad 3 (4), (Do).

[3] *Dinendra* v. *Wilson*, (1901) 28 Cal 264 (270): 5 Cal W N 434.

[4] *Mt Fuli Bibi* v. *Khokai Mondal*, 1928 Cal 537 (539): 55 Cal 712: 111 Ind Cas 349.

O. 32, R.1, Notes 1—5.

The Code does not provide for suits by or on behalf of idols. On the analogy of this rule, however, it has been held that the Manager or the *Shebait* of an idol can sue on behalf of the idol, which is considered to be a perpetual minor in the eye of the law.[5]

2. **Minor, who is.**—Under section 3 of the Indian Majority Act (IX of 1875) every person domiciled in British India shall be deemed to have attained majority when he shall have completed his age of 18 years and not before. But if before the expiry of the age of 18, a guardian for the person or for the property or for both of the minor has been appointed or declared by a Court of Justice, (apart from the provisions of Order 32 of the Code) or the minor's property is taken charge of by a Court of Wards, then the period of minority is extended till the completion of the age of 21.[1]

3. **When a minor may sue without a next friend.**—Under Section 32 of the Presidency Small Cause Courts Act (XV of 1882), a minor may institute a suit for any sum of money not exceeding 500 rupees which may be due to him under S. 70 of the Contract Act, 1872, for wages of piece-work or for work as a servant, in the same manner as if he were of full age.

4. **Minor suing as adult.**—*See* Note 2 to the next rule.

5. **Suit on behalf of an alleged minor who is not a minor in fact.**—Supposing a suit is filed through a next friend on the allegation that the plaintiff is a minor and it is subsequently found that the plaintiff was in fact a major even on the date of the suit. What is the proper procedure to be followed in such a case? The High Court of Allahabad in the undermentioned cases[1] held that the suit should be dismissed, the reason given being that there is no valid plaint before the Court. This view has, however, been overruled by a Special Bench decision of the same High Court which holds that where the mistake in filing suit is due to a *bona fide* doubt as regards the age of the minor, the defect is a *formal* one not affecting the merits of the

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(5) *Nandkishoredas* v. *Kala Bai*, 1926 Nag 351 (351); 94 Ind Cas 703; *Shri Gopalji Maharaj* v. *Krishna Sunder*, 1929 All 887 (888): 1925 All L J 1251.

Note 2.

(1) See also *Yeknath* v. *Warubai*, (1889) 13 Bom 285 (289); *Jagon Ram* v. *Mahadeo Prasad*, (1909) 1 Ind Cas 724 (726): 36 Cal 768: 13 Cal W N 643; In the goods of *Sewnarain Mohata*, (1894) 21 Cal 911 (912, 913); *Suttya Ghosal* v. *Suttya Nand Ghosal*, (1875-76) 1 Cal 388 (390); *Noor Ahmed* v. *Lulta*, (1870) 2 N W P H C R 189; *Guardian appointed under Act XL of* 1858, *minority extends till* 21; *Rudhraprokash* v. *Bholanath*, (1888) 12 Cal 612 (614); *Rajcoomar* v. *Alfuzudin*, (1881) 8 Cal L R 419 (425); *Sadho Lal* v. *Murlidhar*, (1907) 29 All 672 (675): 4 All L J 597: 1907 All W N 211; *Khawahish Ali* v. *Sarju Prasad*, (1881) 3 All 598 (600): 1881 All W N 30; *Guardian appointed under Act, VIII of* 1890—*Minority extends till* 21. *Durga Devi* v. *Gur Narain*, 1924 Lah 157 (158): 69 Ind Cas 401; *Girish Chunder* v. *Abdul Selam*, (1887) 14 Cal 55 (59) [Order of appointment enough though no certificate is taken out]; *Shivram Konda* v. *Krishnabai*, (1907) 31 Bom 80 (84); 8 Bom L R 897, (Do); *Gordhan Das* v. *Harivalabdas*, (1897) 21 Bom 281 (285, 286); *Chitty's* S C C R 514 [Though such guardian is discharged before 18, minority nevertheless continues till 21]; *Nagardas* v. *Anandrao*, (1907) 31 Bom 590 (603): 9 Bom L R 495 [If order of appointment is *set aside*—Minority does not extend to 21); *Pateeri* v. *Champa*, 1891 All W N 118 (119), (Do); *Sorabji Cowasji* v. *Bachoo Bai*, (1894) 18 Bom 366 (367) [Suit under Parsi Marriage Act, XV of 1865—Minority till 21]; *Rallo* v. *Smith*, (1870) 1 Ben L R O C 10 [Or case of a European British subject, age of majority 21]; *Rohilkhand and Kumaun Bank* v. *Row*, (1885) 7 All 490 (500): 1885 All W N 101, (Do.) F B; *Hearsey* v. *Girdhari Lal*, (1871) 8 N W P H C R 338, (Do); *Ramesh Chandra Das* v. *Maharaja Birendra Kishan*, 1925 Cal 513 (514): 29 Cal W N 287: 80 Ind Cas 100 [Ruling chief not domiciled in British India—Majority Act does not apply]; *Jogesh Chunder* v. *Umatara*, (1877) 2 Cal L R 577 (579) [Guardian appointed by will—Not one appointed by a Court of Justice].

Note 5.

(1) *Sheorania* v. *Bharat Singh*, (1898) 20 All 90 (91): 1897 All W N 208; *Ruhul Amin* v. *Shankar Lal*, 1924 All 54 (55): 45 All 701: 21 All L J 626: 4 L R A (Civ) 842: 77 Ind Cas 30.

O.32, R. 1, Notes 5—7.

case and can be cured by amendment.[2] The High Courts of Calcutta,[3] Lahore,[4] Madras,[5] the Chief Court of Oudh[6] and the Court of the Judicial Commissioner of Nagpur[6-a] have all held that the defect in such a case can be remedied by amending the plaint and by removing the next friend.

6. Where question of minority is in dispute.—Disputes as to the question of minority may arise—

(*a*) where the defendant who is sued as a major pleads that he is a minor. In such cases a preliminary issue should be framed for the purpose of deciding the plea of minority and for the trial on this issue a guardian *ad litem* should be appointed for the alleged minor.[1] *See also* Note 4 to R. 3, *infra*.

(*b*) Where the plaintiff sues as a major without a next friend and the defendant pleads that he is a minor, in such a case the procedure prescribed by rule 2 should be followed.

The burden of proving minority is on the party who alleges it.[2] As to the quantum of evidence sufficient to prove minority, *see* the following cases.[3]

7. Objection in appeal to authority of next friend.—If the minor plaintiff has the right to sue, objection as to the want of or any defect in, the authority of the next friend is *not fatal* to the suit and cannot be raised for the first time in appeal.[1] Such a defect does not affect the merits of the case and comes within the purview of Section 99 of the Code.[2]

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(2) *Wali Mohammad Khan* v. *Ishak Ali Khan*, 1931 All 507 (512): 1931 All L J 777: 134 Ind Cas 26. See also *Binda* alias *Bindraban* v. *Mangala*, 1926 All 673 (674): 24 All L J 847: 96 Ind Cas 606: 48 All 661.

(3) *Taqui Jan* v. *Obaidulla*, (1894) 21 Cal 866 (868); *Narayan* v. *Dulal*, 1927 Cal 477 (477, 478): 100 Ind Cas 469.

(4) *Amritsaria* v. *Gamun*, 1926 Lah 82 (82): 89 Ind Cas 863; *Ghasi* v. *Manga*, 1932 Lah 322 (323): 33 Pun L R 263: 136 Ind Cas 710 [The question depends on *bona fides*].

(5) *Shanmuga* v. *Narayana*, (1917) 41 Ind Cas 510 (510): 40 Mad 743.

(6) *Gajraj Singh* v. *Raghubar*, (1904) 7 Oudh Cas 234 (236).

(6-a) *Datta* v. *Bhadsingh*, 1926 Nag 40 (43): 88 Ind Cas 235 [Appeal by next friend on behalf of a major].

Note 6.

(1) *Narsey Tokersey & Co* v. *Sachindranath*, 1929 Bom 431 (432): 31 Bom L R 1007.

(2) *Virupakshappa* v. *Sidappa and Basappa*, (1902) 26 Bom 109 (113, 116): 8 Bom L R 565; *Sheet Narain* v. *Bunwaree*, (1875) 23 Suth W R 395 (397).

(3) *Sha Ara Begum* v. *Nanni Begum*, (1907) 29 All 29 (32): 34 Ind App 1: 11 Cal W N 130: 9 Bom L R 80: 17 Mad L Jour 32: 5 Cal L Jour 4: 1 Mad L Tim 429 P C [Evidence to be such as to carry reasonable conviction to judge]; *Beni Ram* v. *Ram Lal*, (1886) 13 Cal 189 (193) [Mother's evidence supported by horoscope best evidence]; *Goundan* v. *Goundan*, (1894) 17 Mad 134 (139): 4 Mad L Jour 86, (Do); *Husaina* v. *Sahib Nur*, (1910) 7 Ind Cas 505 (517): 36 Pun W R 1910: 213 Pun L R 1910 [Entry in birth register relevant evidence]; *Oriental Assurance Co* v. *Narasimmachariar*, (1902) 25 Mad 183 (209): 11 Mad L Jour 379 [Statement by deceased relative relevant]; *Khetter Mohun Ghose* v. *Ramessur*, (1864) Suth W R 304 (304) [Appearance of minor can be taken into account]; *Kalee Halder* v. *Sreeram Ghose*, 1864 Suth W R 366 (366) [Appearance is not conclusive]; *Satis Chunder* v. *Mohendro Lal*, (1890) 17 Cal 849 (851) [Certificate of guardianship under Act XL of 1858—Not evidence]; *Hem Chundra* v. *Bhobo Prosad*, (1905) 2 Cal L Jour 69-N, (Do); *Gunjra Kuar* v. *Ablakh Pande*, (1896) 18 All 478 (479): 1896 All W N 158, (Do).

Note 7.

(1) *Ram Raghbir* v. *Gauri Pershad*, (1889) Pun Re No. 166: *Hardi* v. *Ruder Perkash*, (1884) 10 Cal 626 (634): 11 Ind App 26: 4 Sar 510: 8 Ind Jur 211 P C; *Norendranath* v. *Bhupendra Narain*, (1896) 23 Cal 374 (386); *Bhoopendro Narayan Dut* v. *Baroda Prosad Roy Chowdhry*, (1891) 18 Cal 500 (505); *Kamaraju* v. *The Secretary of State for India*, (1888) 11 Mad 309 (315); *Sridhar Rao* v. *Ram Lal*, (1909) 1 Ind Cas 555 (556): 31 All 7: 1908 All W N 251: 5 All L J 633. See also *Pirthi Singh* v. *Lobhan Singh*, (1882) 4 All 1 (3): 1881 All W N 90; *Jaisri Singh* v. *Pal Singh*, (1883) All W N 193 (193).

(2) *Ram Raghbir* v. *Gauri Prasad*, (1889) Pun Re No. 166.

O. 32, R. 1, Notes 8—10.

8. Title of suit.—In a suit by the minor plaintiff, the title and description of the minor should be "*X*, a minor by his next friend *Y*, *versus A B*, defendant".[1] Similarly, when the minor is the defendant he should be described as "*X*, a minor by guardian *ad litem Y*". But a defect or misdescription in title, as for instance, where the mother of the minor plaintiff describes herself as *J*, for herself and as guardian of her minor daughter *S*, is not fatal to the suit.[2] The defect is a *formal* one and cannot afford a ground *per se* for interference in appeal.[3]

9. Liability of next friend for costs.—The words "and may be ordered to pay any costs in the suit as if he were the plaintiff" occurring in the corresponding section 440 of the old Code have been omitted. But the omission does not affect the discretion of the Court in proper cases to order the next friend to be personally liable for costs, as for example, when it finds that the suit was instituted by him without any *bona fides*[1] or where the suit is dismissed, and the Court is not satisfied that the suit was instituted for the benefit of the minor.[2] Where, however, the Court finds that there were reasonble grounds for filing the suit and the next friend has been *bona fide* in his conduct, it will direct the costs to come out of the minor's estate.[3]

Save in exceptional cases neither the infant plaintiff nor the next friend ought to be required to give security for costs.[4] Where on the death of a deceased creditor, his minor legal representative demands the debt, the debtor is entitled to refuse to pay until his interests are safeguarded by the production of a succession certificate or of a probate or Letters of Administration; where the minor in such a case sues the debtor for the amount, the defendant is not liable for the costs of the suit.[5]

10. Effect of decree in suits by minors.—If a minor is *properly represented* by the next friend and there is no fraud or collusion, or gross negligence on his part, the decree passed in the suit is binding on the minor as on an adult and will operate as *res judicata*.[1] *See also* Note 13 to R. 3, *infra* and Note 69 to S. 11, *ante*.

Note 8.

[1] *Alim Buksh* v. *Jhalo*, (1886) 12 Cal 48 (49).

[2] *Alim Buksh* v. *Jhalo*, (1886) 12 Cal 48 (49); *Surjakant* v. *Hemanta Kumari*, (1898) 20 Cal 498 (504): 20 Ind App 25: 17 Ind Jur 169: 6 Sar 279 P C.

[3] *Bhaca Pershad* v. *Secretary of State*, (1887) 14 Cal 159 (163); *Goonoo Monee* v. *Ram Kumol*, (1872) 17 Suth W R 144 (145); *Mrinanmoyi Dabia* v. *Juggodishuri Dabia*, (1880) 5 Cal 450 (453): 5 Cal L Rep 361: 5 Ind Jur 313: 3 Shome L R 49.

Note 9.

[1] *Venkataraman* v. *Ponnusami Padayachi*, 1927 Mad 1023 (1024): 106 Ind Cas 131; *Maroti* v. *Bhagi*, 1923 Nag 43 (45): 68 Ind Cas 465; *Komul Chunder* v. *Surbessur Doss*, (1894) 21 Suth W R 298 (298) [Case under the old Code]; *Brijessuree Dossie* v. *Kishore Doss*, (1876) 25 Suth W R 316 (316), (Do); *Rajah Bikromajeet* v. *Court of Wards*, (1874) 21 Suth W R 312 (314), (Do.); *Brojo Mohun* v. *Roodernath Surmah*, (1871) 15 Suth W R 192 (193), (Do); *Omrao Singh* v. *Prem Narain*, (1875) 24 Suth W R 264 (264), (Do); *Lachman Prasad* v. *Ram Narain*, (1887) All W N 129 (129), (Do.).

[2] *Geereeballa* v. *Ohunder Kant*, (1885) 11 Cal 213 (219).

[3] *Devkabai* v. *Jefferson*, (1886) 10 Bom 248 (254): 10 Ind Jur 422.

[4] *Bai Porebai* v. *Devji*, (1899) 28 Bom 100 (102).

[5] *Thakar Das* v. *The Firm of Bahsimal Kishen Ohand*, (1921) 64 Ind Cas 385 (386) Lah.

Note 10.

[1] *Madari* v. *Hardayal*, (1910) 7 Ind Cas 538 (539): 13 Oudh Cas 158; *Amir Ohand* v. *Narsingh Narayan Singh*, (1908) 11 Oudh Cas 319 (321); *Madhoo Soodun* v. *Prithee Bullub*, (1871) 16 Suth W R 231 (232); *Jwala Singh* v. *Jaimal Singh*, (1909) 1 Ind Cas 400 (402): 14 Pun W R 1909: 25 Pun L R 1909; *Padmakar* v. *Mahadev Krishna*, (1886) 10 Bom 21 (24): 10 Ind Jur 188 [Held minor not represented]; *Labh Singh* v. *Shahban Mir*, 1926 Lah 289 (290): 7 Lah 129: 27 Pun L R 310: 95 Ind Cas 842 [Gross negli-

O.32, R.1,
Notes
11—13.

11. Estoppel.—A Court of Equity will deprive a fraudulent minor of the benefit of the plea of infancy when, by his conduct or representation he induces others to believe that he is a major. Thus where a minor, representing himself to be of full age, collects rents, and grants receipts[1] or where he executes a registered sale-deed representing himself to be a major[2] he will be estopped from filing a suit through a next friend questioning the validity of those transactions. But the person relying upon the plea of estoppel must himself come with clean hands and prove not only that fraud was practised upon him by the minor but that he was deceived into action by such fraud.[3] In other words there can be no estoppel when the truth (of minority) is known to both the parties.[4]

12. Limitation.—As already pointed out in Note 1, the suit though filed by the next friend is really that of the minor plaintiff and is governed by the law of limitation applicable to the minor.[1] He is entitled to the exemption prescribed by sections 6 and 7 of the Limitation Act (IX of 1908).[2]

13. Attorney's costs.—The costs incurred by the attorney or solicitor of the guardian or next friend of a minor party in properly prosecuting or defending the suit are recoverable from the estate of the minor as "necessaries" under section 68 of the Indian Contract Act (IX of 1872).[1] The

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gence in not putting up proper pleas]; *Subbiah Pandaram* v. *Arunachala,* (1924) 80 Ind Cas 992 (994): 1925 Mad 379 [A guardian filing suit *bona fide* without considering legal aspects—Not guilty of gross negligence].

Note 11.

(1) *Ram Ratun* v. *Shew Nandan,* (1902) 29 Cal 126 (127): 6 Cal W N 182. See also *Maung Nyein* v. *Ma Myin,* (1918) 46 Ind Cas 421 (422): (1918) 3 U B R 75 [Minority no defence to a suit for breach of promise of marriage under Burmese Buddist Law].

(2) *Ganesh Lala* v. *Bapu,* (1897) 21 Bom 198 (201).

(3) *Dhurmo Dass* v. *Brahmo Dutt,* (1898) 25 Cal 616 (622): 2 Cal W N 330; *Brahmo Dutt* v. *Dhurmo Das,* (1899) 26 Cal 381 (388, 394): 3 Cal W N 468.

(4) *Mohri Bibee* v. *Dharmodas,* (1903) 30 Cal 539 (540): 30 Ind App 114: 5 Bom L R 421: 7 Cal W N 441: 8 Sar 374 P C; *Dhanmul* v. *Ramachandra,* (1897) 24 Cal 265 (270, 271): 1 Cal W N 270; *Harna Singh* v. *Naraina,* (1920) 54 Ind Cas 876 (877): 162 Pun Re 1919: 2 U P L R (L) 40: 66 Pun W R 1920: 1 Lah L Jour 122.

Note 12.

(1) *Khodabax* v. *Budree Narain,* (1881) 7 Cal 137 (139): 8 Cal L Rep 306: 5 Ind Jur 644; *Suffaroonissa* v. *Nooral Hossein,* (1872) 17 Suth W R 419 (419); *Ishwari Chaudhari* v. *Dukhi,* (1920) 54 Ind Cas 575 (576): 1 U P L R (B R) 43.

(2) *Govinda Pillai* v. *Thayammal,* (1905) 23 Mad 57 (60): 14 Mad L Jour 209; *Moro Sadashiv* v. *Visaji,* (1892) 16 Bom 536 (537); *Annantharama Iyer* v. *Karuppannan,* (1882) 4 Mad 119 (120); *Ratnam* v. *Krishna,* (1898) 21 Mad 494 (496): 8 Mad L Jour 75 [Applicability of S. 7 of the Limitation Act (XV of 1877); *Zamir* v. *Sunder,* (1900) 22 All 199 (204): 1900 All W N 8, (Do.) F B; *Suryakumar* v. *Arunachunder,* (1901) 28 Cal 465 (469, 470): 5 Cal W N 767, (Do); *Baldeo Singh* v. *Kishen Lal,* (1887) 9 All 411 (413): 1887 All W N 58, (Do); *Girija Nath* v. *Patani Bibee,* (1890) 17 Cal 263 (267), (Do); *Rudra Kant* v. *Nobo Kishore,* (1882) 9 Cal 663 (667): 12 Cal L Rep 269, (Do.) F B; *Yeknath* v. *Waman,* (1886) 10 Bom 241 (242), (Do.); *Jagadindra Nath* v. *Hemanta Kumari,* (1905) 32 Cal 129 (139): 31 Ind App 203: 6 Bom L R 765: 1 All L J 585: 8 Cal W N 809: 8 Sar 698 P C [S 6 of the Limitation Act]; *Guneshwar Singh* v. *Jagadatri Persad,* (1898) 3 Cal W N 24 (25, 28), (Do); *Harek Chand* v. *Maharaj Bejoy Chand,* (1905) 2 Cal L Jour 87 (90): 9 Cal W N 795, (Do); *Subramania* v. *Siva Subramania,* (1884) 17 Mad 316 (323): 4 Mad L Jour 152 [Case under Art. 12]; *Seshagiri* v. *Tanguturi Jagannadham,* (1916) 32 Ind Cas 391 (392, 393): 19 Mad L Tim 93: 39 Mad 1081, (Do); *Shama Churn* v. *Kananagai Chaitan,* (1903) 7 Cal W N 594 (595), (Do); *Phoolbas Koonwar* v. *Lalla Jogeshur,* (1875-76) 1 Cal 226 (243): 3 Ind App 7: 25 Suth W R 285: 3 Sar 573: 3 Suth 236 P C [Claim suit—Limitation]; *Satish Chunder Guha* v. *Chandra Kant Pyne,* (1898) 3 Cal W N 278 (279) [Applicability of Art. 44]; *Veeramma* v. *Abbiah,* (1895) 18 Mad 99 (103, 109, 112) [S. 7, Limitation Act does not apply to suits under S. 77 of the Registration Act]; *Jagjivan Amirchand* v. *Hasan Abraham,* (1883) 7 Bom 179 (180): 7 Ind Jur 373 [Application for execution]; *Monmohun* v. *Gunga Soondery,* (1882) 9 Cal 181 (182): 11 Cal L Rep 34: 5 Shome L R 135, (Do); *Narayanan* v. *Damodaran,* (1894) 17 Mad 189 (192): 4 Mad L Jour 79, (Do); *Lalit Mohun Misser* v. *Janoky Nath Roy,* (1893) 20 Cal 714 (716) [Case under Art. 179 of the Limitation Act, 1877].

Note 13.

(1) *Sham Charan* v. *Chowdhry Debya Singh,* (1894) 21 Cal 872 (880); *Watkins* v. *Dhunnoo Baboo,* (1881) 7 Cal 140 (144): 8 Cal L Rep 433; *Venkata Vijaya Gopala Raju* v. *Timayya Pantulu,* (1899) 22 Mad 314 (316, 317).

O. 32, R. 1, Notes 13–15.

High Court of Madras has, however, held that, where a suit instituted on behalf of a minor, is repudiated by him on his attaining majority pending the suit, and the suit is dismissed, the solicitor cannot recover his costs from the estate of the *quandum* minor but can proceed against the next friend personally.[2] But in any case the attorney is entitled only to a charge on the minor's *estate* and cannot get a personal decree against the infant.[3]

14. Suits for specific performance by or against minors.—As to the maintainability of suits by or against minors for specific performance of contracts entered into by the guardian, *see* the cases noted below.[1]

15. Suit for possession against person in possession as guardian of minor plaintiff.—Where *A* was in possession claiming to be the *de jure* guardian of *B*, a minor, and *C*, acting as next friend of *B* filed a suit against *A* for possession, it was held that the question was one exclusively falling within the purview of the Guardians and Wards Act (VIII of 1890) and that no suit lay.[1] *See also* Note 54 to S. 9.

O.32, R.2.

Where suit is instituted **without next friend, plaint to be taken off the file.**

R. **2.** [S. 442] (1) *Where a suit is instituted* by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

[1877—S. 442.]

Synopsis.

1. Scope of the rule.
2. Suit by minor without a next friend.
3. Waiver or objection by defendant.
4. Costs.

Appeal. See Note 2, Pt. (2).
Effect of suit by minor without next friend—Only irregularity. See Note 3, Pt. (1).
Minor becoming major before decision. See Note 2, Pt. (7).
Minority apparent or found on enquiry—Procedure. See Note 2, Pts. (1) to (6).
Minor having certificated guardian—Suit by other person as next friend—Effect. See Note 1, Pt. (2).
No application by defendant rule still applies. See Note 1, Pt. (1).
Objection no force after appointment of next friend. See Note 3, Pt. (2).
Striking off of plaint—When made. See Note 2, Pt. (3).
Suit as minor—Really major—Effect. See Rule 1, Note 5.

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[2] *Branson* v. *Appasami*, (1894) 17 Mad 257 (259).

[3] *Kumar Krishna* v. *Hri Narain*, (1916) 33 Ind Cas 708 (711): 20 Cal W N 537: 43 Cal 676.

Note 14.

[1] *Jugal Kishori* v. *Anunda Lal*, (1895) 22 Cal 545 (551); *Fatima Bibi* v. *Debnath*, (1898) 20 Cal 508 (513); *Khairunnissa* v. *Loke Nath Pal*, (1900) 27 Cal 276 (278); *Krishnasami* v. *Sundarapayyar*, (1895) 18 Mad 415 (416): 5 Mad L Jour 164; *Kashiba* v. *Shripat Narshiv*, (1895) 19 Bom 697 (700) [Suit on bond executed by minor].

Note 15.

[1] *Mt Bhagi* v. *Kashiram*, 1925 Nag 328 (329): 21 Nag L R 75: 89 Ind Cas 55.

O. 32, R. 2, Notes 1—2.

1. **Scope of the Rule.**—Where a minor sues without a next friend, the defendant can, under this Rule, apply to have the plaint taken off the file. But even without any such application the Court is bound to take notice of the minority of the plaintiff, if the same is disclosed in the course of the trial, and suspend all proceedings in the suit until the defect is remedied by the minor getting himself properly represented by a next friend.[1]

Where there is a certificated guardian appointed for a minor under the Guardians and Wards Act (VIII of 1890), but a suit is filed by a third person on behalf of the minor, it has been held by the High Court of Allahabad that the suit should be considered to be filed by the minor without a next friend and should be taken off the file.[2]

2. **Suit by minor without a next friend.**—It has been held by the High Court of Calcutta that this Rule applies only to cases where the fact of minority is apparent *on the face of the plaint* and that the rule does not contemplate an *inquiry* into the question of minority where the plaint *prima facie* shows that the plaintiff is a major.[1] In the latter case where on enquiry the plaintiff is actually found to be a minor the proper procedure according to that Court is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend. If the Court purports to act under this rule, and takes the plaint off the file, the order must be treated as a decree dismissing the suit or an order rejecting the plaint in both of which cases an appeal will lie.[2] On the other hand, the High Court of Bombay has held that this rule applies even to cases where the fact of minority is disclosed, on enquiry, but that the Court should as a matter of practice stay proceedings and allow sufficient time to enable the minor plaintiff to be represented by a next friend unless the plaintiff instituted the suit with the knowledge of the fact of minority and with the intention of deceiving the Court and of evading the payment of costs in the event of failure, in which case the suit should be taken off the file.[3] The High Courts of Lahore,[4] and Madras,[5] and the Judicial Commissioner's Court of Oudh,[6] have taken the same view.

In any view, where the plaintiff attains majority by the time of the enquiry as to his minority, there is no necessity for an amendment inasmuch as he can elect to proceed with the suit.[7]

Order 32, Rule 2—Note 1.

(1) *Ali Ahmad* v. *Said Mian,* 1924 Lah 188 (188): 4 Lah 390: 75 Ind Cas 1028; *Maung San Bwin* v. *Maung Nyi,* 1925 Rang 325 (326): 3 Rang 239: 89 Ind Cas 870 [Defendant *ex parte*].

(2) *Raja Lohar* v. *Nur Mohammad,* (1929) 115 Ind Cas 456: 1929 Notes 8 (*c*).

Note 2.

(1) *Beni Ram* v. *Ram Lal,* (1886) 13 Cal 189 (191).

(2) *Beni Ram* v. *Ram Lal,* (1886) 13 Cal 189 (191); In re *Lalbihari Shah,* 1921 Cal 776 (777): 26 Cal W N 631: 60 Ind Cas 889: 47 Cal 721; *Misri Sahu* v. *Vishu Nath Sahu,* (1919) 52 Ind Cas 985 (986): 29 Cal L Jour 419; *Russick Das* v. *Preonath,* (1884) 10 Cal 102 (106): 13 Cal L Rep 405; *Moorlee Dhur* v. *Nathonee Mahtoon,* (1876) 25 Suth W R 184 (185); *Rollo* v. *Smith,* (1868) 1 Beng L R O C 10.

(3) *Rattonbai* v. *Chabildas Laloobhoy,* (1889) 13 Bom 7 (11).

(4) *Mt Durga Devi* v. *Gur Narain,* 1924 Lah 157 (158): 69 Ind Cas 401.

(5) *Puppoth* alias *Ramanunni Kurup* v. *V M Raman Somayaji Pad,* 1923 Mad 553 (554): 44 Mad L Jour 515: 17 Mad L W 558: 32 Mad L Tim 107: 1923 Mad W N 301: 74 Ind Cas 309.

(6) *Gagraj Singh* v. *Raghbar,* (1904) 7 Oudh Cas 234 (236); *Abdul Karim* v. *Muhammad Ahmad,* (1908) 11 Oudh Cas 159 (164).

(7) *Beni Ram* v. *Ram Lal,* (1886) 13 Cal 189 (191, 192); *Nasiruddin Hussain* v. *Ashfaq Hus-*

3. **Waiver of objection by defendant.**—Where a defendant against whom a suit is instituted by a minor is aware of the minority of the plaintiff and yet elects to proceed to trial and take the chance of obtaining a decree in his favour on the merits without raising any objection under this rule, he cannot be allowed for the first time in appeal, when the trial has gone against him, to contend that the suit is not maintainable owing to the minority of the plaintiff. The decree passed in such a case is *not a nullity.* The non-representation of the minor by a next friend is only an irregularity capable of being waived by the defendant.[1]

On the same principle it has been held that where on objection taken by the defendant, a next friend is appointed for the plaintiff, the defendant cannot object in appeal that the suit was originally filed without a next friend and was, therefore, not maintainable.[2]

4. **Costs.**—Where the plaintiff is found to be a minor and the plaint is consequently directed to be taken off the file of the Court, costs should not be ordered to be recovered from the estate of the minor; the pleader or other person presenting the plaint should be made liable therefor.[1]

O. 32, R.3.

Guardian *for the suit* **to be appointed by Court** *for minor defendant.*

R. 3. [Ss. 443, 456.] (1) Where the defendant is a minor,[4] the Court, on being satisfied of the fact of his minority,[3] shall appoint a proper person to be guardian for the suit[2] for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application *shall* be supported by an affidavit[9] verifying the fact that the proposed guardian has no interest in the matters in *controversy* in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) *No order shall be made on any application under this rule except upon notice to the minor*[11] *and to any guardian of minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there*

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sain, (1918) 46 Ind Cas 747 (748): 16 All L J 737 [The plaint must be deemed to have been properly presented on the day of the application to proceed with the plaint]; *Puppoth* alias *Ramanunni Kurup* v. *Raman Somayaji Pad,* 1923 Mad 553 (554): 44 Mad L Jour 575: 17 Mad L W 558: 32 Mad L Tim 107: 1923 Mad W N 301: 74 Ind Cas 309.

Note 3.

(1) *Full Bibi* v. *Khokai Mondal,* 1928 Cal 537 (539): 55 Cal 712: 111 Ind Cas 349; *Doorga Mohun Das* v. *Tahir Ally,* (1899) 22 Cal 270 (274); *Wazi Rai* v. *Sheobart Rai,* (1881) All W N 150 (151); *Parikh Gokuldas* v. *Ravial Jalam,* (1884) Bom P J 262 (268); *Kamalakshi* v. *Ramasami,* (1896) 19 Mad 127 (129); *Brocklebank, In re,* (1877) 6 C D 358: 37 L T 282: 46 L J Bt. 113: 25 W R 859. But see *Radha Kishen* v. *Bakhtawur Lal,* (1866) 1 Agra H C 1.

(2) *Kotasseri Ezhuthassan Veetil Sankaran Nambi* v. *Eanholi Illathil Devatu Antherjeenam,* 1922 Mad 259 (260): 16 Mad L W 26: 1922 Mad W N 428: 43 Mad L Jour 572: 73 Ind Cas 491.

Note 4.

(1) *Amichand* v. *Collector of Sholapur,* (1889) 13 Bom 234 (236). See also *Shonnai Bewa* v. *Monoram Mundal,* (1882) 11 Cal L R 15 (16).

is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

[1877—Ss. 443, 446.]

Local Amendments.

ALLAHABAD.

Add the following proviso to R. 3 (4):—

"Provided that if the minor is under ten years of age no such notice shall be issued to him."

BOMBAY.

The words "to the minor and" in line 2 of sub-R. (4) shall be *deleted.*

LAHORE.

The following sub-rules were *substituted* for sub-Rr. (3) and (4):—

"(3) The plaintiff shall file with his plaint a list of relatives of the minor and other persons, with their addresses, who *prima facie* are most likely to be capable of acting as guardian for the suit for a minor defendant. The list shall constitute an application by the plaintiff under sub-R. (2), above.

(4) The Court may at any time after institution of the suit call upon the plaintiff to furnish such a list, and, in default of compliance, may reject the plaint.

(5) Any application for the appointment of a guardian for the suit and any list furnished under this rule shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that each person proposed is a fit person to be so appointed.

(6) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule:

Provided that the Court may, if it sees fit, issue notice to the minor also."

MADRAS.

Delete Rr. 3 and 4 and *substitute* in lieu thereof the new R. 3 set forth below:—

Qualifications to be a next friend or guardian.

3. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:

Provided that the interest of that person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

Appointed or declared guardians to be preferred and to be superseded only for reasons recorded.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed as the case may be.

Guardians to be appointed by Court.

(3) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the minor.

O. 32, R. 3.

Appointment to be on application and where necessary after notice to proposed guardian.

(4) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. The application, where it is by the plaintiff, shall set forth, in the order of their suitability, a list of persons (with their full addresses for service of Notice in Form No. 11-A set forth in Appendix H hereto) who are competent and qualified to act as guardian for the suit for the minor defendant. The Court may for reasons to be recorded, in any particular case, exempt the applicant from furnishing the list referred to above.

Contents of affidavit in support of the application for appointment of guardian.

(5) The application referred to in the above sub-rule whether made by the plaintiff or on behalf of the minor defendant shall be supported by an affidavit verifying the fact that the proposed guardian has not, or that no one of the proposed guardians has, any interest in the matters in controversy in the suit adverse to that of the minor and that the proposed guardian or guardians are fit persons to be so appointed. The affidavit shall further state according to the circumstances of each case (*a*) particulars of any existing guardian appointed or declared by competent authority, (*b*) the name and address of the person, if any, who is the *de facto* guardian of the minor, (*c*) the names and addresses of persons, if any, who in the event of either the natural or the *de facto* guardian or the guardian appointed or declared by competent authority, not being permitted to act, are by reason of relationship or interest or otherwise, suitable persons to act as guardian for the minor for the suit.

Application for appointment of guardian to be separate from application for bringing on record the legal representatives of a deceased party.

(6) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representatives of a deceased plaintiff or defendant. The applications shall be by separate petitions.

Notice of application to be given to persons interested in the minor defendant other than the proposed guardian.

(7) No order shall be made on any application under sub-R. (4) above except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or where there is no guardian, upon notice to the father or other natural guardian of the minor, or where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. The notice required by this sub-rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in Form No. 11 set forth in Appendix H hereto.

Special provision to shorten delay in getting a guardian appointed.

(8) Where the application is by the plaintiff, he shall, along with his application and affidavit referred to in sub-Rr. (4) and (5) above, produce the necessary forms in duplicate, filled in to the extent that is possible at that stage, for the issue simultaneously of notices to two at least of the proposed guardians for the suit to be selected by the Court from the list referred to in sub-R. (4) above, together with a duly stamped voucher indicating that the fees prescribed for service have been paid. If one or more of the proposed guardians signify his or their consent to act, the Court shall appoint one of them and intimate the fact of such appointment to the person appointed by registered post. If no one of the person served signifies his consent to act, the Court shall proceed to serve simultaneously another selected two, if so many there be, of the persons named in the list

referred to in sub-R. (4) above, but no fresh application under sub-R. (4) shall be deemed necessary. The applicant shall, within three days of intimation of unwillingness by the first set of proposed guardians, pay the prescribed fee for service and produce the necessary forms duly filled in.

No person shall be appointed guardian without his consent.

(9) No person shall, without his consent, be appointed guardian for the suit. Whenever an application is made proposing the name of a person as guardian for the suit, a notice in Form No. 11-A set forth in Appendix H hereto shall be served on the proposed guardian, unless the applicant himself be the proposed guardian or the proposed guardian consents.

Court guardian—when to be appointed—how he is to be placed in funds.

(10) Where the Court finds no person fit and willing to act as guardian for the suit the Court may appoint any of its officers or a pleader of the Court to be the guardian and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit or out of any fund in Court in which the minor is interested, and may give directions for the re-payment or allowance of the costs as justice and the circumstances of the case may require.

Funds for a guardian other than Court guardian to defend.

(11) When a guardian for the suit of a minor defendant is appointed and it is made to appear to the Court that the guardian is not in possession of any or sufficient funds for the conduct of the suit on behalf of the defendant and that the defendant will be prejudiced in his defence thereby, the Court may, from time to time, order the plaintiff to advance moneys to the guardian for purpose of his defence and all moneys so advanced shall form part of the costs of the plaintiff in the suit. The order shall direct that the guardian, as and when directed, shall file in Court an account of the moneys so received by him.

NAGPUR.

For Rr. 3 and 4, *substitute* the following:—

Guardian for the suit to be appointed by Court for minor defendant.

"3. Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit of such minor.

Who may act as next friend or guardian for the suit.

4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit.

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff:

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or as his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act in either capacity.

Procedure for appointment of guardian for the suit.

4-A. (1) No person, except the guardian appointed or declared by competent authority, shall, without his consent, be appointed guardian for the suit.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Unless the Court is otherwise satisfied of the fact that the proposed guardian has no interest adverse to that of the minor in the matters in controversy in the suit and that he is a fit person to be so appointed, it shall require such application to be supported by an affidavit verifying the fact.

O. 32, R. 3.

(4) No order shall be made on any application for the appointment as guardian for the suit of any person, other than a guardian of the minor appointed or declared by competent authority, except upon notice to the proposed guardian for the suit and to any guardian of the minor appointed or declared by competent authority, or, where there is no such guardian, the person in whose care the minor is, and after hearing any objection that may be urged on a day to be specified in the notice. The Court may, in any case, if it thinks fit, issue notice to the minor also.

(5) Where, on or before the specified day, such proposed guardian fails to appear and express his consent to act as guardian for the suit, or, where he is considered unfit, or disqualified under sub-R. (3), the Court may, in the absence of any other person fit and willing to act, appoint any of its officers or a pleader to be guardian for the suit.

(6) In any case in which there is a minor defendant the Court may direct that a sufficient sum shall be deposited in Court by the plaintiff from which sum the expenses of the minor defendant in the suit shall be paid. The matter shall be adjusted in accordance with the final order passed in the suit in respect of costs.''

OUDH.

Add the following proviso to R. 3 (4):—

''Provided that if the minor is under ten years of age no such notice shall be issued to him.''

RANGOON.

The following shall be *substituted*, namely:—

''3. (1) Where any of the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper guardian for the suit for such minor.

(2) For this purpose there shall be filed by the plaintiff with the plaint a list of all persons whom the plaintiff considers to be capable of acting as guardian of the minor for the suit. Such list shall be in the form of an application duly verified and requesting that one of such persons may be appointed guardian of the minor for the suit, and shall state for each of such persons whether he has a guardian appointed or declared by competent authority, or a natural guardian, or the custodian of the minor, or a stranger, and shall give the address of each of such persons.

(3) An order for the appointment of a guardian for the suit may also be obtained upon application in the name and on behalf of the minor.

(4) An application under sub-R. (2) or sub-R. (3) shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(5) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.''

Synopsis.

1. Scope and object of the rule.
2. "Shall appoint a proper person to be guardian for the suit."
2-A. Title of suit against minor.
3. "On being satisfied of the fact of his minority."
4. When defendant pleads minority.
5. Non-representation.
6. Absence of formal order of appointment of guardian, substantial representation.
7. Illegal procedure in appointing guardian.
8. Decree against major treating him as

minor and vice versa.
9. Such application shall be supported by affidavit—Sub-Cl. (3).
10. Service of summons.
11. Notice to the minor and his guardian.
12. Duties of a guardian—Gross negligence.
13. Effect of fraud or gross negligence of guardian.
14. Probate proceedings.

Applicability of order to execution proceedings. See O. 32, General Note 2.
Estoppel. See Note 8, Pt. (3).
Guardian not appointed—Whether decree is valid. See Note 5, Pt. (1).
Minor—When can impeach decree. See Notes 5, 12 and 13.
No guardian ad litem—Effect on limitation. See Note 2, Pt. (4).

1. Scope and object of the rule.—The object of the rule is to see that the minor's interest does not suffer and that he is properly represented in a suit filed against him.[1] The Court cannot, therefore, be too jealous in observing the requirements of the law in regard to infants and in seeing that their interests are properly safeguarded. It should be satisfied not merely that the proposed guardian is a fit and proper person to act as guardian but also that he has no interest, directly or indirectly, adverse to the minor.[2] As to the applicability of the rule to proceedings other than suits, *see* the undermentioned cases.[3]

2. "Shall appoint a proper person to be guardian for the suit."—The provisions of the rule are mandatory and the Court is bound to appoint a proper guardian for a minor defendant.[1] The appointment is not a mere matter of form. The Court is bound to satisfy itself that the proposed guardian is a fit and proper person to represent the interests of the minor.[2] A decree obtained against a minor without appointing a guardian for him as required by this rule is nullity (see Note 5, *infra*). The principle that the manager of a joint Hindu family represents in litigation the other members including minor co-parceners does not apply when minors are *made parties* to a suit, the Court is therefore bound to appoint a guardian for the minor defendant even though the managing member of the family of which such minor is a member is a co-defendant.[3]

But the fact that the validity of the proceedings depends upon the appointment of a proper guardian for a minor defendant does not mean that for purposes of limitation a suit is not validly filed until a guardian

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Order 32, Rule 3—Note 1.

(1) *Aramita Lisboade Souza* v. *Andithrao Waghoji Raje Shirke*, 1927 Bom 613 (615): 29 Bom L R 1357: 105 Ind Cas 537.

(2) *Bhura Mal* v. *Har Kishan Das*, (1902) 24 All 383 (386, 393): 1902 All W N 76 F B; *Shipal Singh* v. *Jagdish Narayan*, (1920) 56 Ind Cas 313 (315): 7 Oudh L J 219: 2 U P L R (J O) 77: 23 Oudh Cas 396; *Ahmad Mirza Khan* v. *Hira Lal*, 1899 Pun Re No. 23.

(3) *Pateswar* v. *Ajodhia*, (1919) 52 Ind Cas 123 (124): 1 U P L R (J C) 9 [Do not apply to partition proceedings under U P Land Revenue Act]; *Madho Singh* v. *Lala Keshab Deo*, 1931 All 656 (657): 1931 All L J 1152: 13 L R A 3 [Applies to proceedings in Revenue Court]; *Hari Charan Sil* v. *Bepin Behari Mukhopadhya*, 1927 Cal 374 (374): 100 Ind Cas 146 [Do not apply to commutation proceedings under Bengal Tenancy Act]; *Vasudev Vishnu* v. *Narayan Jagannath*, (1872) 9 Bom H C R 289 [Proceedings to file and enforce an award are of the nature of a suit under S. 2 of Act XX of 1864, and minor has to be represented by holder of certificate of administration].

Note 2.

(1) *Damu Diga* v. *Vakrya Nathu*, (1920) 56 Ind Cas 455 (456): 22 Bom L R 328: 44 Bom 767; *Shivanath Singh* v. *Manohar Lal*, (1914) 22 Ind Cas 245 (246): 16 Oudh Cas 261; *Bhagwan Dayal* v. *Param Sukh Dass*, (1917) 36 Ind Cas 366 (369): 14 All L J 818: 39 All 8: Anonymous (1869) 5 Mad H C R App 8.

(2) *Ram Chandra* v. *Joti Prosad*, (1907) 29 All 675 (677, 678): 1907 All W N 225. See also *Guru Churn* v. *Kali Kissen*, (1885) 11 Cal 402 (405).

(3) *Chandi Prasad Misir* v. *Balaji Missir*, 1931 All 136 (136): 129 Ind Cas 560: 1931 All L J 152: 53 All 427.

O. 32, R.3, Notes 2—5.

ad litem is appointed for the minor; the institution of a suit is complete and saves limitation even though the further progress of the suit depends upon the appointment of a suitable guardian.[4]

2-A. Title of suit against minor.—In a suit against a minor, the minor should himself be made, and described as, a defendant, some other person being named as guardian. Thus a suit against *C.D.*, a minor, should describe him as "*C.D.*, a minor, of whom *E.F.* is guardian *ad litem*".[1]

3. **"On being satisfied of the fact of his minority."**—*See* the undermentioned case.[1]

4. **When defendant pleads minority.**—When a defendant who is sued as a major pleads that he is a minor, the proper procedure is to raise a *preliminary issue* on the question of his minority, and give a finding thereon. In the proceedings for the determination of such issue, however, the alleged minor should be represented by a guardian *ad litem* appointed by the Court. If it is found that the defendant is in fact a minor, then a guardian should be appointed for the suit. If not, the guardian appointed for the enquiry should cease to act.[1] On the analogy of this principle, it has been held that where a minor applies to be brought on record as the legal representative of a deceased party, the Court ought to appoint a guardian for the purpose of the enquiry as to his being the legal representative.[2]

5. **Non-representation.**—A minor cannot be considered to be a party to a suit unless he is represented therein by a duly qualified guardian. A decree passed against a minor not so represented must be regarded as a decree passed against a person not a party to the suit and is therefore without jurisdiction, null and void.[1] In order to set aside such a decree it is not necessary to show that the minor has suffered any prejudice by non-repre-

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(4) *Rup Chand* v. *Dasodha*, (1908) 30 All 55 (56): 1907 All W N 290: 3 Mad L Tim 58; *Bhagwan Dayal* v. *Param Sukh Dass*, (1917) 36 Ind Cas 366 (369): 14 All L J 818: 39 All 8; *Har Lal Singh* v. *Rudra Singh*, 1927 All 787 (787): 49 All 869: 25 All L J 655: 102 Ind Cas 624; *Ishwari Chaudhari* v. *Dukhi*, (1920) 54 Ind Cas 575 (576): 1 U P L R (B R) 43; *Khen Karan* v. *Har Dayal*, (1882) 4 All 37 (39): 1881 All W N 129: 6 Ind Jur 382; *Imami* v. *Saddan*, (1901) Pun Re No. 18: 31 Pun L R 1901.

Note 2-a.

(1) *Mongula Dossee* v. *Sharoda Dossee*, (1873) 20 Suth W R 48 (48): 12 Ben L R App 2. See also *Girwar Narayan Mahton* v. *Kamla Prasad*, 1933 Pat. 104 (110): 13 Pat L Tim 737: 12 Pat 117 [Minor sued as majors—Written statement filed by their mother as their guardian—Court accepted the same—Failure to amend the cause title is a mere irregularity]; *Amritsaria* v. *Gamun*, 1926 Lah 82 (82): 89 Ind Cas 363 [Suit by father as next friend of his minor son—Finding him a major on that date—Cause-title amended—Though on date of amendment barred by Limitation, suit not to be dismissed].

Note 3.

(1) *Shi Paul Singh* v. *Jagadish Singh*, (1920) 56 Ind Cas 313 (315): 7 Oudh L J 219: 2 U P L R (J C) 77: 23 Oudh Cas 393.

Note 4.

(1) *Kasi Doss* v. *Kassim Sait*, (1898) 16 Mad 344 (346): 2 Mad L Jour 215; *Ram Gobind* v. *Sital Singh*, 1926 Pat 489 (490): 96 Ind Cas 273.

(2) *Rukmani Ammal* v. *Veeraswami Ayyangar*, 1924 Mad 813 (814): 47 Mad L Jour 370: 35 Mad L Tim 82: 1924 Mad W N 763: 80 Ind Cas 942.

Note 5.

(1) *Khiarajmal* v. *Dain*, (1905) 32 Cal 296 (312, 315): 32 Ind App 23: 9 Cal W N 201: 2 All L J 71: 7 Bom L R 1: 1 Cal L Jour 584: 8 Sar 734 P C; *Partab Singh* v. *Bhabuti Singh*, (1913) 21 Ind Cas 288 (291): 17 Cal W N 1165: 1913 Mad W N 785: 14 Mad L Tim 299: 25 Mad L Jour 492: 11 All L J 901: 16 Oudh Cas 247: 18 Cal L Jour 384: 15 Bom L R 1001: 35 All 487: 40 Ind App 182 P C; *Narain Singh* v. *Raj Kumar Singh*, 1922 All 217 (219): 20 All L J 251: 44 All 428: 66 Ind Cas 62; *Champi* v. *Tara Chand*, 1924 All 892 (894): 46 All 744: 22 All L J 665: 6 L R A Civ 502: 82 Ind Cas 516; *Ram Das* v. *Dwarka Das*, 1930 All 875 (876): 128 Ind Cas 763; *Hanuman Prasad* v. *Muhammad Ishaq*, (1906) 28 All 137 (138, 141): 1905 All W N 229: 2 All L J 615; *Sundara* v. *Sakharam Gopal*, (1915) 26 Ind Cas 444 (444): 16 Bom L R 616: 39 Bom 29; *Vishnu Keshav* v. *Ram Chandra*, (1887) 11 Bom 130 (132); *Banswar Pramanik* v. *Tarapada Bhattacharjee*, (1917) 41

O. 32, R.3, Note 5.

sentation.[2] Not being a party to the suit, the minor will not be barred by the principle of *res judicata* from raising the same questions in a subsequent suit as were decided in the prior suit.[3] On the same principle their Lordships of the Privy Council have held in *Rashid-un-nissa* v. *Muhammad Ismail,* I.L.R. 31 All. 572, that a minor not represented in the suit cannot, in execution, object to the execution of the decree.[3-a] Their Lordships observed as follows: "Section 244 (now S. 47) of the Civil Procedure Code applies to questions arising between *parties to the suit* in which the decree was passed, that is to say, between parties who were properly made parties in accordance with the provisions of the Code." It will also follow from this that a minor not properly represented in the suit and against whom an *ex parte* decree has been passed cannot apply under O. 9, R. 13 to set aside the *ex parte* decree, inasmuch as under that rule only a *defendant,* that is, a person properly made a defendant, can apply. This is the view of the High Court of Madras,[4] and the Judicial Commissioner's Court of Nagpur.[5] The High Court of Allahabad[6] and the Chief Court of Oudh[7] have, however, held that such an application is maintainable. In view of the Privy Council decision mentioned above, it is submitted that the latter view is not correct.

Ind Cas 872 (873): 26 Cal L Jour 258; *Shaik Abdul Karim* v. *Thakurdas Thakur,* 1928 Cal 844 (848): 55 Cal 1241: 32 Cal W N 665; *Jamilennessa Khatun* v. *Ijjatennessa Khatun,* 1929 Cal 586 (589); *Umapati Samanta* v. *Sheikh Nasitullah,* 1923 Cal 692 (693): 37 Cal L Jour 496: 72 Ind Cas 475; *Durgaram Bose* v. *Tara Prosad Naik,* 1923 Cal 338 (339); *Halli Jha* v. *Lal Singh,* (1915) 27 Ind Cas 425 (426, 427) Cal; *Sadhu Charan Pal* v. *Indra Mohan Mistari,* (1921) Oudh 148: 64 Ind Cas 90 (90): 24 Oudh Cas 234: 8 Oudh L J 626; *Dakeshur Pershad* v. *Rewat Mehton,* (1897) 24 Cal 25 (27); *Ganga Prasad* v. *Umbika Churn,* (1887) 14 Cal 754 (757); *Mongula Dossee* v. *Sharoda Dossee,* (1874) 12 Ben L R App 2: 20 Suth W R 48; *Radha Kristo* v. *Ram Chunder,* (1869) 11 Suth W R 300 (301); *Indar Sain* v. *Prabhu Lal,* 1922 Lah 277 (278): 3 Lah 88: 66 Ind Cas 4; *Barkat Bibi* v. *Mohd Amin,* 1932 Lah 521 (522): 33 Pun L R 551: 139 Ind Cas 113 [Reader of the Court appointed "to conduct the case" for the minor but without sending notice either to the minor or to the render as required by O 32, R 3, C. P. C.]; *Hira Singh* v. *Ghulam Quadir,* (1918) 48 Ind Cas 399 (399): 113 Pun Re 1918; *Chaudhury Krishnayya* v. *Kori Palli Raju,* (1916) 35 Ind Cas 154 (156): 31 Mad L Jour 39; *Eda Punnayya* v. *Gangala Kama Kotayya,* (1919) 53 Ind Cas 184 (186): 37 Mad L Jour 399: 26 Mad L Tim 327: 10 Mad L W 471: 1920 Mad W N 1; *Permanand* v. *Lakhmichand,* 1922 Nag 249 (250): 18 Nag L R 138: 66 Ind Cas 480; *Rampirit Prasad* v. *Thakur Saran,* 1921 Pat 293 (293): 1921 Pat H C C 335: 2 Pat L Tim 617: 63 Ind Cas 484; *Ido* v. *Rulia,* (1910) 6 Ind Cas 663 (664): 55 Pun W R 1910: 35 Pun Re 1910: 43 Pun L R 1910; *Bishen Singh* v. *Mit Singh,* (1899) Pun Re No. 17 [Confession of judgment on behalf of minor not by *guardian ad litem* but a co-defendant uncle—Not binding]. See also *Erfanuddin Molla* v. *Badan Sheikh,* (1919) 51 Ind Cas 583 (586) Cal [Decree can be set aside in an appeal by another party].

(2) *Mt Chambi* v. *Tarachand,* 1924 All 892 (898): 46 All 744: 22 All L J 665: 5 L R A Civ 502: 82 Ind Cas 516.

(3) *Sundara Babu Shetyi* v. *Sakaram Gopal Shet Gandhi,* (1915) 26 Ind Cas 444 (444): 16 Bom L R 616: 39 Bom 29; *Rashid-un-nissa* v. *Muhammad Ismail Khan,* (1909) 31 All 572 (582): 36 Ind App 168: 6 All L J 822: 11 Bom L R 1225: 13 Cal W N 1182: 10 Cal L Jour 318: 19 Mad L Jour 631: 3 Ind Cas 864: 6 Mad L Tim 279 P C.

(3-a) See also *Kali Pada* v. *Hari,* (1917) 35 Ind Cas 856 (858, 859): 24 Cal L Jour 375: 44 Cal 627: 21 Cal W N 1104; *Bideshri* v. *Lakhpat,* (1910) 8 Ind Cas 26 (27): 15 Cal W N 725; *Mahomed Nooroollah Khan* v. *Har Charan Rai,* (1874) 6 N W P H C 98; *Lahore Bank, Ltd* v. *Gulam Jilani,* 1924 Lah 448 (448): 5 Lah 54: 78 Ind Cas 460. But see *Sami Chettiar* v. *T R Sesha Ayyar & Co,* 1928 Mad 1057 (1058): 113 Ind Cas 663; *Madhuri Venkata Someswara Rao* v. *Pulavarty Lakshmanswami,* 1929 Mad 213 (217): 56 Mad L Jour 175: 29 Mad L W 125: 52 Mad 275: 115 Ind Cas 801 F B [Per Devadoss J *obiter*].

(4) *Arumugu Goundan* v. *Periavanjiappa Goundan,* 1924 Mad 489 (489): 46 Mad L Jour 348: 19 Mad L W 233: 34 Mad L Tim 94: 1924 Mad W N 289: 78 Ind Cas 76; *Eda Punnayya* v. *Jangala Kama Kotayya,* (1919) 53 Ind Cas 184 (185, 186).

(5) *Seth Paramanad* v. *Lakhmichand,* 1922 Nag 249 (250): 18 Nag L R 138: 66 Ind Cas 460.

(6) *Bhagwan Dayal* v. *Param Sukh,* (1916) 36 Ind Cas 366 (369): 14 All L J 818: 39 All 8 [It was held in this case that it is also open to minor to *appeal* from the decree or apply for a review. For the reasons given in the commentary this view is also not correct]. *Peara Lal* v. *Ashraf Khan,* 1923 All 213 (214): 21 All L J 185: 71 Ind Cas 456: 4 L R A Civ 137.

(7) *Shiam Bahadur* v. *Brij Kishore,* 1927 Oudh 173 (174): 4 Oudh W N 356: 101 Ind Cas 632.

O. 32, R.3, Note 5.

Where an *incompetent or disqualified* guardian is appointed for a minor party, the position is the same as if no guardian is appointed at all.[8] As to when a guardian *ad litem* can be regarded as a disqualified person and when not, *see* Notes 4 to 8 to R. 4, *infra.*

Where a minor *is* represented in the suit by a duly qualified guardian, he becomes legally a party to the suit and the Court acquires jurisdiction to decide his case.[9] The decree passed against him in such a case is binding on him as much as on an adult, and the judgment will operate as *res judicata* against him in subsequent proceedings.[10] The law, however, recognises a substantive right in him to avoid the decree so passed if he can establish that the guardian has been grossly negligent in the conduct of the suit and if he suffered prejudice by reason of such negligence.[11] The minor can exercise this right in various ways:—

(1) If the decree is an *ex parte* one, he may apply under O. 9, R. 13 to set aside the *ex parte* decree. The negligence of the guardian may constitute a "sufficient cause" for setting aside the decree within the meaning of that rule.[12]

(2) He may prefer an appeal from the decree.

(3) He may apply for a review of the judgment.[12-a]

(4) He may file a *suit* to set aside the decree.[13]

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(8) *Gangaraju* v. *Satyanarayana*, 1931 Mad 674 (677): 34 Mad L W 317: 134 Ind Cas 188. See also Notes 4 and 5 to Rule 4, *infra.*

(9) *Pande Satdeo Narain* v. *Ramyan Tewari*, 1923 Pat 242 (250): 2 Pat 335: 4 Pat L Tim 147: 71 Ind Cas 705. See also *Walian* v. *Banke Behari Pershad Singh*, (1903) 30 Cal 1021 (1031): 30 Ind App 182: 5 Bom L R 822: 7 Cal W N 774: 8 Sar 512 P C.

(10) *Venkatachalam* v. *Mahalakshmamma*, (1887) 10 Mad 272 (279); *Raj Gopal Acharjya* v *Upendra Acharjya Goswami*, 1926 Pat 528 (529): 96 Ind Cas 437: 5 Pat 768; *Gursandas Natha* v. *Ladkavahu*, (1895) 19 Bom 571 (576); *Sukha* v. *Lachmi Narain*, 1928 All 621 (622): 26 All L J 834; *Brij Raj* v. *Ram Sarup*, 1926 All 36 (40, 41): 23 All L Jour 901: 6 L R A Civ 488: 90 Ind Cas 749: 48 All 44; *Bachan* v. *Bhika Singh*, 1927 All 601 (602): 8 L R A Rev 229: 106 Ind Cas 49; *Jammu* v. *Mahadeo Prasad*, 1922 All 294 (295): 66 Ind Cas 559; *Sham Lal* v. *Ghasita*, (1901) 23 All 459 (461): 1901 All W N 147; *Murlidhar* v. *Pitambar Lal*, 1922 All 91 (94): 20 All L J 329: 66 Ind Cas 872: 44 All 525 [Court can go into the merits of the prior suit and see whether minor not properly represented]; *Beni Prasad* v. *Lajjaram*, (1916) 35 Ind Cas 63 (64): 14 All L J 438: 38 All 452; *Benarsi* v. *Ramnarain*, (1908) 30 All 105 (108): 5 All L J 35: 1908 All W N 28: 3 Mad L Tim 128; *Daulat Singh* v. *Raghbir Singh*, (1894) All W N 141 (142); *Hanmantappa* v. *Jivubai*, (1900) 24 Bom 547 (552): 2 Bom L R 478; *Padmaker* v. *Mahadev*, (1886) 10 Bom 21 (24): 10 Ind Jur 188; *Bepin Chandra Das* v. *Menajaddi*, 1927 Cal 865 (866, 867): 46 Cal L Jour 287: 107 Ind Cas 199; *Surendranath Ghose* v. *Hemangini Dasi*, (1907) 34 Cal 83 (89); *Raghubar* v. *Bhikya*, (1886) 12 Cal 69 (75, 76); *Modhoo Soodun* v. *Prithee*, (1871) 16 Suth W R 281 (232); *Sherafuttoollah* v. *Abedoonissa*, (1872) 17 Suth W R 374 (374); *Gulam Jilani* v. *Yusuf Shah*, (1887) Pun Re No. 72; *Maruthamalai Goundan* v. *Palani Goundan*, (1912) 16 Ind Cas 182 (183): 37 Mad 535; *Baijnath* v. *Radha Rawan Prasad*, (1918) 43 Ind Cas 563 (565) Oudh; *Madari* v. *Hardayal*, (1910) 7 Ind Cas 538 (539): 13 Oudh Cas 158; *Matadin* v. *Ali Mirza*, (1902) 5 Oudh Cas 197 (200); *Amirchand* v. *Narasingh Narayan Singh*, (1908) 11 Oudh Cas 319 (321).

(11) *Siraj Fatima* v. *Mahmood Ali*, 1932 All 293 (308): 1932 All L J 437: 138 Ind Cas 465 F B. See also *Indar Sain* v. *Prabhu Lal*, 1922 Lah 277 (278): 3 Lah 88: 66 Ind Cas 4.

(12) *Dulhin Brinodini Debi* v. *Parameswar Dayal Singh*, 1925 Pat 512 (514): 1925 Pat H C C 180: 88 Ind Cas 987: 6 Pat L Tim 855; *Raghubar Dyal Sahu* v. *Bhikya Lal Misser*, (1885) 12 Cal 69 (75, 76); *Kesho Pershad* v. *Hirday Narain*, (1880) 6 Cal L R 69 (70).

(12-a) *Dabee Dut* v. *Subodra Bibi*, (1876) 25 Suth W R 449 (450): 2 Cal 288; *Beni Prasad* v. *Lajja Ram*, (1916) 35 Ind Cas 63 (64): 14 All L J 438: 38 All 452; *Jogeshwar Narain* v. *Roy Radha Raman*, (1912) 16 Ind Cas 543 (545) Cal.

(13) *Vithoba* v. *Sego*, (1918) 45 Ind Cas 882 (884) (Nag); *Gottepati Subbanna* v. *Gottepati Narasamma*, (1915) 26 Ind Cas 16 (17): 27 Mad L Jour 486; *Parameswari* v. *Seho Dal*, (1907) 6 Cal L Jour 448 (451, 452); *Khadija* v. *Fidyatuz Zhora*, (1919) 49 Ind Cas 707 (708): 24 Pun Re No. 1919 [If the minor became a major on *date of judgment* and treated as such, he cannot attack the decree]; *Mallaya* v. *Punnamma*, 1924 Mad 608 (608, 609): 47 Mad 476: 46 Mad L Jour 291: 19 Mad L W 410: 34 Mad L Tim 295: 77 Ind Cas 628; *Srinivasacharlu* v. *Munnirathna Naidu*, 1926 Mad 905 (905): 1926 Mad W N 350: 95 Ind Cas 707; *Chunduru Ponnayya* v. *Rajam Viranna*, 1922 Mad 273 (273): 42 Mad L Jour 429: 45 Mad 425: 1922 Mad W

O. 32, R.3, Notes 5—6.

(5) He may even, *in defence,* show that the decree is not binding on him on the ground of gross negligence of the guardian and consequent prejudice.[14]

Where a decree is set aside on the ground of non-representation or on the ground of gross negligence of the guardian in the conduct of the suit, the minor is remitted to his original rights as it stood before the decree, and the Court can, under its inherent powers, revive the first suit and proceed with it from the stage at which it was declared that the proceedings were illegal as against the minor.[15]

6. Absence of formal order of appointment of guardian—Substantial representation.—Where a minor defendant is effectively represented by a guardian with the sanction of the Court, the mere fact that a *formal order* of appointment was not passed will not render the decree a nullity as in the case of *non*-representation. The absence of the order of appointment is only an irregularity which in the absence of any prejudice to the minor resulting therefrom, will not be a ground for setting aside the decree.[1] On the same principle it has been held that the want of a certificate required by S. 3 of the Bengal Minors' Act, 1858 (now repealed by Guardians and Wards Act

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N 218: 15 Mad L W 427; *Lalla* v. *Ramnadhan,* (1895) 22 Cal 8 (13); *Mohan Lal* v. *Noki,* (1917) 87 Ind Cas 195 (196): 117 Pun L R 1916; *Muhammad* v. *Sukha Singh,* (1912) 18 Ind Cas 20 (21): 86 Pun W R 1912: 15 Pun L R 1912; *Ismail* v. *Sultan Bibi,* (1918) 43 Ind Cas 354 (355): 103 Pun Re No. 1917: 155 Pun W R 1917: 6 Pun L R 1918; *Ghulam Abhas* v. *Munna Lal,* (1907) 10 Oudh Cas 321 (330).

(14) *Kari Bapanna* v. *Sankari Yerramma,* 1923 Mad 718 (718): 45 Mad L Jour 324: 18 Mad L W 49: 1923 Mad W N 452: 74 Ind Cas 218: 33 Mad L Tim 46; *Gottepati Subbanna* v. *Godepatti Narasamma,* 26 Ind Cas 16 (17): 27 Mad L Jour 486.

(15) *Raghunatha Mahanty* v. *Ghonnu Mahanty,* 1928 Mad W N 275 (279) [Dissenting from 1924 Mad 489]; *Kirpu Kishen* v. *Babulal,* 1924 All 225 (225): 45 All 606: 76 Ind Cas 765; *Bhagwan Dayal* v. *Param Sukh Dass,* (1916) 36 Ind Cas 366 (369): 14 All L J 818: 39 All 8; *Talib Ali Shah* v. *Piarey Lal,* 1930 All 644 (646): 1930 All L J 938: 128 Ind Cas 438: 52 All 924; *Ichhamoyi Pal* v. *Pirymohan Shah,* 1925 Cal 512 (513): 78 Ind Cas 427; *Muin-ud-din* v. *Abul Khair,* 1926 Lah 441 (441): 94 Ind Cas 686; *Zuhara Begam* v. *Mashuq Fatima,* 1926 Oudh 32 (33): 88 Ind Cas 175.

Note 6.

(1) *Mst Bibi Walian* v. *Banke Behari Pershad Singh,* (1903) 30 Cal 1021 (1031): 30 Ind App 182: 5 Bom L R 822: 7 Cal W N 774: 8 Sar 512 P C; *Phulli* v. *Debi Pershad,* 1923 Lah 575 (578): 5 Lah 38: 75 Ind Cas 449; *Uhan Singh* v. *Gardip Singh,* (1919) 49 Ind Cas 954 (955): 39 Pun W R 1919; *Ramnain Shukul* v. *Ganga Shukul,* (1914) 25 Ind Cas 620 (621) All; *Pokhpal Singh* v. *Chiddu Singh,* (1912) 15 Ind Cas 903 (904): 9 All L J 653; *Vithaldas* v. *Dattaram,* (1902) 26 Bom 298 (300): 3 Bom L R 887; *Vasudev* v. *Krishnaji,* (1896) 20 Bom 534 (536); *Satyendra Nath Khan* v. *Panchanon Chatterjee,* 1930 Cal 455 (456): 51 Cal L Jour 362: 128 Ind Cas 81; *Ranmaya Gaorangini* alias *Rasidunnissa* v. *Betty Mahbert,* 1927 Cal 207 (208): 31 Cal W N 160: 100 Ind Cas 177; *Bhutnath* v. *Satya Kinkar,* (1920) 54 Ind Cas 368 (370) Cal [Decree set aside because minors prejudiced]; *Janki Das* v. *Mohabir Prasad,* (1914) 22 Ind Cas 240 (240) Cal; *Chunder Sekhar* v. *Balakdhar,* (1912) 14 Ind Cas 845 (847): 15 Cal L Jour 446: 17 Cal W N 219; *Suresh Chunder* v. *Jugut,* (1887) 14 Cal 204 (212, 215); *Midnapore Zemindari Co* v. *Gobinda Mahto,* (1908) 8 Cal L Jour 31 (32, 33); *Ankhil Chunder* v. *Trippoora Sundaree,* (1874) 22 Suth W R 525 (525); *Sardara* v. *Mt Hayat Bibi,* 1927 Lah 861 (861): 28 Pun L R 627: 9 Lah L Jour 206: 100 Ind Cas 469; *Narain Das* v. *Ralli Brothers,* (1915) 31 Ind Cas 45 (45): 1915 Pun Re No. 61: 136 Pun W R 1915; *Dhanput Mal* v. *Khazana,* 1897 Pun Re No. 67; *Kunhammad* v. *Kutti,* (1889) 12 Mad 90 (91); *Sadasheo* v. *Karim,* 1926 Nag 267 (268): 92 Ind Cas 241; *Dasshan Singh* v. *Ratan Lal,* 1924 Oudh 178 (178): 74 Ind Cas 821; *Mata Ghulam Singh* v. *Sital Prasad,* 1923 Oudh 206 (207): 26 Oudh Cas 113: 74 Ind Cas 409; *Sat Deo* v. *Jai Nath,* 1922 Oudh 75 (78): 9 Oudh L J 141: 67 Ind Cas 808; *Chiet Ram* v. *Kanshi Ram,* (1923) 71 Ind Cas 7 (8, 9) Lah; *Rani Chattra Kumari Debi* v. *Panda Radha Mohan Singari,* 1922 Pat 291 (293): 66 Ind Cas 137: 3 Pat L Tim 451; *Keshawesarindra Sahi* v. *Debendra Bala Dassi,* (1918) 48 Ind Cas 245 (253): 4 Pat L Jour 213: 1919 Pat H C C 121; *Ram Asray Singh* v. *Sheonandan,* (1915) 35 Ind Cas 868 (870): 1 Pat L Jour 573: 1 Pat L W 35: 1917 Pat H C C 21; *Kuber* v. *Ramakar,* 1925 All 351 (352): 23 All L J 44: 6 L R A Civ 178: 86 Ind Cas 86: 47 All 357; *Ram Kishen* v. *Radhey Lal,* 1932 All 130 (132): 1931 All L J 1102: 136 Ind Cas 562; *Siam Kalia* v. *Silam Sitama,* (1916) 33 Ind Cas 941 (942): 9 Bur L Tim 158.

O. 32, R.3, Notes 6—8.

VIII of 1890)[2] or a misdescription of the minor in the pleadings[3] are only irregularities which are not necessarily fatal to the suit.

7. **Illegal procedure in appointing guardian.**—A defect or irregularity in procedure in the appointment of a guardian *ad litem* is also only an irregularity and will not be a ground for setting aside the decree unless it had the effect of causing prejudice to the minor.[1] In *Walian* v. *Banke Behari,* I.L.R. 30 Cal. 1021, their Lordships of the Judicial Committee after impressing upon the Courts in India the importance of following strictly the rules laid down by the Code, proceeded to observe at page 1031: "*But it is quite another thing to say that a defect in following the rules is necessarily fatal to the proceedings.*" Applying this principle, it has been held that a failure to issue notice as required by sub-R. (4),[2] or the absence of, or omission to, file an affidavit as required by sub-R. (3),[3] are mere irregularities which, by themselves, cannot render the decree void and cannot be a ground for setting aside the decree unless *prejudice* is proved to have resulted to the minor. The question whether the minor was prejudiced in any particular case depends upon the facts and circumstances of that case and does not necessarily follow from the irregularity in the appointment of a guardian *ad litem.*[4]

8. **Decree against major treating him as minor and** *vice versa.*—A major defendant who is described and impleaded as a minor[1] or a minor who is treated as a major and impleaded as such[2] cannot be treated as a party to the suit and is not bound by the decree passed in the suit. But if the major defendant is aware of the defect or takes part in the proceedings

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(2) *Parmeshar Das* v. *Bela,* (1887) 9 All 508 (510): 1887 All W N 189; *Ram Raghbir* v. *Gauri Prasad,* 1889 Pun Re No. 166; *Jogi Singh* v. *Kunj Behari,* (1885) 11 Cal 509 (518); *Mungniram* v. *Gur Sahai,* (1890) 17 Cal 347 (357): 16 Ind App 195: 5 Sar 463: 13 Ind Jur 449 P C.

(3) *Ganapathi Mudaliar* v. *Krishnamachariar,* (1914) 24 Ind Cas 187 (190): 27 Mad L Jour 213; *Hari Saran* v. *Bhubaneswari,* (1889) 16 Cal 40 (56): 15 Ind App 195: 5 Sar 198: 12 Ind Jur 373 P C; *Suresh Chunder* v. *Jugut Chunder,* (1887) 14 Cal 204 (208, 209, 214); *Alim Buksh Fakir* v. *Jhalo Bibi,* (1886) 12 Cal 48 (49); *Guru Churn* v. *Kali Kissan,* (1885) 11 Cal 402 (405); *Jogi Singh* v. *Kunj Behari,* (1885) 11 Cal 509 (518); *Grish Chunder* v. *Miller,* (1879) 3 Cal L Rep 17 (19); *Natesayyan* v. *Narasimmayyar,* (1890) 13 Mad 480 (483); *Subramanya Pandya* v. *Sivasubramania,* (1894) 17 Mad 316 (337, 338): 4 Mad L Jour 152; *Net Lal Sahoo* v. *Kareem Bux,* (1896) 23 Cal 686 (689); *Kedar Prosunno* v. *Pratap Chunder,* (1893) 20 Cal 11 (14).

Note 7.

(1) *Shipal Singh* v. *Jagadish Narain,* (1920) 56 Ind Cas 313 (315): 7 Oudh L J 219: 2 U P L R (O) 77: 23 Oudh Cas 396; *Ram Rekha Singh* v. *Ganga Prasad,* 1926 All 545 (545): 24 All L J 970: 97 Ind Cas 514 F B; *Madho Singh* v. *Lala Keshal Deo,* 1931 All 656 (657): 1931 All L Jour 1152: 13 L R A Rev 8; *Kuber Upadhia* v. *Ramakar Dat,* 1925 All 351 (351): 23 All L Jour 44: 6 L R A Civ 178: 86 Ind Cas 86: 47 All 357; *Gobardhan Sahi* v. *Mahabir Singh,* (1912) 14 Ind Cas 506 (507): 9 All L J 290: 34 All 321; *Rambrichh Ram* v. *Tarak Tewair,* (1916) 33 Ind Cas 805 (807): 14 All L J 589; *Chat Ram* v. *Hari Baksh,* 1926 Lah 435 (435): 98 Ind Cas 848.

(2) *See* cases cited in Note 11, *infra.*

(3) *Ramaswami Chetty* v. *Doraiswami,* 1923 Mad 465 (467): 44 Mad L Jour 299: 17 Mad L W 638: 73 Ind Cas 409.

(4) *Rambrichh Ram* v. *Tarak Tewari,* (1916) 33 Ind Cas 805 (808): 14 All L J 589; *Chatter Singh* v. *Tej Singh,* 1921 All 393 (395): 43 All 104: 59 Ind Cas 671: 18 All L J 956.

Note 8.

(1) *Sakal Singh* v. *Chander Dip Lal,* (1919) 49 Ind Cas 627 (629) Pat; *Ghanshayamdas* v. *Hardu,* (1916) 32 Ind Cas 380 (383): 2 Oudh L J 562.

(2) *Daulat Singh* v. *Rajaramji,* 1926 All 387 (387): 24 All L J 379: 93 Ind Cas 376: 48 All 362; *Purna Chandra Kumar* v. *Bejoy Chand,* (1913) 18 Ind Cas 859 (860): 17 Cal W N 549: 18 Cal L Jour 18; *Pasumarti* v. *Gandi,* (1915) 29 Ind Cas 314 (316): 28 Mad L Jour 525: 38 Mad 1076; *Seshagiri* v. *Hanumantha,* (1916) 32 Ind Cas 391 (392): 19 Mad L Tim 93: 39 Mad 1031; *Ali Hussain* v. *Faguni Rai,* 1925 Pat 367 (368): 3 Pat L R 16: 86 Ind Cas 856; *Gauri Shankar* v. *Keshab Deo,* 1929 All 148 (154): 1929 All L J 204: 114 Ind Cas 881 [Minor sued along with other partners of a firm as major—Decree not bad].

O. 32, R.3, Notes 8—11.

without objection he will be *estopped* from questioning the validity of the decree later on.[3]

9. Such application shall be supported by affidavit—Sub-clause (3).—An application for the appointment of a guardian should be supported by an affidavit stating the fact of minority of the defendant and that the proposed guardian is a fit person to be appointed as guardian. The Court must be satisfied that the person it appoints will safeguard the interests of the minor and that he has no interest of his own which will come into conflict with that of the minor.[1] But as already pointed out in Note 7 the absence of such an affidavit is only an irregularity and cannot render the decree invalid.[2]

See sub-R. (3) of R. 3 substituted by the Madras High Court as to the contents of the affidavit in support of a petition under this rule.

10. Service of summons.—There is no specific mode provided for the service of summons on a minor defendant. It should therefore be served in the manner prescribed for service of summons under O. 5 *ante*.[1] Where, however, a guardian has been appointed in the suit for the minor, notice of an appeal from a decree in that suit need only be served on the guardian.[2]

11. Notice to the minor and his guardian.—No order should be made under this rule appointing a guardian for a minor defendant unless and until the necessary notices are given to the persons referred to in the rule.[1] The object of giving a notice to the minor is twofold: he may not be a minor at all, in which case he may come to Court and defend the suit as a major[2]: even if he is a minor he has a right to be heard and his wish consulted in the matter of the choice of his guardian.[3]

But the omission to send the notice required by this rule is, as has been observed in Note 7 *supra*, only an *irregularity* which will not vitiate the proceedings unless it is proved that the minor has been prejudiced

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(3) *Gangaram* v. *Mihir Lal*, (1906) 28 All 416 (417): 1906 All W N 73: 3 All L J 187; *Thakur Hargobind Singh* v. *Hukam Chand*, 1924 All 94 (95): 45 All 608: 21 All L J 551: 4 L R A Civ 291: 75 Ind Cas 351; *Sarat Chandra* v. *Bibhabati Debi*, 1921 Cal 584 (589): 34 Cal L Jour 302: 66 Ind Cas 433; *Ramachari* v. *Duraiswami*, (1898) 21 Mad 167 (169). See also *Krishna Mangal* v. *Akbar Jumma*, (1881) 9 Cal L Rep 213 (215).

Note 9.

(1) *Bhura Mal* v. *Harkishan Das*, (1902) 24 All 383 (393): 1902 All W N 76; *Ghulam Abbas* v. *Munna Lal*, (1907) 10 Oudh Cas 321 (331).

(2) *Munnu Lal* v. *Ghulam Abbas*, (1910) 6 Ind Cas 788 (788): 11 Cal L Jour 557: 12 Bom L R 439: 14 Cal W N 794: 8 Mad L Tim 57: 20 Mad L Jour 591: 32 All 287: 37 Ind App 77: 30 Oudh Cas 123 P C; *Imam Din* v. *Puran Chand*, (1920) 55 Ind Cas 833 (834): 1 Lah 27: 84 Pun L R 1920: 37 Pun W R 1920. See however *Alam Din* v. *Allah Dad*, 1922 Lah 447 (448): 5 Lah L Jour 44: 67 Ind Cas 547.

Note 10.

(1) *Jatindra* v. *Srinath*, (1898) 26 Cal 267 (273): 3 Cal W N 261. In the goods of *Amrita Lal*, (1900) 27 Cal 350 (351); *Abdul* v. *Eggar*, (1908) 35 Cal 182 (184): 12 Cal W N 160; *Watter Rebells* v. *Maria Rebells*, (1897) 2 Cal W N 100 (103, 105).

(2) *Rasik Moral* v. *Kumar Jyotish Kantha Roy*, 1926 Cal 1106 (1107): 30 Cal W N 949: 97 Ind Cas 614.

Note 11.

(1) *Aramita Lisboa De Souza* v. *Andithrao Waghoji Raji Shirke*, 1927 Bom 613 (615): 29 Bom L R 1357: 105 Ind Cas 537; *Nachiappa Chetty* v. *Chinniah Ambalam*, (1916) 36 Ind Cas 794 (795): 4 Mad L W 362; *Phool Kuer* v. *Rewari Singh*, 1930 All 609 (610): 124 Ind Cas 191: 1930 All L J 1020 [Substituted service improper]; *Adkia* v. *Shanker Rao*, 1921 Nag 126 (126, 127): 59 Ind Cas 757; *Lal Hanwant Ram* v. *Muhammad Abdul Hassan Khan*, (1915) 26 Ind Cas 712 (712): 1 Oudh L J 708; *Bhairo Prasad Sahu* v. *Ram Chandra Prasad*, (1918) 45 Ind Cas 253 (254): 4 Pat L W 373.

(2) *Aramita Lisboa* v. *Andithran*, 1927 Bom 613 (615): 29 Bom L R 1357: 105 Ind Cas 537.

(3) *Gobind Ram* v. *Muhammad Ali*, (1911) 11 Ind Cas 317 (318): 115 Pun W R 1911: 211 Pun L R 1911: 35 Pun Re No. 1912.

O. 32, R.3, Notes 11—12.

thereby in his defence[4] or there is fraud or collusion on the part of the guardian.[5] Such prejudice is not a matter of assumption or presumption, but of positive proof.[6]

12. **Duties of a guardian—Gross negligence.**—The guardian *ad litem* is in the position of a trustee and is bound to act strictly in the interests of the minor and to raise the best possible defences for him.[1] He must act in good faith, *i.e.*, with due care and caution.[2] It has been seen in Note 5 *supra* that the law recognises a substantive right in the minor to avoid the decree passed against him where the guardian has been negligent in the conduct of the suit. It is not however every kind of negligence which will render the proceedings otherwise regular and proper, liable to be re-opened. The *negligence must be such as leads to the loss of a right which might have been successfully asserted if the suit had been defended with due care.*[3] In other words, the negligence must be such as would imply that the person guilty of it neglected to do what was plainly his duty to do, or did something which he ought not to have done, or omitted to do something which any man of ordinary prudence would have done.[4] When a guardian exhibits want of such knowledge or information as is easily available it may amount to gross negligence.[4-a] But a mere omission on the part of the guardian to appear at the trial would not amount to gross negligence if

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(4) *Sultan* v. *Hardiyan*, 1925 All 548 (549): 6 L R A Civ 323: 88 Ind Cas 294; *Mahadeo Pandeo* v. *Sobha Nath Pandey*, 1926 All 757 (759): 24 All L J 914: 97 Ind Cas 277: 48 All 828; *Bhagwan Dayal* v. *Paramsukh Das*, (1915) 27 Ind Cas 623 (624): 13 All L J 179: 37 All 179; *Aramita Lisboa* v. *Andithrao*, 1927 Bom 613 (615): 29 Bom L R 1357: 105 Ind Cas 537; *Sayad Amir* v. *Shekh Masleudin*, (1917) 37 Ind Cas 186 (188): 18 Bom L R 563: 40 Bom 541; *Kidambi Tirumalacharyulu* v. *Ammisetti Venkiah*, 1924 Mad 763 (763, 764): 1924 Mad W N 362: 34 Mad L Tim 202: 46 Mad L J 363: 19 Mad L W 678: 80 Ind Cas 541; *Enuga Sundara Rama* v. *Bezwada Pattabi Ram Reddi*, (1917) 42 Ind Cas 421 (423): 1917 Mad W N 495: 6 Mad L W 272; *Sarfaraz Singh* v. *Manager, Court of Wards Estate*, 1929 Oudh 481 (482): 4 Luck 517: 117 Ind Cas 475: 7 Oudh W N 191; *Mt Ummakulsum* v. *Ghulam Rasul Khan*, 1929 Sind 32 (34): 114 Ind Cas 101 [Notice not necessary in Sind owing to the amendment in 1927]; *Pritam Ram* v. *Dharo Rai*, 1924 Pat 772 (773): 1924 Pat H C C 216: 78 Ind Cas 613. But see *Rajendra Prasad* v. *Probodh Chandra*, 1921 Pat 25 (26): 6 Pat L Jour 82: 2 Pat L Tim 116: 1921 Pat H C C 156: 59 Ind Cas 936; *Syed Ali Sarkar* v. *Manikjan Bibi*, (1918) 43 Ind Cas 728 (729) Cal [Per *Teunon, J*]; *Karim Khan* v. *Salamuddi*, (1912) 13 Ind Cas 594 (595) Cal.

(5) *Sukha* v. *Lachmi*, 1928 All 621 (622): 26 All L J 834; *Phulli* v. *Debi Pershad*, 1923 Lah 575 (578): 5 Lah 38: 75 Ind Cas 449; *Muhammad Shah* v. *Nawab*, (1928) 109 Ind Cas 521 (522): 1928 Notes 81-d; *Vytheswara Ayyar* v. *Kumarappa Chettiar*, (1929) 115 Ind Cas 247 (248): 1929 Notes 13-C; 1929 Mad W N 139; *Jambu Ammal* v. *Natarajam Pillai*, 1922 Mad 485 (486): 31 Mad L Tim 215: 70 Ind Cas 867; *Shipal Singh* v. *Jagadish Narain*, (1920) 56 Ind Cas 313 (316): 7 Oudh L J 219: 2 U P L R (J C) 77: 23 Oudh Cas 396.

(6) *Kidambi Tirumalacharlu* v. *Ammisetti Venkiah*, 1924 Mad 763 (763): 1924 Mad W N 362: 34 Mad L Tim 202: 46 Mad L Jour 363: 19 Mad L W 678: 80 Ind Cas 541.

Note 12.

(1) *Irshadulhaq* v. *Muhammadulnissa*, 14 Ind Cas 150 (151): 127 Pun W R 1912.

(2) *Ahmad Ali Shah* v. *Mir Shah*, (1898) Pun Re No. 35.

(3) *Parmeswari* v. *Sheo Dat*, (1907) 6 Cal L Jour 448 (451, 452); *Kashiram* v. *Balwant*, 1928 Nag 207 (208): 108 Ind Cas 437; *Chunduru Punnayyah* v. *Rajam Viranna*, 1922 Mad 273 (274): 42 Mad L Jour 429: 15 Mad L W 427: 1922 Mad W N 213: 45 Mad 425: 70 Ind Cas 668; *Ananda Rao* v. *Venkatadriappa Rao*, 1925 Mad 258 (259): 47 Mad L Jour 700: 1925 Mad W N 75: 85 Ind Cas 812 [Omission to rely on a previous judgment for pleading *res judicata* is not gross negligence]; *Tummalapalli Anjanayulu* v. *Chinna Subbiah*, 1924 Mad 860 (860): 20 Mad L W 529: 1924 Mad W N 758: 82 Ind Cas 952 [Mere non-production of document in evidence does not amount to gross negligence]; *Vadlamudi Sastrulu* v. *Thalluri Venkataseshayya*, 1928 Mad 614 (619): 110 Ind Cas 894, (Do); *Chandar Sekhar Tewari* v. *Balakdhar Dubey*, (1912) 15 Ind Cas 611 (612): 10 All L J 149 [Guardian neglecting but not *deliberately*—Decree cannot be set aside]; *Court of Wards* v. *Raj Coomar*, (1871) 16 Suth W R 142 (146) [Guardian filing statement prejudicial to his ward—Held gross negligence]; *Tika Ram* v. *Yasin Khan*, (1919) 49 Ind Cas 420 (421): 19 Pun W R 1919 [Held there was gross negligence].

(4) *Ananda Rao* v. *Venkatadri Appa Rao*, 1925 Mad 258 (259): 47 Mad L Jour 700: 1925 Mad W N 75: 85 Ind Cas 812; *Bihari Lal* v. *Amin Chand*, (1920) 52 Ind Cas 346 (347): 94 Pun L R 1919: 74 Pun W R 1919: 1 Lah L Jour 109.

(4-a) *Ahmed Ali Shah* v. *Mir Shah*, 1898 Pun Re No. 35.

there was no good ground of defence available to be put forward on behalf of the minor.[5] Nor is it the duty of the guardian to raise frivolous and untenable defences.[6] And it will be no dereliction of duty on his part to refuse to litigate on behalf of his ward, a claim which he knows to be false and unfounded in fact.[7] The *test* is whether there has been *culpable neglect* of the interests of the minor, and whether there has been in the conduct of the suit any act or omission on the part of the guardian which has resulted in *prejudice* to the minor.[8]

13. Effect of fraud or gross negligence of guardian.—It has been observed in Note 5 *ante* that when a minor is represented in a suit by a duly qualified guardian he becomes legally a party to the suit and that the decree passed against him is binding on him as much as on an adult and that the judgment will operate against him as *res judicata* in subsequent proceedings. But where the guardian has been guilty of *fraud or collusion* the minor like any other party to a suit can, under the provisions of S. 44 of the Indian Evidence Act, avoid the bar of *res judicata* against him by proving such fraud or collusion. It has been held by the High Court of Madras that, on the analogy of the same section, the minor can avoid the bar of *res judicata* by showing that the guardian was guilty of gross negligence in the conduct of the suit.[1] In the undermentioned case[2] the High Court of Allahabad has also held that the judgment obtained against a minor in a suit in which the guardian has been guilty of gross negligence is not *res judicata* against him. It has, however, reached this conclusion on the view that the principle of S. 44 of the Evidence Act cannot be applied to such a case but that the minor ceases "for all practical purposes" to be a party to the suit when the guardian is guilty of gross negligence, and that therefore the previous decision was not one between the *parties* to the subsequent suit and that therefore there could be no *res judicata*. It is

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(5) *Chunduru Punnayyah* v. *Rajam Viranna*, 1922 Mad 273 (273, 274): 42 Mad L Jour 429: 15 Mad L W 427: 1922 Mad W N 213: 45 Mad 425: 70 Ind Cas 668; *Ramaswami Chetty* v. *Doraiswami*, 1923 Mad 465 (467): 44 Mad L Jour 299: 17 Mad L W 638: 73 Ind Cas 409; *Dada Sahib* v. *Gajraj Singh*, 1925 Mad 204 (205): 47 Mad L Jour 928: 20 Mad L W 854: 85 Ind Cas 258 [Court guardian absent on date of hearing though witnesses present—Held gross negligence]; *Raja Babu* v. *Balmukund*, 1925 All 214 (215): 5 L R A Civ 692: 83 Ind Cas 328; *Collector of Meerut* v. *Umrao Singh*, (1915) 29 Ind Cas 220 (221): 13 All L J 437; *Vishnu Narayan* v. *Dattu Vasudeo*, (1907) 9 Bom L R 1099 (1101); *Sheik Abdul Karim* v. *Thakurdas Thakur*, 1928 Cal 844 (848): 55 Cal 1241: 32 Cal W N 665; *Nawab Singh* v. *Gurbachan Singh*, 1925 Lah 116 (116): 6 Lah L Jour 346: 82 Ind Cas 598; *Girja Dayal* v. *Raghu Mal*, (1916) 33 Ind Cas 481 (482) Oudh [Court guardian not getting instructions in spite of endeavours—Decree binding]; *Raghuraj Gir* v. *Rudra Partab*, (1916) 36 Ind Cas 811 (811): 19 Oudh Cas 119: 3 Oudh L J 585; *Baji Nath* v. *Radha Rawan Prasad*, (1918) 43 Ind Cas 563 (565) Oudh; *Hitendra Narain Singh* v. *Sukhdeb Prasad Jha*, 1929 Pat 360 (362, 363): 8 Pat 558: 10 Pat L Tim 79: 115 Ind Cas 886; *Zarina Bibi* v. *Wazuddi*, 1932 Cal 888 (889): 59 Cal 1108 (1109). See *Lekhraj* v. *Mahtab Chand*, (1872) 17 Suth W R 117 (118): 14 Moo Ind App 393: 10 Beng L R 35: 2 Suth 536: 3 Sar 43 P C; *Ananthachari* v. *Rangachari*, 1927 Mad 209 (209): 98 Ind Cas 463.

(6) *Bihari Lal* v. *Amin Chand*, (1920) 52 Ind Cas 346 (347): 94 Pun L R 1919: 74 Pun W R 1919: 1 Lah L Jour 109; *Yezu Mallayya* v. *Punnamma*, 1924 Mad 608 (609): 47 Mad 476: 46 Mad L Jour 291: 19 Mad L W 410: 34 Mad L Tim 295: 77 Ind Cas 628; *Sivasubramania Pillai* v. *Rakku Muthu Moopan*, 1924 Mad 645 (646): 19 Mad L W 502: 1924 Mad W N 454: 79 Ind Cas 418; *Venkataramani Ayyar* v. *Subramania Ayyar*, 1928 Mad 945 (949, 950): 108 Ind Cas 639 [Failure to raise a doubtful plea].

(7) *Bejoy Singh* v. *Mathuriya Debya*, (1920) 56 Ind Cas 97 (106) Cal.

(8) *Brij Raj* v. *Ram Sarup*, 1926 All 36 (41): 23 All L J 901: 6 L R A Civ 488: 90 Ind Cas 749: 48 All 44; *Siraj Fatima* v. *Mahomed Ali*, 1932 All 293 (302): 1932 All L J 437: 138 Ind Cas 465 F B.

Note 13.

(1) *Karri Bappanna* v. *Sunkari Yerrama*, 1923 Mad 718 (718): 45 Mad L Jour 324: 18 Mad L W 49: 1923 Mad W N 452: 74 Ind Cas 218: 33 Mad L Tim 46.

(2) *Siraj Fatima* v. *Mahomood Ali*, 1932 All 293 (302, 303, 311): 1932 All L J 437: 138 Ind Cas 465 F B.

O. 32, R. 3, Notes 13—14.

submitted that the reasoning is not correct. Where once a guardian *ad litem* is duly appointed for a minor party he becomes, as has been seen already, legally a party to the suit and the Court acquires jurisdiction to hear his case. He cannot cease to be a party or continue to be a party from time to time according as the guardian is acting negligently or otherwise.

14. Probate proceedings.—Although as a rule of practice it may be expedient to have a guardian appointed where a will, of which probate is sought, affects the interests of a minor,[1] yet S. 141 of the Code and consequently O. 32 will not apply to proceedings in probate which have not reached a *contentious stage.*[2]

O. 32, R.4.

Who may *act as* next friend *or be* appointed *guardian for the suit.*

R. 4. [Ss. 440, 443, 445, 456, 457.] (1) Any person[3] *who is* of sound mind and *has attained majority* may act as next friend of a minor *or as his guardian for the suit*:

Provided *that the interest of such person* is not adverse[5] to that of the minor and *that* he is not, *in the case of a next friend*, a defendant, *or*, *in the case of a guardian for the suit, a plaintiff.*

(2) *Where* a minor has a guardian appointed or declared by competent authority,[6] *no* person other than such guardian *shall act as the next friend of the minor* or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that *another* person be permitted[12] to act[7] or be appointed, as the case may be.

(3) *No person shall without his consent*[8] *be appointed guardian for the suit.*

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian,[9] *and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.*

[1877—Ss. 440, 443, 445, 456; *Cf.* R. S. C., O. 65, R. 13.]

Note 14.

[1] *Radhashyam Dasya* v. *Ranga Sundari Dasya*, (1921) 59 Ind Cas 664 (666): 24 Cal W N 541.

[2] *Sachindra Narain Sah* v. *Hironmoyee Dasi*, (1921) 59 Ind Cas 435 (437): 24 Cal W N 538.

Local Amendments.

ALLAHABAD.

Substitute the following for R. 4:—

"4. (1) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as next friend, except by leave of the Court.

(2) Subject to the provisions of sub-R. (1) any person who is of sound mind and has attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or he is a defendant, or the Court for other reasons to be recorded considers him unfit to act.

(3) Every next friend shall, except as otherwise provided by Cl. (5) of this rule, be entitled to be reimbursed from the estate of the minor any expenses incurred by him while acting for the minor.

(4) The Court may in its discretion, for reasons to be recorded, award costs of the suit, or compensation under S. 35-A or S. 95 against the next friend personally as if he were a plaintiff.

(5) Costs or compensation awarded under Cl. (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable."

Add the following R. 4-*A*:—

4-A. (1) Where a minor has a guardian appointed by competent authority, no person other than such guardian shall be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be appointed.

(2) Where there is no such guardian, or where the Court considers that such guardian should not be appointed, it shall appoint as guardian for the suit the natural guardian of the minor, if qualified, or, where there is no such guardian, the person in whose care the minor is, or any other suitable person who has notified the Court of his willingness to act, or failing any such person, an officer of the Court.

Explanation.—An officer of the Court shall for the purposes of this sub-rule include a legal practitioner on the roll of the Court.

(3) No person shall without his consent be appointed guardian for the suit; provided that in all cases the consent of such person shall be presumed, unless within fifteen days of receipt of notice from the Court, he notifies to the Court his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to act.

(4) Where an officer of the Court is appointed guardian for the suit under sub-R. (2), the Court may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

BENGAL.

Substitute the words "Except as otherwise provided in this order", *for* the words "Where there is no other person fit and willing to act as guardian for the suit".

LAHORE.

New sub-R. (2-A) was *inserted*:—

"(2-A) Where a minor defendant has no guardian appointed or declared by competent authority, the Court may, subject to the proviso to sub-R. (1), appoint as his guardian for the suit a relative of the minor.

If no proper person be available, who is a relative of the minor, the Court shall appoint one of the other defendants, if any, and failing such other

O. 32, R. 4.

defendant shall ordinarily proceed under sub-R. (4) of this rule to appoint one of its officers.''

and the following words were *added* to sub-R. (3):—

''but the Court may presume such consent to have been given, unless it is expressly refused.''

MADRAS.

See Local Amendments to R. 3, *supra.*

NAGPUR.

See Local Amendments to R. 3, *supra.*

OUDH.

Substitute the following for R. 4:—

''4. (1) Where a minor has a guardian appointed or declared by competent authority no person other than such guardian shall act as next friend, except by leave of the Court.

(2) Subject to the provisions of sub-R. (1) any person who is of sound mind and has attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or he is a defendant, or the Court for other reasons to be recorded considers him unfit to act.

(3) Every next friend shall, except as otherwise provided by sub-R. (5) of this rule, be entitled to be re-imbursed from the estate of the minor any expenses incurred by him while acting for the minor.

(4) The Court may, in its discretion, for reasons to be recorded, award costs of the suit, or compensation under S. 35-A or S. 95 against the next friend personally as if he were a plaintiff.

(5) Costs or compensation awarded under sub-R. (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable.''

Add the following R. 4-*A*:—

4-A. (1) Where a minor has a guardian appointed by competent authority, no person other than such guardian shall be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be appointed.

(2) Where there is no such guardian, or where the Court considers that such guardian should not be appointed, it shall appoint as guardian for the suit, the natural guardian of the minor, if qualified, or, where there is no such guardian, the person in whose care the minor is, or any other suitable person who has notified the Court of his willingness to act, or failing any such person, an officer of the Court.

Explanation.—An officer of the Court shall for the purposes of this sub-rule include a legal practitioner on the roll of the Court.

(3) No person shall without his consent be appointed guardian for the suit: provided that in all cases the consent of such person shall be presumed, unless within fifteen days of receipt of notice from the Court, he notifies to the Court his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to act.

(4) Where an officer of the Court is appointed guardian for the suit under sub-R. (2), the Court may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

PATNA.

In sub-R. (4) for the words ''where there is no other person fit and willing to act as guardian for the suit'', in the first sentence of the sub-rule, *substitute* the following:—

O. 32, R.4, Notes 1—2.

"Where the person whom the Court, after hearing objections, if any, under sub-R. (4) of R. 3, proposes to appoint as guardian for the suit, fails, within the time fixed in a notice to him to express his consent to be so appointed."

RANGOON.

For R. 4, the following shall be *substituted*, namely:—

"4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit; provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor, or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) In the event of there being no such guardian, the natural guardian of the minor, or, if there is no natural guardian, the person in whose care the minor is, should, subject to the proviso to sub-R. (1), ordinarily be appointed his guardian for the suit.

(4) No person shall without his consent be appointed guardian for the suit.

(5) Where none of the aforementioned persons, or of the persons mentioned by the plaintiff in the list filed by him under sub-R. (2) of R. 3, is fit and willing to act as guardian for the suit, and where no application is made on behalf of the minor under sub-R. (3) of R. 3, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for repayment or allowance of such costs as justice and the circumstances of the case may require. An advocate or pleader of the Court shall be an officer of the Court for this purpose."

Synopsis.

1. **Legislative changes.**
2. **Scope of the rule.**
3. **Who may be next friend or guardian of a minor.**
   4. **Married woman.**
   5. **Persons with adverse interest.**
6. **Guardian appointed by competent authority.**
7. **"Another person be permitted to act."**
8. **Appointment of person as guardian without his consent.**
9. **Officer of Court as guardian ad litem —Sub-R. (4).**
10. **Wishes of the minor if should be considered.**
11. **Probate proceedings. See Note 14 to R. 3, supra.**
12. **Leave to sue or defend on behalf of a minor.**

Absence of affidavit—Effect of. See R. 3, Note 7, Pt. (3) and Note 9, Pt. (2).

1. Legislative changes.—

Sub-R. (1) corresponds to Ss. 445 and 457 of the old Code, and sub-R. (2) to Ss. 440 and 443, second paragraph. Sub-R. (3) is new. Sub-R. (4) corresponds to the second paragraph of S. 456 of the old Code. The provision as to the direction with regard to the costs to be incurred by the Court guardian is new.

2. Scope of the rule.—This rule deals with the question as to who can act as next friend or be appointed as guardian of a minor for the suit. The general rule is that any person who is of sound mind and has attained majority may so act or be so appointed, provided his interests are not adverse

O. 32, R.4. Notes 2—4.

to that of the minor (sub-R. 1).[1] Where there is a certificated guardian for the minor it is he that should be allowed to act as next friend or be appointed as guardian and not any other person unless it is for the welfare of the minor that another person should be appointed (sub-R. 2). Where there is no other person fit and willing to act as guardian, the Court may appoint its own officer to act as guardian (sub-R. 3).

The powers of the Court under this rule and R. 11 of this Order are exercisable by the Registrar under S. 105 of Sch. I of the Rangoon Small Cause Court Act (VII of 1920).

3. **Who may be next friend or guardian of a minor.**—Any person can be the next friend or the guardian of a minor provided—

(1) he is not of unsound mind,
(2) he is himself not a minor,
(3) his interests are not adverse to that of the minor, and,
(4) he is not the opposite party, *i.e.*, a defendant in the case of a next friend or a plaintiff in the case of a guardian. (*See also.*[1])

Provided these conditions are satisfied the mere fact that he happens to be an undischarged insolvent will not invalidate his appointment as a guardian.[2]

4. **Married woman.**—Under S. 457 of the Code of 1882 a married woman was disqualified from being appointed as guardian *ad litem* in a suit. Consequently it was held that a decree obtained against a minor with a married woman as his guardian was a *nullity*.[1] But it was held that the prohibition did not apply to the case of a *next friend* and that a married woman could validly represent a minor plaintiff.[2] Under the present rule

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Order 32, Rule 4—Note 2.

[1] See also *Karam Nawaz* v. *Ruknun*, 1930 Lah 302 (302): 30 Pun L R 590: 126 Ind Cas 565 [In a suit to set aside alienation by mother, Court is justified in allowing minor to be represented by one of other plaintiffs though father does not wish to sue].

Note 3.

[1] *Gur Charan* v. *Fashikuddin*, 1925 Oudh 178 (178): 80 Ind Cas 602 [Guardian a minor —Proceedings void]; *Sri Ram Lakshman Janki Jee* v. *Nirsu Ram*, 1930 Pat 97 (97): 118 Ind Cas 729 [Defendant shebait cannot represent the idol plaintiff]; *Garumella Annapurnayya* v. *Venkatasubramaniam*, 1925 Mad 1285 (1287): 49 Mad L Jour 549: 22 Mad L W 560: 91 Ind Cas 742 [Natural father proper guardian to assert adoptive right of his minor son]; In the matter of the petition of *Danapa Subrav*, (1862-65) 1 Bom H C R A C 134 [Mother appointed guardian]; *Chunduru Ponniah* v. *Viranna*, 1922 Mad 273 (274): 42 Mad L Jour 429: 15 Mad L W 427: 1922 Mad W N 213: 45 Mad 425: 70 Ind Cas 668 [Minor entitled to a next friend who will be diligent in his interests]; *Sumar Singh* v. *Amar Singh*, 1926 Oudh 406 (407): 3 Oudh W N 494: 95 Ind Cas 254, (Do); *Beresford* v. *Ramasubba*, (1890) 13 Mad 197 (199) [Collector can be next friend of a ward].

[2] *Manik Rao* v. *Nur Hussain*, 1925 Nag 376 (376): 88 Ind Cas 254.

Note 4.

[1] *Rashid-ud-Nissa* v. *Muhammad Ismail Khan*, (1909) 3 Ind Cas 864 (866): 31 All 572: 36 Ind App 168: 13 Cal W N 1182: 10 Cal L Jour 318: 6 All L J 822: 11 Bom L R 1225: 6 Mad L Tim 279: 19 Mad L Jour 681 P C; *Kundan Lal* v. *Gajadhar Lal*, (1907) 29 All 728 (729): 4 All L J 698: 1907 All W N 243; *Sham Lal* v. *Ghasita*, (1901) 23 All 459 (460): 1901 All W N 147; *Zaminia Begam* v. *Nihal Chand*, (1883) All W N 90 (90); *Khusali* v. *Rani*, (1882) 4 All 195 (196): 1882 All W N 5; *Sorabji* v. *Bhuchoobai*, (1894) 18 Bom 366 (367); *Narsing* v. *Jahi Mistry*, (1912) 13 Ind Cas 414 (414); 15 Cal L Jour 3; *Kali Shankar Sahai* v. *Maharaja Pratab Udai Nath Sahi Deo*, (1907) 6 Cal L Jour 36 (37); *Wadhawa Mal* v. *Wadhawa*, 1908 Pun Re No. 8: 15 Pun W R 1908: 149 Pun L R 1908 [Question left open]. See *Imam Din* v. *Puran Chand*, (1920) 55 Ind Cas 833 (834): 1 Lah 27: 84 Pun L R 1920: 37 Pun W R 1920 [An objection as to the legality of a married woman to act as guardian cannot be raised for the first time in appeal]. But see *Kunhi Kuttiali Haji* v. *Kunhi Patha*, (1906) 29 Mad 58 (61): 16 Mad L Jour 14: *Gur Narain* v. *Gulzari Lal*, (1914) 25 Ind Cas 917 (919): 1 Oudh L J 503: 17 Oudh Cas 318 [A widow held to be not a married woman].

[2] *Asirun Bebi* v. *Sharip Mondul*, (1890) 17 Cal 488 (489); *Guru Pershad* v. *Munraj*, (1885) 11 Cal 733 (734): 10 Ind Jur 220 [Overruled in 17 Cal 488].

O. 32, R.4, Note 5.

the disqualification has been removed altogether so that a married woman can now represent the minor plaintiff as well as a defendant.

5. Persons with adverse interest.— The proviso to sub-R. (1) prohibits the appointment of a guardian *ad litem* whose interests are adverse to that of the minor. Such a person is disqualified to be the guardian of the minor.[1] A minor represented by such a person is not legally represented at all and a decree obtained against him will be a nullity.[2] In the undermentioned cases,[3] however, it was held by the High Court of Madras that the mere fact that the interest of the guardian was adverse to that of the minor is not sufficient to invalidate the decree passed against the minor, but that the minor should be shown to have suffered *prejudice* by such appointment. The decisions do not advert to the decision of their Lordships of the Privy Council in *Rashid Unnissa* v. *Muhammad Ismail,* I.L.R. 31 All. 572, in which it is laid down that a person having an interest adverse to that of the minor is a disqualified person and that the minor cannot be deemed to have been legally represented by him. The said decisions cannot, therefore, be considered to be correct.

The question whether the interests of the guardian are adverse to that of the minor depends on the facts and circumstances of each case.[3-a] There is a conflict of opinion as to whether a person who has executed a document or entered into a transaction on behalf of the minor is a person whose interests are adverse to that of the minor in a suit on that document or transaction. According to the High Courts of Allahabad[4] and Patna[5] his interests are adverse and he cannot therefore be appointed as guardian of the minor. According to a Full Bench of the High Court of Madras,[6]

Note 5.

(1) *Rashid-un-Nissa* v. *Muhammad Ismail Khan,* (1908) 31 All 572 (582): 36 Ind App 168: 6 All L J 822: 11 Bom L R 1225: 13 Cal W N 1182: 10 Cal L Jour 318: 19 Mad L Jour 631: 3 Ind Cas 864: 6 Mad L Tim 279 P C.

(2) *Rashid-un-Nissa* v. *Muhammad Ismail Khan,* (1908) 31 All 572 (582): 36 Ind App 168: 6 All L J 822: 11 Bom L R 1225: 13 Cal W N 1182: 10 Cal L Jour 318: 19 Mad L Jour 631: 3 Ind Cas 864: 6 Mad L Tim 279 P C; *Chiranji Lal* v. *Syed Ilias Ali,* 1924 All 751 (751): 46 All 620: 22 All L J 493: 5 L R A Civ 360: 79 Ind Cas 556; *Rattan Chand* v. *Ram Kishan Murarji,* 1928 All 447 (448): 26 All L J 777; *Hanuman Pershad* v. *Muhammad Ishaq,* (1906) 28 All 137 (139): 1905 All W N 229: 2 All L J 615 [Even if he is a certificated guardian]; *Sudhir Chandra Das* v. *Gobinda Chandra Roy,* (1917) 41 Ind Cas 503 (509): 21 Cal W N 1043: 45 Cal 538; *Suraj Deo Narain Misra* v. *Sarju Prasad Misra,* (1917) 40 Ind Cas 227 (228): 1 Pat L W 647: 1917 Pat H C C 198: 2 Pat L Jour 390; *Jumoo Mal* v. *Gurdinomal,* 1921 Sind 61 (63): 17 Sind L R 211: 83 Ind Cas 913; *Sellappa Goundan* v. *Masa Naicken,* 1924 Mad 297 (298): 47 Mad 79: 45 Mad L Jour 675: 18 Mad L W 838: 33 Mad L Tim 126: 1923 Mad W N 775: 76 Ind Cas 1018.

(3) *Venkatachalam Chetty* v. *Paramasivam Pillai,* 1927 Mad 668 (669): 52 Mad L Jour 709: 1927 Mad W N 523: 104 Ind Cas 405. See also *Maruthi Swamiar* v. *Subramania Ayyar,* 1929 Mad 393 (394): 29 Mad L W 393: 118 Ind Cas 831. See also *Kuppuswami* v. *Kamalammal,* (1921) 59 Ind Cas 662 (663): 12 Mad L W 243: 39 Mad L Jour 375: 43 Mad 842.

(3-a) *Seth Maganmal* v. *Darbarilal,* 1922 Nag 239 (241): 68 Ind Cas 191 [Minor benamidar for next friend—Held interest not adverse]; *Laxmanan Chetty* v. *Laxmanan Chettiar,* (1914) 25 Ind Cas 738 (738): 1 Mad L W 875 [Indebtedness of next friend to minor—Court can dismiss the suit]; *Abdulbari* v. *Rash Behari,* (1880) 6 Cal L R 413 (415) [Uncle of a Mahomedan infant can represent]; *Sami Raw* v. *Elaianatha Raw,* (1907) 16 Mad L Jour 357 (357) [Held to possess an adverse interest]; *Gajju* v. *Manni Bibi,* (1893) All W N 104 (105).

(4) *Murli Dhar* v. *Pitambar Lal,* 1922 All 91 (93): 20 All L J 329: 66 Ind Cas 872: 44 All 525; *Braij Nath Rai* v. *Dharam Deo Tewari,* (1916) 35 Ind Cas 707 (708): 14 All L J 353: 38 All 315. But see *Thakur Ganesh Singh* v. *Shyam Singh,* (1919) 52 Ind Cas 636 (637) All.

(5) *Hari Prasad Singha* v. *Sourendra Mohan Sinha,* 1922 Pat 450 (474): 66 Ind Cas 945: 1 Pat 506: 3 Pat L Tim 709. See, however, *Indra Deo Narayan* v. *Matukdhari,* (1917) 37 Ind Cas 389 (390) Pat [Mortgage bond by grandfather—Mortgage suit—Minor's father appointed *guardian-ad-litem*—Held minor properly represented].

(6) *Venkata Someswara Rao* v. *Lakshmanaswami,* 1929 Mad 213 (222): 56 Mad L Jour 175: 29 Mad L W 125: 52 Mad 275: 115 Ind Cas 801. See also *Rama Rao* v. *Venkataraju,* 1926 Mad 1146 (1147): 97 Ind Cas 703 [Son born subsequent to mortgage—Appointment of

O. 32, R.4,
Notes 5-6.

his interests are not necessarily adverse to that of the minor in all cases but whether they are so in any particular case depends upon the facts of that case.

6. **Guardian appointed by competent authority.**—Where a minor has a guardian appointed or declared by a competent authority, the Court is bound to appoint that guardian as guardian *ad litem* of the minor unless for reasons to be recorded it considers that in the interest and welfare of the minor some one else should be appointed.[1] According to the High Courts of Allahabad,[2] Calcutta,[3] and Patna,[4] the violation of this provision is only an *irregularity* and does not, by itself, vitiate the decree. Thus where the mother of certain minor defendants was appointed their guardian *ad litem* in ignorance of the fact that there was a certificated guardian, it was held that the decree could not be set aside in the absence of any proof of prejudice to the minors.[5] The High Court of Madras[6] has, on the other hand, held that in such a case the appointment is *illegal* and the decree obtained against the minor, *void*.

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father as guardian—Interest not adverse]; *Sellappa Goundan* v. *Masa Naicken*, 1924 Mad 297 (298): 47 Mad 79: 45 Mad L Jour 675: 18 Mad L W 838: 33 Mad L Tim 126: 1923 Mad W N 775: 76 Ind Cas 1018 [Suit on a mortgage by father—Father appointed guardian of minor son—Held interest adverse].

Note 6.

[1] *Janki Das* v. *Mohabir Prasad*, (1914) 22 Ind Cas 240 (240) Cal; *Sham Krishna* v. *Ram Das*, (1898) 20 All 162 (164): 1898 All W N 9; *Har Bilas* v. *Lachman Das*, (1891) All W N 42 (43). For cases under the Bengal Minors Act, XL of 1858, now repealed by Act VIII of 1890, *see* the following cases; *Durga Ohurn* v. *Nilmoney*, (1884) 10 Cal 134 (135): 13 Cal L R 369; *Lachmiput* v. *Amir*, (1883) 9 Cal 176 (179): 12 Cal L Jour 22; *Doorga Pershad* v. *Kesho*, (1881) 8 Cal 656 (662): 9 Ind App 27: 4 Sar 332: 11 Cal L Rep 210: 6 Ind Jur 272; *Gourah Koeri* v. *Gujadhar*, (1879) 5 Cal 219 (220, 221): 4 Cal L Jour 398: 4 Ind Jur 627; *Mrinamoyi Dabia* v. *Jogodisuri Dabia*, (1880) 5 Cal 450 (453): 5 Cal L Jour 861: 5 Ind Jur 313: 8 Shome L R 49; *Debi Dutt Sahoo* v. *Sobodra Bibi*, (1876-77) 2 Cal 283 (288); *Nabadwip Chandra Sirkar* v. *Kalinath Pal*, (1869) 3 Beng L R App 130; *Sobha Kooeree* v. *Hardey Narain*, (1876) 25 Suth W R 97 (98); *Benomalee Kesh* v. *Hungeshessur*, (1872) 17 Suth W R 492 (493); *Mst Etwaree* v. *Ram Narain*, (1870) 13 Suth W R 230 (230): 4 Ben L R App 71; *Sheburrut Singh* v *Laljee Chowdhury*, (1870) 13 Suth W R 202 (202); *Ram Dhun* v. *Ram Ruttun*, (1868) 10 Suth W R 425 (426); *Lachmee* v. *Bhugwan*, 1866 6 Suth W R Mis 116 (116); *Lala Boodhmul* v. *Lalla Gowree*, (1865) 4 Suth W R 71 (72); *Oodoy Chand* v. *Dhun Monee*, (1865) 3 Suth W R 183 (183); *Manna Jhunno* v. *Laljee*, (1864) 1 Suth W R 121 (122); *Baldeo Das* v. *Gobind*, (1885) 7 All 914 (915): 1885 All W N 294; *Janki* v. *Dharam Chand*, (1881) 4 All 177 (178): 1881 All W N 175: 6 Ind Jur 541; *Zorawar Singh* v. *Jawahir Singh*, (1868) 3 Agra H C 167 [Cases under the Bombay Minors Act XX of 1864 also repealed by Act VIII of 1890; *Dattaram* v. *Gangaram*, (1899) 23 Bom 287 (290); *Daji Himat* v. *Dhirajram*, (1888) 12 Bom 18 (22): 12 Ind Jur 189; *Vishnu Keshav* v. *Ramachandra Bhaskar*, (1887) 11 Bom 130 (132); *Babaji* v. *Sheshgiri*, (1882) 6 Bom 593 (595): 7 Ind Jur 37; *Mohan Ishwar* v. *Haku*, (1879-80) 4 Bom 638 (641); *Murlidhar* v. *Sopdu*, (1879) 3 Bom 149 (150); *Gopal Kashi* v. *Ramabai Saheb Patvardhan*, (1875) 12 Bom H C R 17; *Babaji* v. *Maruti*, (1874) 11 Bom H C 182; *Motiram Rupa Chand, In re*, (1874) 11 Bom H C 21; *Vijkor* v. *Jijibhai Vaji*, (1872) 9 Bom H C R 310; *Maganbhai Purushotamdas* v. *Vithoba Bin Narayan Shet*, (1870) 7 Bom H C R 7; *Dhondiba Laxman* v. *Kusa*, (1869) 6 Bom H C 219; *Sitarambhat* v. *Sitaram Ganesh*, (1869) 6 Bom H C R 250; [Cases as to when a guardian may be appointed under Act VIII of 1890]; *Bandhu Prasad* v. *Dhiraji Kuar*, (1898) 20 All 400 (401): 1899 All W N 94; *Jhabhu Singh* v. *Ganga Bishan*, (1895) 17 All 529 (530): 1895 All W N 119; *Manilal Hurgovan, In re*, (1901) 25 Bom 353 (356): 3 Bom L R 411; *Pathan Alikhan Badlukhan* v. *Panibai*, (1895) 19 Bom 832 (833); *Virupakshappa* v. *Nilgangava*, (1895) 19 Bom 309 (317) F B; *Jagannath Ramji*, petitioner, (1895) 19 Bom 96 (98); *Sayad Shahu* v. *Hapija Begam*, (1893) 17 Bom 560 (562); *Vallabdas Hirachand* v. *Krishnabhai*, (1893) 17 Bom 566 (569); *Jairam* v. *Laxmon*, (1892) 16 Bom 634 (636); *Rakhaimoni Dassi* v. *Adwyta Prasad Roy*, (1903) 30 Cal 613 (616): 7 Cal W N 449; *Sham Kuar* v. *Mohannada Sahoy*, (1892) 19 Cal 301 (311); *Brij Mohan* v. *Rudra Perkash*, (1890) 17 Cal 944 (949) [Case under Act IX of 1875].

[2] *Dammar Singh* v. *Pirbhu Singh*, (1907) 29 All 290 (291): 4 All L J 155: 1907 All W N 70; *Sham Krishna* v. *Ram Das*, (1898) 20 All 162 (165): 1898 All W N 9 [The plaint should be returned for amendment].

[3] *Jogeshwar Narain* v. *Lala Mooralidhar*, (1908) 7 Cal L Jour 270 (273).

[4] *Mahomed Abdus Salam* v. *Kamal Mukhi*, (1918) 46 Ind Cas 316 (318): 5 Pat L W 92.

[5] *Dammarsingh* v. *Pirbhu Singh*, (1907) 29 All 290 (291): 4 All L J 155: 1927 All W N 70. See however *Mussumat Khooshalo* v. *Sub Seokh*, (1866) 1 Agra 175 [A decree against a minor represented by his uncle without any legal authority—Set aside by lawful guardian—Though no fraud or collusion].

[6] *Pujari Bhimaji* v. *Hussain Sahib*, (1921) 59 Ind Cas 842 (843, 844): 12 Mad L W 114: 39 Mad L Jour 239: 43 Mad 808: 28 Mad L Tim 295; *Sami Chettiar* v. *T R Sesha Iyer & Co*, 1928 Mad 1057 (1058): 113 Ind Cas 663.

O. 32, R. 4.
Notes
6—8.

The words "appointed by *competent authority*" do not include the case of a Hindu father purporting to appoint a testamentary guardian to his son even assuming that he has the power to appoint a guardian under the general Hindu Law.[7]

7. **"Another person be permitted to act."**—A Court can in the interests of the minor permit a person other than the certificated guardian to act or appoint him as a guardian *ad litem* of the minor notwithstanding the existence of a certificated guardian. Thus, where the appointment or the identity of the certificated guardian is not known[1] the Court may appoint another person as guardian *ad litem* of the minor.

8. **Appointment of person as guardian without his consent.**—Sub-R. (3) controls both sub-R. (1) and sub-R. (2)[1] and provides that no person, shall, without his consent, be appointed guardian for the suit. The consent may however be express or *implied*.[1-a] The object of the rule is to safeguard the interests of the minor by ensuring that the guardian has taken upon himself the onerous duty of defending the interests of the minor.[2] Where a person is appointed guardian of a minor without his consent, express or implied, there is a conflict of opinion as to whether the decree passed must be deemed to be one passed against the minor who has not been represented in the suit, and to be therefore a nullity. The High Courts of Allahabad and Calcutta have held that the decree passed under such circumstances is a nullity.[3] The High Courts of Madras and Patna have expressed conflicting opinions on this point, holding in some cases that it is a nullity,[4] and in others that it is only an *irregularity* which, in the absence of proof of prejudice to the minor, will not vitiate the decree.[5] It is submitted that the

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(7) *Budhilal Monji* v. *Morarji Premji*, (1907) 31 Bom 413 (417): 9 Bom L R 553. But see *Budhilal* v. *Morarji*, (1906) 8 Bom L R 522 (524).

Note 7.

(1) *Girja Dayal* v. *Raghu Mal*, (1916) 33 Ind Cas 481 (482) Oudh.

Note 8.

(1) *Ananda Prasad* v. *Upendra*, 1921 Cal 600 (601): 34 Cal L Jour 293: 26 Cal W N 781: 65 Ind Cas 18.

(1-a) *Vasireddi Sriramulu* v. *Putcha Lakshminarayana*, 1925 Mad 30 (37): 47 Mad 783: 47 Mad L Jour 273: 20 Mad L W 248: 35 Mad L Tim 12: 88 Ind Cas 312 F B; *Yezumallayya* v. *Punnamma*, 1924 Mad 608 (609): 47 Mad 476: 46 Mad L Jour 291: 19 Mad L W 410: 34 Mad L Tim 295: 77 Ind Cas 628; *Venkatachalam* v. *Paramasivam*, 1927 Mad 668 (669): 52 Mad L Jour 709: 1927 Mad W N 523: 104 Ind Cas 405; *Chatter Singh* v. *Tej Singh*, (1920) 59 Ind Cas 671 (671): 18 All L J 956: 2 U P L R (A) 384: 43 All 104: 1921 All 393 (394); *Jawahar Singh* v. *Sewa Singh*, 1924 Lah 97 (98): 5 Lah L Jour 487: 79 Ind Cas 572; *Thakur Tajeswar Dutt* v. *Lakhan Prasad Singh*, 1923 Pat 231 (235): 2 Pat 296: 4 Pat L Tim 127: 1 Pat L R 59: 1923 Pat H C C 88: 83 Ind Cas 290; *Shiam Bahadur* v. *Seth Brij Kishore*, 1927 Oudh 173 (174): 4 Oudh W N 356: 101 Ind Cas 632; *Sarju Singh* v. *Dhani Ram*, 1927 Oudh 560 (560): 4 Oudh W N 791: 104 Ind Cas 814; *Baijnath* v. *Radha Rawan*, (1918) 43 Ind Cas 563 (564) Oudh [Guardian served—Not appearing—Consent implied]; *Naunihal Singh* v. *Puttu Lal*, 1931 Oudh 50 (50): 7 Oudh W N 1109: 129 Ind Cas 175.

(2) *Bhairo Prasad Sahu* v. *Ram Chandra Prasad*, (1918) 45 Ind Cas 253 (254): 4 Pat L W 373; *Jadow* v. *Chhagan*, (1881) 5 Bom 306 (309).

(3) *Baij Nath Rai* v. *Dharani Deo Tewari*, (1916) 35 Ind Cas 707 (708): 14 All L J 353: 38 All 315; *Satis Chandra Bandopadhya* v. *Hashem Ali Kazi*, 1927 Cal 488 (491): 31 Cal W N 634: 54 Cal 450: 103 Ind Cas 124; *Ananda* v. *Upendra*, 1921 Cal 600 (601): 34 Cal L Jour 293: 26 Cal W N 781: 65 Ind Cas 18; *Umapati Samanta* v. *Sheikh Mosetullah*, 1923 Cal 692 (693): 37 Cal L Jour 496: 72 Ind Cas 475; *Jagadish Chandra De* v. *Harihar De*, 1924 Cal 1042 (1043): 40 Cal L Jour 39: 78 Ind Cas 219; *Krishna Chandra Mondol* v. *Jogendra*, (1915) 27 Ind Cas 139 (141): 20 Cal L Jour 469: 19 Cal W N 537; *Shambhu Mahto* v. *Midnapur Zemindari Co, Ltd*, (1912) 18 Ind Cas 90 (91) Cal. See also *Surendra* v. *Aghore*, (1921) 62 Ind Cas 464 (465): 1921 Cal 534 (535): 25 Cal W N 525 [Want of consent even on technical grounds sufficient to invalidate appointment as guardian].

(4) *Sharoof Sahib* v. *Raghunatha Sivaji*, (1915) 29 Ind Cas 579 (580): 18 Mad L Tim 401; *Mohan Krishna Dar* v. *Har Prasad*, (1917) 40 Ind Cas 2 (11) Pat; *Sadjad Hussain* v. *Sakat Rai*, 1922 Pat 448 (449): 2 Pat 7: 72 Ind Cas 637: 4 Pat L Tim 575. See also *Rani Chattra Kumari Debi* v. *Panda Radha Mohan Singari*, 1922 Pat 291 (293): 66 Ind Cas 137: 3 Pat L Tim 451 [No guardian was appointed at all].

(5) *Odayanasami Tevar* v. *Alagappa Chetty*, (1904) 14 Mad L Jour 342 (343); *Muhammad Abdul Satak* v. *Mekkena Kondappa*, (1909) 4 Ind

O. 32, R. 4, Notes 8—9.

last view is correct. As has been seen in Note 5 to R. 3, *ante*, where, on the face of the record, the minor is represented by a person and such person is not disqualified to be a guardian, the Court has jurisdiction to deal with the suit against the minor and the non-compliance with the various requirements in the process of appointing the guardian cannot render the judgment a nullity, but would only amount to *irregularities* which may be grounds for setting aside the decrees in proper proceedings on proof of prejudice to the minor.[6]

It has been held by the High Court of Calcutta that the consent of a guardian cannot be presumed merely from the fact that a notice under O. 21, R. 22 has been issued to him.[7] The Chief Court of Oudh, has also held that a person who is named as guardian but who does not appear in the suit cannot be said to have consented to be appointed as guardian.[8] Where, however, the guardian has had an opportunity to object to his appointment and does not do so, the consent, according to the Allahabad High Court can be presumed.[9] *See also* the amendments to this rule made by the various High Courts.

9. **Officer of Court as guardian ad litem—Sub-R. 4.**—Where the proposed guardian does not appear[1] or declines the guardianship,[2] the proper procedure is to apply to the Court for the appointment of an officer of the Court as guardian. The Court should however appoint an officer of the Court as guardian only when there is no other person fit and willing to act as guardian.[3] But the fact that a Court guardian was appointed without any enquiry as to whether there was any other person fit and willing to act as guardian[4] or the fact that the appointment of Court guardian was obtained by the fraud of the opposite party, instead of another who could have conducted the case better on behalf of the minor[5] is only an irregularity which

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Cas 1108 (1108): 5 Mad L Tim 162 [Material irregularity]; *Vasireddi Sriramulu* v. *Putcha Lakshminarayana*, 1925 Mad 30 (32): 47 Mad 788: 47 Mad L Jour 273: 20 Mad L W 248: 35 Mad L Tim 12: 83 Ind Cas 312 [Order of reference to Full Bench—Per Phillips J—Irregularity—Per Venkatasubba Rao, J—Nullity]; *Pande Satdeo Narain* v. *Ramayan Tewari*, 1923 Pat 242 (256): 2 Pat 335: 4 Pat L Tim 147: 71 Ind Cas 705; *Suraj Deo Narain* v. *Surjug Prasad*, (1917) 40 Ind Cas 227 (228): 1 Pat L W 647: 1917 Pat H C C 198: 2 Pat L Jour 390.

(6) *Pande Satdeo Narain* v. *Ramyan Tewari*, 1923 Pat 242 (250): 2 Pat 335: 4 Pat L Tim 147: 71 Ind Cas 705.

(7) *Khajen Salaluddin* v. *Afzal Begum*, 1925 Cal 23 (25): 28 Cal W N 963: 39 Cal L Jour 390: 84 Ind Cas 68 [Under the Code of 1882 consent was presumed if the guardian did not decline the appointment]. See *Sarat Chandra Maiti* v. *Bibhati Debi*, 1921 Cal 584 (589): 34 Cal L Jour 302: 66 Ind Cas 433.

(8) *Rameshwar Baksh Singh* v. *Ridh Kuer*, 1925 Oudh 633 (638): 87 Ind Cas 238: 1 Oudh W N 775.

(9) *Raja Babu* v. *Balmukund*, 1925 All 214 (215): 5 L R A Civ 692: 83 Ind Cas 828.

Note 9.

(1) *Dinabandhu Nandi* v. *Mashuda Khatum*, (1912) 17 Ind Cas 263 (264): 16 Cal L Jour 318; *Balkissen* v. *Tapeswar*, (1912) 14 Ind Cas 845 (847)): 15 Cal L Jour 446: 17 Cal W N 219; *Babuji* v. *Maruti*, (1881) 5 Bom 810 (812); *Issur Chunder* v. *Nobo Kristo*, (1880) 7 Cal L Rep 407 (410).

(2) *Surendra Nath Bose* v. *Aghore Nath Bose*, 1921 Cal 534 (535): 25 Cal W N 525: 62 Ind Cas 464; *Brij Raj Saran* v. *Alliance Bank*, (1928) 110 Ind Cas 346: 1928 Notes 15 (*c*).

(3) *Nachiappa Chetty* v. *Chinniah Ambalam*, (1916) 36 Ind Cas 794 (795): 4 Mad L W 362; *Baneswar* v. *Tarapada*, (1917) 41 Ind Cas 872 (873): 26 Cal L Jour 258; *Mohammad Ismail Khan* v. *Abdul Gaffar Beg*, 1930 Oudh 110 (112): 6 Oudh W N 1060: 5 Luck 453: 124 Ind Cas 442 [Court officers have neither the time nor the opportunity to do justice to the cause of the minors and they should not be required to risk their own good name and the minor's interests by receiving these appointments].

(4) *Hitendra Narayan Singh* v. *Sukhdeb Prasad Jha*, 1929 Pat 360 (362): 8 Pat 558: 10 Pat L Tim 79: 115 Ind Cas 886; *Sri Rajah Danturi Devi Prasada Satyanarayana Veerabhadra Venkata Lakshmi Kantaraja Garu* v. *Peda Venkata Jagannatha Raju Garu*, 1924 Mad 281 (282): 46 Mad L Jour 12: 33 Mad L Tim 243: 1924 Mad W N 125: 77 Ind Cas 464.

(5) *Gangaraju* v. *Satyanarayana*, 1931 Mad 674 (677): 34 Mad L W 317: 134 Ind Cas 188 [1923 Mad 553 explained].

O. 32, R. 4, Notes 9—12.

will not render the decree null and void though it may be a ground for setting the decree aside if the minor is shown to have been prejudiced by such irregularity.

Where a Court guardian is appointed the Court may provide for the payment of the costs to be incurred by him in conducting the proceedings on behalf of the minor.[6] Where the Court guardian is not put in possession of any funds for defending the suit with the result that defences open to the minor are not raised, the decree can be avoided by the minor in appropriate proceedings.[7]

10. **Wishes of the minor if should be considered.**—The wishes of the minor should, if possible, be considered and given due weight in the matter of the appointment of a person as his next friend[1] or guardian *ad litem.*[2] This is the reason why notice is to be given to the minor. *See* Note 11 to R. 3.

11. **Probate proceedings.**—*See* Note 14 to R. 3. *supra.*

12. **Leave to sue or defend on behalf of a minor.**—Under the present rule leave to sue or defend is necessary only in cases where there is already a guardian for the minor appointed or declared by a competent authority and some other person wishes to represent the minor as the next friend or guardian *ad litem.* But the absence of a formal order granting leave to sue is not necessarily fatal to the suit.[1]

For cases under the Bengal Minors Act (XL of 1858) and the Bombay Minors Act (XX of 1864) (both of them now repealed by Act VIII of 1890) the provisions whereof required the granting of a permission or a certificate to sue on behalf of the minor, *see* the following cases.[2]

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(6) *Brij Raj Saran* v. *Alliance Bank of Simla,* 1928 Notes 15 (c): 110 Ind Cas 846; *Kedar Rai* v. *Sheopal Rai,* (1915) 28 Ind Cas 852 (858) All; *Bhagwan Das* v. *Mahadeo Prasad,* 1928 All 298 (298): 21 All L J 271: 71 Ind Cas 959: 45 All 390: 4 L R A Civ 156; *Gopilal* v. *Agarsinghji,* (1904) 28 Bom 626 (629): 6 Bom L R 544.

(7) *Rajamanicka Chetty* v. *Venkatramana Rao,* 1926 Mad 950 (951): 1926 Mad W N 8: 93 Ind Cas 84; *Chandradip Tewari* v. *Jadunandan,* 1924 All 578 (578): 5 L R A Civ 866: 79 Ind Cas 1041; *Bhagwan* v. *Param Sukhy,* (1917) 27 Ind Cas 623 (624): 37 All 179: 13 All L J 179; *Brij Narain Rai* v. *Mangla Prasad,* (1919) 50 Ind Cas 101 (102): 17 All L J 249: 1 U P L R (A) 49: 41 All 235.

Note 10.

(1) *Mahomed Sadaquat Ali Khan* v. *Muhammad Sajjad Ali Khan,* 1929 Lah 257 (260): 30 Pun L R 17: 11 Lah L Jour 180: 118 Ind Cas 901.

(2) *Rajendra Prasad* v. *Prabodhchandra Mitra,* 1921 Pat 25 (26): 6 Pat L Jour 82: 2 Pat L Tim 116: 1921 Pat H C C 156: 59 Ind Cas 986.

Note 12.

(1) *Sridhar Rao* v. *Ram Lal,* (1909) 1 Ind Cas 555 (556): 31 All 7: 1908 All W N 251: 5 All L J 633.

(2) *Newaj* v. *Maksud,* (1886) 12 Cal 131 (132); *Bhaca Pershad Khan* v. *The Secretary of State for India in Council,* (1887) 14 Cal 159 (164); *Russick Das Bairagy* v. *Preonath Misra,* (1911) 10 Cal 102 (105, 106): 13 Cal L Rep 405 [Volunteer—Guardian—No right to sue]; *Thakoor Bodh Singh* v. *Lochun Singh,* (1868) 3 Agra Rep 220; *Dhanpat Mal* v. *Khazana,* 1897 Pun Re No. 67; *Mt Atar Kour* v. *Man Singh,* 1883 Pun Re No. 62; *Kedarnath* v. *Debi Din,* (1882) 4 All 165 (167): 1881 All W N 173: 6 Ind Jur 539; *Geberdhan* v. *Girwar,* (1868) 3 Agra 92; *Sreemunto* v. *Sharoda,* (1867) 8 Suth W R 197 (198); *Anand Chunder* v. *Komul Narain,* (1865) 2 Suth W R 218 (219); *Hurendur Lal* v. *Rajendar Pertab,* (1865) 1 Suth W R 260 (261); *Prithi Singh* v. *Lobhan Singh,* (1882) 4 All 1 (3): 1881 All W N 90; *Nag Thakur* v. *Madnaji Sadshiv,* (1884) 8 Bom 239 (240); *Venkatrav Raji Ghorpada* v. *Madhavarav Ramachandra,* (1887) 11 Bom 53 (55); *Narasingrav Ramachandra* v. *Venkaji Krishna,* (1884) 8 Bom 395 (397); *Ram Kuar* v. *Sardar Singh,* (1898) 20 All 352 (354): 1898 All W N 64 [Case under Act VII of 1889]. See also *Biseswar* v. *Shoshi Shikar Eswar,* (1889) 17 Cal 688 (693): 17 Ind App 5: 5 Sar 501 P C [Case under S. 55 of the Bengal Court of Wards Act (Bengal Act IX of 1879)].

Representation of minor **by next friend or guardian** *for the suit.*

R. **5.** [Ss. 441, 444.] (1) Every application to the Court on behalf of a minor, other than an application under *rule* 10, *sub-rule* (2), shall be made by his next friend or *by* his guardian for the suit.

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, *where* the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

[1877—S. 441.]

Synopsis.

1. **Who may apply.**
2. **Effect of an application without a next friend or guardian.**
3. **Appointment of guardian ad litem how long continues.**
4. **Pleader's liability for costs.**
5. **Suit for custody of minor.**

1. **Who may apply.**—Sub-R. 1 of the rule enacts that every application on behalf of a minor other than an application under R. 10, sub-R. 2 shall be made by his next friend or guardian. An application by a guardian who has been discharged by the Court is thus not valid and ought to be rejected.[1] Where before a guardian is appointed for a minor defendant in a suit, it was found necessary to apply for the transfer of the suit to another Court, it was held by the High Court of Calcutta that the next friend of the minor could make such an application on behalf of the minor plaintiff.[2]

2. **Effect of an application without a next friend or guardian.**—It has been seen in Note 5 to R. 3 above that where a minor is not represented in a suit, the decree passed against him is a nullity. On the same principle an order made on an application without the minor being properly represented therein by a next friend or guardian does not bind the minor.[1] Sub-R. 2 provides that such an order may be discharged.

3. **Appointment of guardian ad litem how long continues.**—Where a guardian *ad litem* has once been appointed, his appointment enures for the whole of the *lis* in all its ramifications unless and until it is revoked by the Court, or the guardian dies or retires.[1] The appointment continues for

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Order 32, Rule 5—Note 1.

(1) *Raj Kishore* v. *Ram Gulam*, 1922 Pat 256 (258): 3 Pat L Tim 61: 6 Pat L Jour 171: 1921 Pat H C C 193: 62 Ind Cas 235.

(2) *Jotendro Nath* v. *Raj Kristo*, (1889) 16 Cal 771 (776).

Note 2.

(1) *Jungee Lall* v. *Sham Lall*, (1872) 20 Suth W R 120 (122); *Ramsoonduree* v. *Girish Chunder*, (1865) 4 Suth W R 106 (106); *Amichand* v. *Collector of Sholapur*, (1889) 13 Bom 234 (236) [Application to sue in *forma pauperis*].

Note 3.

(1) *Jwala* v. *Pirbhu*, (1892) 14 All 35 (37): 1891 All W N 192; *Hanuman Singh* v. *Ram Lahan*, 1930 All 646 (646): 1930 All L J 923: 128 Ind Cas 437; *Krishna Pershad Singh* v. *Gosta Behari Kundu*, (1907) 5 Cal L Jour 434 (439, 440); *Noor Muhammad* v. *Shah Mal*, 1885 Pun Re No 115 [All applications on minor's behalf arising out of, or connected with the suit, including one for review must be made by the guardian]; *Mt Kisni* v. *Ghulaji*, (1905) 1 Nag L Rep 128.

purposes of execution,[2] and appeal.[3]

It has been held that the Deputy Registrar of the High Court who has been appointed guardian *ad litem* ceases to represent the minor as soon as the appeal to the Privy Council is admitted although he can represent the minor in an application for leave to appeal.[4]

4. **Pleader's liability for costs.**—Where the pleader representing the minor knew, or might have known, of the fact of minority and yet files an application without a next friend or guardian, he is liable to be saddled with the costs to the opposite party.[1]

5. **Suit for custody of minor.**—This rule does not apply to a suit for the custody of a minor. It is not necessary in such a suit that the minor should be separately represented.[1]

O. 32, R. 6.

Receipt by next friend or guardian *for the suit* of property under decree for minor.

R. 6. [S. 461.] (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor either—

(*a*) by way of compromise before decree or order, or

(*b*) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

[1877—S. 461.]

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(2) *Shantabai* v. *Laxmichand*, 1930 Nag 185 (186): 26 Nag L R 173: 124 Ind Cas 247; *Kaniz Mehdi Begum* v. *Rasul Beg*, (1918) 48 Ind Cas 39 (47, 48): 5 Oudh L J 551.

(3) *Latafat Ali Khan* v. *Muhammad Yar Khan*, 1930 All 456 (457): 1930 All L J 771: 124 Ind Cas 474: 52 All 494; *Bhagelu* v. *Mt Dharma*, 1924 All 79 (80): 45 All 628: 21 All L J 591: 4 L R A Civ 304: 75 Ind Cas 898; *Shamboo* v. *Kanhaya*, 1922 All 332 (333): 20 All L J 599: 44 All 619: 75 Ind Cas 457; *Muzaffar Ali Khan* v. *Parbati*, (1907) 29 All 640 (648): 1907 All W N 221: 4 All L J 521; *Venkata* v. *Alakarajamba*, (1899) 22 Mad 187 (188); *Zarina Bibi* v. *Wazuddi*, 1932 Cal 888 (889): (1932) 59 Cal 1108 (1109) [There is no need for the appointment of a fresh guardian for the purposes of the appeal]; *Mt Daulat Rai* v. *Shaukat Rai*, 1931 Lah 685 (686): 32 Pun L R 460: 130 Ind Cas 445 [Only the next friend can appeal]; *Abdul Hussain* v. *Meghraj*, 1924 Nag 133 (134): 7 Nag L Jour 110: 78 Ind Cas 780; *Abdul Gani* v. *Barkia*, 1921 Nag 152 (153): 61 Ind Cas 605; *Punjfai* v. *Ramanand*, 1930 Nag 177 (178): 122 Ind Cas 445 [If some other person wants to appeal he must apply to remove the guardian *ad litem* under R 11]; *Bawan Das* v. *Bishnath*, 1899 All W N 203 (204). See also *Lachman Singh* v. *Mt Chatten Kaur*, 1927 Lah 663 (664): 103 Ind Cas 767.

(4) *Maharaja Bir Bikram Kishore Manikaya Bahadur* v. *Ali Muhamad*, 1928 Cal 286 (287): 32 Cal W N 140: 106 Ind Cas 867: 55 Cal 758. See also *Aminullah* v. *Secretary of State for India*, (1901) 4 Oudh Cas 98 (99) [Any person can represent the minor in an application for leave to appeal to Privy Council].

Note 4.

(1) *Shonai Bewa* v. *Monoram Mundul*, (1882) 11 Cal L Rep 15 (16).

Note 5.

(1) *Mrs Annie Besant* v. *G Narayaniah*, (1913) 21 Ind Cas 789 (796): 15 Mad L Tim 1: 1914 Mad W N Sup 1: 25 Mad L Jour 661.

Synopsis.

1. **Joint Hindu family—Right of manager to withdraw money or give discharge.**
2. **Payment to next friend without leave.**
3. **Security for protection of minor's property.**

Object of the rule. See Note 1, F.-N. (2).
Remedy against surety—Procedure. See Note 3, Pt. (3).

1. **Joint Hindu family—Right of manager to withdraw money or give discharge.**—It was held by their Lordships of the Privy Council in *Ganesha Row* v. *Tulja Ram Rao*, I.L.R. 36 Mad. 295, that where the managing member of a joint Hindu family is himself the next friend or guardian of a minor party "his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court". According to the High Court of Madras, these observations apply equally to cases coming under this rule and the *karta*, who represents minor parties to the suit as their next friend or guardian, cannot, without leave of the Court under this rule, give a valid discharge of the decree or withdraw any monies deposited by the judgment-debtor for the benefit of the minor members.[1] A contrary view was taken in the undermentioned cases,[2] one of which was before the date of the decision of the Privy Council in *Ganesha Row's case* and the other, though decided after the decision of *Ganesha Row's case*, did not advert to it. It is submitted that they are not correct.

But the rule will not apply where the managing member is *not* the next friend or guardian of the minor party. His right to give a discharge on behalf of the family under the Hindu Law is not affected by this rule.[3] According to the High Court of Bombay, where the decree itself dispenses with the separate application and sanction which might be necessary under this rule, and allows the manager to receive the amount so long as he furnishes security, the latter can give a valid discharge without the leave of the Court under this rule.[4]

2. **Payment to next friend without leave.**—A payment made by the judgment-debtor to the next friend or guardian without the leave of the Court under this rule is not a valid payment and will not prevent the decree from being regarded as a subsisting one.[1]

3. **Security for protection of minor's property.**—The fact that the next friend or guardian is the manager of a joint Hindu family does not

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Order 32, Rule 6—Note 1.

(1) *Pitchakkuttiya Pillai* v. *Doraiswamy Moopanar*, 1925 Mad 230 (232): 47 Mad L Jour 498: 1924 Mad W N 815: 82 Ind Cas 588; *Al Vr Ct Lakshmanan Chetty* v. *V R Rh V L Subbiah Chetty*, 1925 Mad 78 (80): 47 Mad L Jour 389: 20 Mad L W 342: 35 Mad L Tim 92: 1924 Mad W N 773: 82 Ind Cas 785: 47 Mad 920.

(2) *Harihar Pershad Singh* v. *Mathura Lal*, (1908) 35 Cal 561 (565, 566): 12 Cal W N 598: 8 Cal L Jour 256 [Object of the rule stated —Decided before 36 Mad 295]; *Ram Singh* v. *Nanak Chand*, (1915) 27 Ind Cas 603 (603): 10 Pun W R 1915: 60 Pun L R 1915 [Assumed].

(3) *Jhakhri Gope* v. *Phagu Mahto*, 1927 Pat 329 (330): 103 Ind Cas 75: 8 Pat L Tim 708.

(4) *Murlidhar* v. *Shivram*, 1929 Bom 382 (384): 31 Bom L R 963: 121 Ind Cas 446.

Note 2.

(1) *Abhoy Naidu* v. *Rama Chandra Naidu*, 1924 Mad 279 (280): 1923 Mad W N 925: 76 Ind Cas 905: 19 Mad L W 686; *Harbhajan Singh* v. *Santok Singh*, 1930 Lah 496 (496): 31 Pun L R 171 [Trial Court directing next friend under R 6 to refund money to Bank drawn without its permission]. See also *Muhammad Zulfikar Khan* v. *Abrar Ali*, 1924 Lah 681 (682): 78 Ind Cas 285.

O. 32, R. 6, Note 3.

exempt him from giving security under sub-R. 2.[1] The bond should be duly stamped, and affixed with Court-fee stamp as required by Art. 6, Sch. II of the Court Fees Act.[2]

Proceedings against a surety to enforce the security furnished by him under this rule are not to enforce *any decree* or order of the Court and cannot be therefore taken under S. 145. The remedy is to file a separate suit against him after taking an assignment of the bond from Court.[3] Such an assignment need not, however, be stamped and registered as in the case of a deed of sale, but can be made by an order of the Court.[4]

O. 32, R. 7.

Agreement or compromise by next friend or guardian *for the suit.*

R. 7. [S. 462.] (1) No next friend or guardian[7] for the suit shall, without the leave of the Court, *expressly recorded[3] in the proceedings*, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court *so recorded* shall be voidable against all parties other than the minor.[5]

[1877—S. 462. *See* S. 147.]

Local Amendment.

MADRAS.

Insert the following as sub-R. (1-*A*):—

"Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter to which a minor or other person under disability is a party shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No. 24 in Appendix D to this schedule."

Note 3.

(1) *Krishna Aiyar* v. *Chakrapani*, (1915) 29 Ind Cas 475 (476) Mad; *Chaganlal Aildas* v. *Tejoo Mal*, 1927 Sind 268 (269): 103 Ind Cas 460. See also In re *Application by Sunderdas*, 1927 Sind 187 (190): 101 Ind Cas 166 [Application for certificate under the Succession Act—Next friend should execute a bond under S 375]. But see *Manohar Lal* v. *Sheo Singh*, (1908) 11 Oudh Cas 246 (247). See, however, *Bhabatarini Debi* v. *Profulla Kumar*, 1933 Cal 17 (18-19): 36 Cal W N 871: 140 Ind Cas 376 [This rule does not control S 194 of the Succession Act (XXXIX of 1925). Moveables ordered possession of, without security].

(2) *Reference from Munsiff, Fourth Court, Habiganj*, In re, under S 113 read with O 46, R 1, C P Code, 1925 Cal 906 (907): 42 Cal L Jour 5: 29 Cal W N 851: 89 Ind Cas 289: 53 Cal 101 F B.

(3) *Nadanaligi Kurugodappa* v. *Angadi Soogamma*, (1917) 39 Ind Cas 928 (930): 1917 Mad W N 490: 22 Mad L Tim 320: 41 Mad 40.

(4) *Ram Saran Das* v. *Yudhishtar Prasad*, 1931 All 389 (391): 1931 All L J 503.

O. 32, R. 7, Notes 1—2.

Synopsis.

1. Legislative changes.
2. Scope and object of the rule.
3. "Without the leave of the Court expressly recorded."
    4. Where leave is granted under a mistake.
    5. Effect of compromise without leave of the Court.
    6. Bond executed by minor and an adult in pursuance of a compromise without the leave of the Court.
    7. Compromise by natural guardian, father or managing member of a joint Hindu family.
    8. Compromise by adult members of a Tarwad.
    8-a. Compromise by adult members of a joint Hindu family.
    9. "Compromise" by the "Court" of Wards, on behalf of the ward.
10. Agreement to be bound by oath, if a compromise.
11. Abandonment of issue—If a compromise.
12. Withdrawal of suit.
13. Compromise in execution proceedings.
14. Transfer, without leave, of decree in favour of minor.
15. Agreement to refer to arbitration.
16. Compromise, when can be set aside.
    17. Gross negligence of next friend or guardian.
    18. Fraud.
    19. Minor attaining majority pending suit.
20. Procedure to set aside a compromise decree.

Compromise against wishes of next friend or guardian. See Note 2, Pts. (6), (7) and (8); Note 5, Pt. (13).

Compromise due to misapprehension of material facts. See Note 4, Pt. (1).

Essentials for validity of compromise decree against a minor. See Note 16.

Materials for Court's consideration in granting leave. See Note 2, Pt. (2); Note 3, Pts. (4) to (10).

Sub-R. (2). See Note 5. See also Note 2, Pt. (9).

1. Legislative changes.—

The words "expressly recorded in the proceedings" are new. *See* Note 3, *infra*.

2. Scope and object of the rule.—This rule as well as the other rules of this order are enacted for the protection of minors who are unable to look after their own interests and to whom the Court stands in a *quasi* tutelary position. The guardians and next friends are not invariably honest, and even if honest, are sometimes careless and occasionally lacking in intelligence. Therefore the duty of safeguarding the interest of the minors, so far as is practicable, is thrown upon the Court.[1]

The rule forbids the next friend or guardian to enter into any agreement or compromise on behalf of the minor without the express leave of the Court and by implication requires the Court to consider, in the exercise of its judicial discretion, the propriety of the same in the interests of the minor.[2] But the rule applies only where the minor is a *party* to a pending suit and not to a case where his interests may be affected by reason of a compromise in a suit to which he is not a party.[3] Nor can a person other than the next friend or guardian compromise the suit on behalf of the minor.[4]

Order 32, Rule 7—Note 2.

(1) *Ganesha* v. *Mul Chand*, (1912) 15 Ind Cas 161 (168): 159 Pun W R 1912: 95 Pun Re 1912.

(2) *Kalavati* v. *Chedi Lal*, (1895) 17 All 531 (532): 1895 All W N 126; *Rajagopal* v. *Muttipalem*, (1881) 3 Mad 103 (104): 5 Ind Jur 308; *Jairaj Singh* v. *Mustafai*, 1931 All 425 (426): 1931 All L J 301: 131 Ind Cas 878.

(3) *Surendra Nath Rath* v. *Sambhu Nath Dobey*, 1927 Cal 870 (878): 104 Ind Cas 219: 55 Cal 210; *Birbhadra Rath* v. *Kalpataru Panda*, (1905) 1 Cal L Jour 388 (397).

(4) *Gurmallappa Mallappa* v. *Mallappa Marthandappa*, (1920) 57 Ind Cas 417 (418): 22 Bom L R 725: 44 Bom 574.

No application for leave is necessary to negotiate the particular terms of a compromise,[5] but such an application is necessary to enter into a compromise. Where such an application is made, the Court will, having regard to the interests of the minor pass a decree in terms thereof under O. 23, R. 3 unless the guardian withdraws his consent or refuses to assent to the compromise before the Court passes the decree.[6] The reason is that the Court cannot force a compromise upon the minor against the wishes of his guardian.[7] But if it appears to the Court that the guardian is acting improperly in refusing to assent to a compromise which is *prima facie* beneficial to the minor, the Court can, in the interests of the minor, remove the guardian and appoint another.[8]

Sub-R. 2 contemplates the case of a minor on one side ranged against adults on the other. It has no reference to the effect of any compromise between adults alone although the minor may be a party to the suit. A compromise between adults is governed by the general law and not by this rule.[9]

The rule applies to compromises by all guardians including a certificated guardian[10] and a natural guardian. As regards the applicability of the provisions of this rule to other proceedings, *see* the following cases.[11]

3. "Without the leave of the Court expressly recorded."—The requirement as to leave of the Court is based on the principle that a suit relating to the estate of an infant and for his benefit has the effect of making him a ward of the Court and no act can be done affecting the property of the minor unless under the express direction of the Court.[1] The leave of the Court should be *express* in all cases[2] and *cannot be implied* from the mere fact that a decree has been passed by the Court adopting the terms of the compromise.[3] As pointed out by Lord Macnaghten in *Manohar*

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(5) *Yadorao* v. *Mirabai*, 1924 Nag 180 (182): 76 Ind Cas 368.

(6) *Ranga Rao* v. *Rajagopala Raju*, (1899) 22 Mad 378 (380); *Sheikh Mahomed Maracayar* v *Mahmud Ammal*, 1926 Jour 195 (2): 91 Ind Cas 521 Mad [Next friend though party to compromise yet changed his mind—Defendant applying for sanction—Minor's vakil not filing certificate (under R 1-A)—Next friend opposing as not beneficial—Compromise not to be sanctioned].

(7) *Gulab Dei* v. *Vaish Motor Company*, 1925 All 570 (571): 28 All L J 523: 6 L R A Civ 890: 88 Ind Cas 429: 47 All 782; *Hemangini Dasi* v. *Bhagwati Sundari*, 1923 Cal 685 (688): 27 Cal W N 792: 75 Ind Cas 682.

(8) *Hemangini Dasi* v. *Bhagwati Sundari Dasi*, 1923 Cal 685 (688): 27 Cal W N 792: 75 Ind Cas 682; *Sambhunath Basak* v. *Abdul Kadar*, 1928 Cal 247 (248): 107 Ind Cas 477.

(9) *Taru Bala Dasi* v. *Sourendra Nath Mitra*, 1925 Cal 866 (869): 41 Cal L Jour 213: 29 Cal W N 597: 88 Ind Cas 369.

(10) *Lala Majlis Sahai* v. *Must Narain Bibi*, (1908) 7 Cal W N 90 (93).

(11) *Bharosa* v. *Sikhdar*, (1915) 27 Ind Cas 97 (99): 12 All L J 998 [Does not apply to Land Revenue Act]; *Harpal Singh* v. *Sukhrani* (1918) 48 Ind Cas 119 (122): 21 Oudh Cas 220, (Do.); *Sitla Prasad Singh* v. *Savgir Singh*, 1932 Oudh 44 (45), (Do.); *Chet Ram* v. *Bhim Sain*, 1930 Lah 250 (251): 31 Pun L R 131: 122 Ind Cas 103 [Compromise sanctioned under this rule—Permission under S 29 of Guardians and Wards Act (VIII of 1890) not necessary]; *Abdul Rashid* v. *Khandkar*, (1922) 68 Ind Cas 997 (997): 35 Cal L Jour 206, (Do.).

Note 3.

(1) *Ram Gulam Sahu* v. *Durga Prasad*, 1921 Pat 14 (17): 6 Pat L Jour 190: 2 Pat L Tim 325: 1921 Pat H C C 235: 60 Ind Cas 980: 3 U P L R (Pat) 75; *Doraiswami Pillai* v. *Thungasami Pillai*, (1904) 27 Mad 377 (380): 14 Mad L Jour 159; *Ram Sarup Lal* v. *Shah Latafat Hossein*, (1902) 29 Cal 735 (737).

(2) *Karmali* v. *Rahimbhoy*, (1889) 13 Bom 137 (146); *Shivram Sand* v. *Manu Lal Khemka*, 1928 Pat 40 (44): 104 Ind Cas 753; *Banwari Jogi* v. *Jamna Kasaudhan*, (1930) 125 Ind Cas 587 (588); *Brijmohan Lal* v. *Ghasi Ram*, 1891 All W N 46 (47); *Government* v. *Monohur Deo*, 1864 Suth W R Sup Vol 39 (40). See however *Umer* v. *Mt Dadli*, 1926 Sind 128 (128): 93 Ind Cas 550: 20 Sind L R 116; *Bajrang Bahadur Singh* v. *Rai Amarpal Singh*, 14 Ind Cas 6 (6, 7).

(3) *Gulab Dei* v. *Vaish Motor Company*, 1925 All 570 (571): 23 All L J 528: 6 L R A Civ 390: 88 Ind Cas 429: 47 All 782; *Har Sarup* v. *Tohfa Singh*, 1928 All 534 (535): 111 Ind

O. 32, R.7, Note 3.

Lal v. *Jadunath Singh,* I.L.R. 28 All. 585 (P.C.) "There ought to be evidence that the attention of the Court was directly called to the fact that the minor was a party to the compromise and it ought to be shown by an order on petition or in some way not open to doubt that the leave of the Court was obtained." The fact that the minor is described as such in the title of the suit and that the terms of the compromise are before the Court is not enough.[4]

The Court should before granting leave exercise a *judicial discretion* as to the propriety of the compromise in the interests of the minor.[5] In other words, the Court must have materials before it to satisfy its mind that the proposed compromise is for the *benefit* of the minor.[6] No compromise involving an apparent surrender of the infant's rights ought to be sanctioned by Courts.[7] No hard and fast rule can be laid down as to what particular materials a Judge may call for before being satisfied that the compromise is in the interests and for the benefit of the minor. It is a matter for the exercise of judicial discretion in each case.[8] It has been held that an affidavit by the guardian setting forth the terms of the compromise and how he considers them beneficial to the minor should be filed. In heavy cases there should also be an opinion of the counsel, or a statement by the counsel at the bar, that the compromise is a fit and proper one to be sanctioned in the interest of the minor.[9] In the undermentioned case[10] their Lordships of the Judicial Committee called for a certificate from the High Court as regards the propriety of a compromise on behalf of a minor before sanctioning the same, observing that there should be "a clear expression of opinion by the proper Court in India that such a compromise is beneficial one" to the minor. There is a conflict of judicial opinion as to the form and nature of the order granting leave to compromise, under this rule. In *Kalavati* v. *Chedi Lal*[11] the High Court of Allahabad held that "the Court should record the fact that such application was made to it, that the terms

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Cas 156; *Sarat Chunder* v. *Kartick Chunder,* (1883) 9 Cal 810 (812): 12 Cal L Rep 453; *Rajagopal* v. *Takkaya Naicker by guardian Subramania Ayyar* v. *Muttupalalem Chetti,* (1881) 8 Mad 103 (104): 5 Ind Jur 308.

(4) *Monohar Lal* v. *Jadu Nath Singh,* (1906) 28 All 585 (589): 33 Ind App 128: 3 All L J 710; 9 Oudh Cas 219: 4 Cal L Jour 8: 8 Bom L R 489: 10 Cal W N 898: 16 Mad L Jour 291: 1 Mad L Tim 210.

(5) *Krishna Proshad Roy* v. *Romesh Chunder Mandol,* (1908) 8 Cal L Jour 274 (277): 13 Cal W N 163: 4 Ind Cas 467; *Lala Majlis Sahai* v. *Musst Narain Bibi,* (1903) 7 Cal W N 90 (93); *Krishna Proshad Roy* v. *Romesh Chunder Mandol,* (1909) 4 Ind Cas 467: 13 Cal W N 163: 8 Cal L Jour 274; *Hira Singh* v. *Kalian Singh,* 1896 All W N 127 (128). See also *Mathu* v. *Sankaran,* 1932 Mad 303: 136 Ind Cas 350 (352): 35 Mad L W 171 [Court not considering benefit to minor—Order bad]; *Mt Barkat Bibi* v. *Mohd Amin,* 1932 Lah 521 (522): 33 Pun L R 551; 139 Ind Cas 113, (Do.).

(6) *Suresh Chandra Saha Chowdhury* v. *Gobind Nath Saha Chowdhury,* 1927 Cal 796 (799, 800); 103 Ind Cas 522: 46 Cal L Jour 441; *Kishen Singh* v. *Mir Singh,* 1899 Pun Re No 17; *Musst Ram Bhajji* v. *Har Narain Das,* 1889 Pun Re No 105; *Arunachalam Chetty* v. *Meyyappa Chetty,* (1898) 21 Mad 91 (93): 8 Mad L Jour 28; *Ramchurn Raha* v. *Mungal Sircar,* (1871) 16 Suth W R 232 (233).

(7) *Jhinku Singh* v. *Sital Singh,* 1923 All 267 (269): 21 All L J 81: 45 All 268: 4 L R A Civ 329: 74 Ind Cas 133; *Muhammad Rashid* v. *Rahamatullah,* (1914) 24 Ind Cas 630 (632): 212 Pun L R 1914: 134 Pun W R 1914: 96 Pun Re 1914; *Jwala* v. *Jaimal,* (1909) 1 Ind Cas 400 (402): 14 Pun W R 1909: 25 Pun L R 1909.

(8) *Dhairya Singh* v. *Kissandas,* 1926 Bom 291 (296): 28 Bom L R 362: 94 Ind Cas 104.

(9) *Chandulal Kanhaylal* v. *Nagindas Bapubhai,* 1929 Bom 350 (351): 31 Bom L R 621: 119 Ind Cas 663; *Shudhirendra Deb Manna* v. *Ranendra Deb Manna,* 1930 Cal 539 (543): 51 Cal L Jour 364: 127 Ind Cas 785.

(10) *Govinda Chandra Pal* v. *Kailasa Chandra,* 1922 P C 186 (187): 26 Cal W N 105: 66 Ind Cas 154: 30 Mad L Tim 181: 48 Ind App 241: 48 Cal 994: 14 Mad L W 396 P C.

(11) (1895) 17 All 531 (532): 1895 All W N 126. See also *Bejoy Singh Hazari* v. *Mathurya Debya,* (1920) 56 Ind Cas 97 (107).

O. 32, R. 7, Notes 3—5.

of the proposed agreement or compromise were considered by the Court and that, having regard to the interests of the minor, the Court granted leave to the making of the agreement or compromise". The High Court of Madras in the undermentioned case[12] also expressed a similar view and held **that the order *should in terms* state** that the question of benefit to the minor was considered by the Court. But in a later case[13] the same High Court, however, dissented from that view and held that the order need not, on the face of it, state in so many words that the Court had considered and come to the conclusion that the settlement was for the minor's benefit and that a mere order on the petition saying "granted" implied that the Court had applied its mind on the matter. In *Virupax* v. *Shiddappa*[14] Sir Lawrence Jenkins, C.J. expressed the view that the form of expression used for indicating that the Court granted the leave is of *slight importance* provided the Court really after a consideration of the circumstances intended to grant the required leave; but Chandavarkar, J., disagreed with this view and held that a mere order of the Court saying "granted" was not a sufficient compliance with the rule. The High Court of Calcutta has expressed conflicting opinions on this point, some decisions[15] following the earlier Madras case, while the case cited below[16] proceeds upon a reasoning similar to that of the later Madras case. The High Courts of Lahore[17] and Patna[18] also hold the same view as that of the later Madras case.

4. Where leave is granted under a mistake.—A compromise is only a contract and if entered into under a misapprehension as to material facts[1] or brought about by the mistake of the parties and of the Court with regard to the subject-matter of the suit[2] is not valid and binding upon the minor even though sanctioned by the Court. *See also* S. 20 of the Contract Act.

5. Effect of compromise without leave of the Court.—It was held by their Lordships of the Privy Council in *Subramania Chetty* v. *Raja Rajeswara Dorai*[1] that the provision making it necessary to obtain the leave of the Court is of great importance for the protection of the interests of the minors, and,

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(12) *Govindaswami Naidu* v. *Alagiriswami Naidu*, (1906) 29 Mad 104 (106).

(13) *Rajagopalan* v. *T Subbarama Ayyar*, (1919) 53 Ind Cas 354 (356): 1919 Mad W N 356.

(14) (1902) 26 Bom 109 (114): 3 Bom L R 565.

(15) *Suresh Chandra Saha Chowdhury* v. *Gobind Nath Saha Chowdhury*, 1927 Cal 796 (799): 103 Ind Cas 522: 46 Cal L Jour 441; *Biku Halwai* v. *Mohesh Halwai* [minor by his father and guardian], (1908) 8 Cal L Jour 266 (270); *Mahabir Prosad* v. *Bandi Prosad*, (1912) 16 Ind Cas 397 (398) Cal.

(16) *Midnapore Zamindari Co, Ltd* v. *Gobinda Mahto*, (1908) 8 Cal L Jour 31 (33)

(17) *Kushal Singh* v. *Labh Singh*, 1927 Lah 330 (332): 9 Lah L Jour 141: 28 Pun L R 184: 102 Ind Cas 358; *Janki* v. *Naunihal*, (1917) 39 Ind Cas 53 (54): 9 Pun L R 1917: 36 Pun Re 1917.

(18) *Ishan Chandra Kundu* v. *Nilaratan Adhikari*, 1923 Pat 375 (377): 4 Pat L Tim 311: 1 Pat L R 217: 1923 Pat H C C 184: 72 Ind Cas 1049: 2 Pat 538.

Note 4.

(1) *Badar Din* v. *Natho*, 1929 Lah 279 (280): 11 Lah L Jour 14: 30 Pun L R 116: 115 Ind Cas 855; *Jhanda Singh* v. *Lachmi*, (1920) 56 Ind Cas 878 (879): 22 Pun W R 1920: 68 Pun L R 1920: 1 Lah 344: 2 Lah L Jour 623.

(2) *Bibi Solomon* v. *Abdul Azeez*, (1881) 6 Cal 687 (705): 8 Cal L Rep 169.

Note 5.

(1) 1915 P C 33 (37): 39 Mad 115: 14 All L J 153: 18 Bom L R 360: 23 Cal L Jour 337: 20 Cal W N 201: 29 Mad L Jour 856: 19 Mad L Tim 150: 3 Mad L W 149: 1916 Mad W N 100: 32 Ind Cas 258. See also *Partab Singh* v. *Babuti Singh*, (1913) 21 Ind Cas 288 (291, 292): 17 Cal W N 1165: 1913 Mad W N 785: 14 Mad L Tim 299: 25 Mad L Jour 492: 11 All L J 901: 16 Oudh Cas 247: 18 Cal L Jour 384: 15 Bom L R 1001: 35 All 487: 40 Ind App 182 P C.

O. 32, R.7. Note 5.

in the absence of such leave, a compromise on behalf of the minor cannot be supported. Such a compromise is, however, not a nullity so far as regards parties other than the minor are concerned.[2] As the rule itself says, it is only "*voidable* against all parties other than the minor". In other words it cannot be avoided by any person other than the minor himself.[3] The minor has an *option* to ratify or affirm it, or to avoid it in proper proceedings.[4] It has been held in the undermentioned cases[5] that he is bound to set it aside, if at all, in a separate suit or in an application for review, and if this is not done within the period prescribed therefor, the decree will become binding on him and cannot be avoided by him later on. On the other hand it has been held in the cases cited below[6] that such a compromise is absolutely void so far as the minor is concerned and may be treated as such in subsequent proceedings, that it will not operate as *res judicata* against the minor and that it can be set up by him in defence to a suit against him based on the compromise.

Where a minor seeks to set a compromise decree aside on the ground of want of sanction under this rule, is the Court bound to set it aside without regard to the question whether the minor is prejudiced thereby? There is a conflict of opinion on the point. According to the High Courts of Bombay,[7] Madras[8] and Patna[9] and the Judicial Commissioner's Court of

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[2] *Tangor Majhi* v. *Jaladhar Deari*, (1910) 5 Ind Cas 691 (692): 14 Cal W N 322 [It is good against all the world]; *Suryabhan* v. *Pandu*, 1925 Nag 325 (326): 21 Nag L R 43: 86 Ind Cas 375. See also cases cited in foot-notes (3), (4) and (5).

[3] *Phulwanti Kunwar* v. *Janeshar Das*, 1924 All 625 (633): 46 All 575: 22 All L J 521: 5 L R A Civ 785: 83 Ind Cas 782; *Balkaran Singh* v. *Indrapal Singh*, (1899) 2 Oudh Cas 67 (73); *Srimati Golnur Bibi* v. *Sheikh Abdus Samad*, 1931 Cal 211 (217): 52 Cal L Jour 298: 35 Cal W N 238: 130 Ind Cas 209: 58 Cal 628; *Tangor Majhi* v. *Jaladhar Deari*, (1910) 5 Ind Cas 691 (692): 14 Cal W N 322.

[4] *Jita Singh* v. *Man Singh*, 1922 Lah 166 (167): 4 Lah L Jour 211: 2 Lah 164: 79 Pun L R 1921: 62 Ind Cas 794 [Minor can ratify or affirm it]; *Srimati Golnur Bibi* v. *Sheikh Abdus Samad*, 1931 Cal 211 (217): 52 Cal L Jour 298: 35 Cal W N 238: 130 Ind Cas 209: 58 Cal 628, (Do.); *Kankayya* v. *Venkataramayya Appa Rao*, 1925 Mad 1287 (1288): 49 Mad L Jour 443: 90 Ind Cas 1049; *Umed Singh* v. *Sobhag Mal Dhadha*, (1916) 32 Ind Cas 161 (163): 20 Cal W N 137: 30 Mad L Jour 67: 14 All L J 97: 3 Mad L W 145: 19 Mad L Tim 108: 23 Cal L Jour 130: (1916) 1 Mad W N 67: 18 Bom L R 308: 43 Cal 290: 43 Ind App 1 (P C) [Want of sanction does not make compromise necessarily *void* against minor]. See also *Partab Singh* v. *Bhabuti Singh*, (1913) 21 Ind Cas 288 (292): 17 Cal W N 1165: 1913 Mad W N 785: 14 Mad L Tim 299: 25 Mad L Jour 492: 11 All L J 901: 16 Oudh Cas 247: 18 Cal L Jour 384: 15 Bom L R 1001: 35 All 487: 40 Ind App 182 P C [Though in this case their Lordships say that the compromise without sanction is *void* against them, this must be understood with reference to the context, as meaning only that the minor is not bound by it but can avoid it]; *Sundarammal* v. *Sundara Reddi*, 1927 Mad 560 (562) [Minor can set aside]. See also *Abdool Ali* v. *Mozaffer Hussein*, (1871) 16 Suth W R 22 (26): 8 Beng L R App 39 P C; *Musst Rambhajji* v. *Harnarain*, 1889 Pun Re No 105. See also *Abubaker Mahomed* v. *Amiabai*, 1932 Bom 401 (401): 34 Bom L R 614: 138 Ind Cas 312 [Compromise out of Court by guardian without leave—Guardian's attorneys cannot proceed with trial—Remedy is to avoid it in proper proceedings by or on behalf of the minor].

[5] *Jita Singh* v. *Man Singh*, 1922 Lah 166 (167): 4 Lah L Jour 211: 2 Lah 164: 79 Pun L R 1921: 62 Ind Cas 794; *Must Phulwanti Kunwar* v. *Janeshar Das*, 1924 All 625 (633): 46 All 575: 22 All L Jour 521: 5 L R A Civ 785: 83 Ind Cas 782; *Basangouda* v. *Rudrappa*, 1927 Bom 87 (87): 28 Bom L R 1507: 99 Ind Cas 814; *Srimati Golnur Bibi* v. *Sheikh Abdus Samad*, 1931 Cal 211 (217): 52 Cal L Jour 298: 35 Cal W N 238: 130 Ind Cas 209: 58 Cal 628.

[6] *Dwarka* v. *Salik*, (1905) 8 Oudh Cas 191 (192); *Pirojshah* v. *Manibhai*, (1911) 12 Ind Cas 543 (544): 13 Bom L R 963: 36 Bom 53 [Not *res judicata*]; *Sethu Ram* v. *Venkatrao*, (1911) 12 Ind Cas 499 (500): 34 Mad 314 [Can be set up in defence]. See also *Bhagirath* v. *Narayan*, (1920) 58 Ind Cas 178 (179) Nag. See also *Chellaram* v. *Kimatram*, (1921) 61 Ind Cas 118 (124): 14 Sind L R 245 [Compromise without sanction *ab initio* void—Subsequent leave not good]; *Mundakath Mathu* v. *Sankaran*, 1932 Mad 303: 136 Ind Cas 350 (351): 13 Lah 36: 137 Ind Cas 877 [Compromise without leave void so far as minor is concerned].

[7] *Bhiwa Jotiba* v. *Dev Chand Behcar*, (1911) 10 Ind Cas 909 (910): 13 Bom L R 280: 35 Bom 322; *Basangouda Budangouda Patel* v. *Rudrappa Mallappa Nidwani*, 1927 Bom 87 (87, 91): 28 Bom L R 1507: 99 Ind Cas 814.

[8] *Sethuram* v. *Venkatrao*, (1911) 12 Ind Cas 499 (500): 34 Mad 314 [Dissenting from 20 All 98].

[9] *Charu Chandra* v. *Sambhu Nath*, (1918) 46 Ind Cas 358 (362): 3 Pat L Jour 255: 4 Pat L W 393: 1918 Pat H C C 193.

O. 32, R. 7, Notes. 5—7.

Oudh[10] no prejudice need be shown. The High Courts of Allahabad[11] and Lahore[12] have on the other hand held that it is necessary for the minor to establish that he has been prejudiced by the decree, before setting it aside. It is submitted that this latter view is not correct. Where the next friend or guardian has himself not consented to the compromise on behalf of the minor, the compromise is, of course, void *in toto*.[13]

6. **Bond executed by minor and an adult in pursuance of a compromise without the leave of Court.**—Where a compromise is entered into without the leave of the Court and in pursuance thereof a minor defendant and an adult party jointly execute a bond, the bond cannot be enforced as against the minor. But the adult co-obligee cannot be exonerated from liability owing to the failure to obtain leave to compromise on behalf of the minor.[1]

7. **Compromise by natural guardian, father or managing member of a joint Hindu family.**—A father or managing member in a joint Hindu family may in certain circumstances and subject to certain conditions enter into agreements which may be binding on the minor members of the family.[1] But, as pointed out by their Lordships of the Judicial Committee in *Ganesha Row* v. *Tulja Ram Row* (I.L.R. 36 Mad. 295 P.C.) when, in a suit in which the minor is a party the father or managing member is appointed the next friend or guardian of the minor, his powers are controlled by the provisions of the law and he cannot do any act in his capacity as father or managing member which he is debarred from doing as next friend or guardian *without the leave of the Court.* "To hold otherwise," their Lordships observed, "would be to defeat the object of the enactment."[2] The same principle will apply to the case of a natural guardian of the minor dealing with minor's interests.[3]

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[10] *Makund Singh* v. *Reoti,* (1899) 2 Oudh Cas 45 (49); *Babu Jadu Nath Singh* v. *Babu Manohar Lal,* (1903) 6 Oudh Cas 175 (179).

[11] *Mt Saidunnissa* v. *Mt Ruqya,* 1931 All 307 (310): 1931 All L J 170: 130 Ind Cas 201: 53 All 428; *Badri Prashad* v. *Gopal Behari Lal,* (1919) 50 Ind Cas 752 (755): 17 All L J 789: 41 All 558; *Aman Singh* v. *Narain Singh,* (1898) 20 All 98 (99): 1897 All W N 205.

[12] *Mt Gurdevi* v. *Kharaiti Mal,* 1927 Lah 685 (686): 104 Ind Cas 222: 10 Lah L Jour 23; *Dalo Mal* v. *Sundar,* (1911) 11 Ind Cas 523 (525): 134 Pun L R 1911: 2 Pun Re 1912: 42 Pun W R 1912. See also *Ghulam Ali Shah* v. *Shahabal Shah,* 1905 Pun Re No 3 Cr: 21 Pun L R 1905 [Can be set aside at the instance of the minor if the equities of the case required it].

[13] *Lootar Ram* v. *Lal Ranjit Singh,* 1924 Oudh 85 (88): 78 Ind Cas 113: 11 Oudh L Jour 381. See *Abdul Hakim Gazi* v. *Panchi Dasi,* (1916) 32 Ind Cas 849 (850) Cal [Consent of guardian and benefit essential—*Obiter*].

Note 6.

[1] *Jamna Bai Saheb Mohitai Avergal* v. *Vasanta Rao,* (1916) 34 Ind Cas 213 (215): 14 All L J 584: 18 Bom L R 432: 31 Mad L Jour 18: 3 Mad L W 540: 24 Cal L Jour 74: 20 Mad L Tim 31: (1916) 1 Mad W N 452: 39 Mad 409: 43 Ind App 99 P C.

Note 7.

[1] See *Venkatagiri Nayaniraru* v. *Subbarayalu Nayani,* (1914) 24 Ind Cas 491 (493) Mad; *Nirvanaya* v. *Nirvanaya,* (1885) 9 Bom 365 (367). See also *Ram Kuber Pande* v. *Ram Dasi,* (1913) 20 Ind Cas 44 (45-46): 35 All 428: 11 All L J 645 [Compromise decree against Hindu father—No collusion—Binding on sons though not parties to the suit]; *Sarabjit Partap* v. *Indarjit Partap,* (1904) 27 All 203 (250): 2 All L J 720: 1904 All W N 244; *Malla Reddy* v. *Aswaratha Reddy,* (1903) 13 Mad L Jour 494 (495) [*Bona fide* compromise of doubtful claim by grandmother binding in absence of collusion].

[2] *Ganesha Row* v. *Tulja Ram Row,* (1913) 19 Ind Cas 515 (517): 17 Cal W N 765: 11 All L J 589: 18 Cal L Jour 1: 15 Bom L R 626: 14 Mad L Tim 1: 1913 Mad W N 575: 25 Mad L Jour 150: 36 Mad 295: 40 Ind App 132 P C [Overruling the decision in 19 Mad L Jour 4: 1 Ind Cas 380]. See also *Sripal Singh* v. *Jagadish Narain,* (1920) 56 Ind Cas 313 (316): 7 Oudh L J 219: 2 U P L R (O) 77: 23 Oudh Cas 396; *Santu* v. *Abhainandan Prasad,* 1925 All 32 (33): 81 Ind Cas 297; *Marivada Veeranna* v. *Vythia Seetanna,* 1931 Mad 218 (221): 59 Mad L Jour 139: 32 Mad L W 188: 128 Ind Cas 701.

[3] *Gurmalappa Mallappa* v. *Mallappa Marthandappa,* (1920) 57 Ind Cas 417 (41[illegible]): 22 Bom L R 725: 44 Bom 574.

O.32, R.7, Notes 8—10.

8. **Compromise by adult members of a Tarwad.**—A compromise of a doubtful claim, entered into by the adult members of a Tarwad *bona fide* and in the interests of the Tarwad is binding on the minor members thereof.[1] But if the Karnavan or adult member happens to be the guardian *ad litem* or next friend of the minor in a suit then on the principles mentioned in Note 7 above leave of the Court is necessary before he can enter into a compromise binding on the minor.

8-a. **Compromise by adult members of a joint Hindu family.**—In *Rameswar Prasad* v. *Ram Bahadur Singh*, (I.L.R. 34 Cal. 70, P.C.), their Lordships of the Judicial Committee held that where a compromise was entered into by the adult co-parceners in a joint Hindu family in a pending litigation in which the minor co-parcener had no interest separate from that of the adult members of the family and the *Court pronounced the compromise beneficial to the minor*, the compromise was binding on the minor.

9. **Compromise by the Court of Wards on behalf of the ward.**—It has been held that in cases coming under the Bengal Court of Wards Act (IX of 1879) no leave of the Court is necessary for entering into a compromise on behalf of the minor.[1] The reason is that S. 51 of that Act makes it obligatory on the Civil Court to recognise the Court of Wards as the next friend or the guardian as the case may be in a suit by or against the minor. Further, S. 18 of that Act itself gives power to the Court of Wards to enter into a compromise on behalf of the ward. Rule 16 of this Order also contains a saving clause in respect of local laws.[2]

10. **Agreement to be bound by oath, if a compromise.**—An offer by the next friend or the guardian as the case may be of a minor, to be bound by the evidence given on oath by the opposite party or his witness under S. 9 of the Indian Oaths Act (X of 1873), does not amount to an agreement or compromise within the meaning of this rule and no leave of the Court is necessary in such a case.[1] The evidence so given is binding upon the minor under S. 11 of that Act unless there is fraud or gross negligence on the part of the guardian in the conduct of the suit which results in prejudice to the minor.[2]

But an offer by the guardian *ad litem*, to suffer a decree on the oath of the plaintiff would amount to a compromise and if not sanctioned by the Court is not binding on the minor.[3]

Note 8.

[1] *Moidin Kutti* v. *Beevi Kutti*, (1895) 18 Mad 38 (40); *Rameswar Pershad Singh* v. *Ram Bahadur Singh*, (1907) 34 Cal 70 (72): 2 Mad L Tim 165: 11 Cal W N 178: 5 Cal L Jour 175: 17 Mad L Jour 59 P C.

Note 9.

[1] *Nakimo Dewani* v. *Mt Pemba Dichan*, 1921 P C 22 (23): 48 Cal 469: 19 All L J 171: 23 Bom L R 698: 33 Cal L Jour 211: 25 Cal W N 797: 40 Mad L Jour 201: 14 Mad L W 253: 1921 Mad W N 115: 59 Ind Cas 911: 48 Ind App 27: 29 Mad L Tim 202 P C. See also *Mahomed Shah* v. *Ghulam Mustafa Shah*, 1930 Sind 217 (217): 123 Ind Cas 698.

[2] *Nakyno Dewani* v. *Jerang Dewan*, (1917) 37 Ind Cas 971 (974): 44 Cal 829. See, however, *M Mumtaz Ali Khan* v. *Sheoruttungir*, (1896) 23 Cal 934 (941): 23 Ind App 75: 6 Mad L Jour 131: 7 Sar 41 P C [Consent to a decree by *manager* of Court of Wards without authority from the Court of Wards—Invalid].

Note 10.

[1] *Deoraj Misra* v. *Mt Abhai Raji*, 1927 All 584 (584): 102 Ind Cas 38: 25 All L J 729: 49 All 842; *Sheo Nath* v. *Sukh Lal*, (1900) 27 Cal 229 (231): 4 Cal W N 327; *Mahomed Mahmud Chowdury* v. *Bheari Lal Saha*, 1930 Cal 463 (464): 34 Cal W N 310: 129 Ind Cas 408; *Malak Sorab* v. *Anokh Rai*, 1891 Pun Re No 18; *Chengal Reddi* v. *Venkata Reddi*, (1889) 12 Mad 483 (484). But see *Mt Rani Bahu* v. *Amrit Lal*, (1904) 17 C P L R 147 (155).

[2] *Chengal Reddi* v. *Venkata Reddi*, (1889) 12 Mad 483 (484).

[3] *Parbhi Dayal* v. *Jamil Ahmad*, 1922 All 160 (161): 44 All 117: 64 Ind Cas 646: 19 All L J 911. See also *Shadi* v. *Nathu*, 1889 Pun Re No 186.

11. **Abandonment of issue—If a compromise.**—The abandonment or giving up an issue on the part of the next friend or guardian *ad litem* in the course of the conduct of the suit does not amount to a compromise within the meaning of this rule and therefore no leave of the Court is necessary. Such abandonment will bind the minor unless the guardian is proved to be guilty of fraud or gross negligence.[1]

12. **Withdrawal of suit.**—A withdrawal of a suit by the next friend of a minor plaintiff *in pursuance of an agreement or compromise* entered into with the defendant can only be made with the leave of the Court; otherwise it will be voidable at the instance of the minor.[1] Applications to allow a suit or appeal to be withdrawn where there are parties who are not *sui juris* are not granted without grave consideration. In the undermentioned case[2] the Judicial Committee granted leave to withdraw an appeal only after being assured by the counsel at the bar that the terms on which it was proposed to be withdrawn were beneficial to the minor. But a mere withdrawal of a suit *not in pursuance of any agreement or compromise* does not come within the purview of this rule although such a withdrawal is open to attack by the minor on the ground of fraud or collusion or gross negligence on the part of the next friend.[3]

13. **Compromise in execution proceedings.**—*See* Note 2 to Order 32, General.

14. **Transfer, without leave, of decree in favour of minor.**—The provisions of this rule apply also to a compromise entered into even after a decree has been passed, and an adjustment of a decree to which a minor is a party is not binding on the minor unless leave of the Court has been obtained therefor.[1] On the same principle a transfer of a decree obtained in favour of a minor is not binding on the minor unless leave of the Court has been obtained for such transfer.[2]

15. **Agreement to refer to arbitration.**—This rule does not apply to references made without the intervention of the Court, inasmuch as there is no *suit* pending in such cases.[1] A decree passed on an award passed on such a reference and filed into Court under paragraph 20 of the Second Schedule is not bad for want of sanction, though it may not be binding on the minor

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Note 11.

(1) *Venkata Narasimha Naidu* v. *Bhashyakarulu Naidu*, (1899) 22 Mad 538 (546, 549); *Ram Naik Shukul* v. *Ganga Shukul*, (1914) 25 Ind Cas 620 (622) All [Confession of judgment when no valid defence exists]. As to waiver by guardian, see *Samirao* v. *Collector of Dharwar*, (1893) 17 Bom 299 (302); *Luchmeswar* v. *Darbanga Municipality*, (1891) 18 Cal 99 (106): 17 Ind App 90: 5 Sar 564 P C.

Note 12.

(1) *Doraiswami Pillai* v. *Thungasami Pillai*, (1904) 27 Mad 377 (378): 14 Mad L Jour 159; *Karmali* v. *Rahimboy*, (1889) 13 Bom 137 (146); *Shib Ram* v. *Abdul Ghani*, 1932 Lah 792 (794): 112 Ind Cas 695 [Such withdrawal however binds a major co-plaintiff].

(2) *Sakinbai* v. *Shrinibai*, (1920) 55 Ind Cas 943 (944): 11 Mad L W 486: 38 Mad L Jour 431: 1920 Mad W N 311: 18 All L J 499: 22 Bom L R 552: 2 U P L R (P C) 107: 47 Ind App 88 P C.

(3) *Ram Sarup Lal* v. *Shah Lala Fat Hossein*, (1902) 29 Cal 735 (737); *Rajada* v. *Ghulla*, (1918) 47 Ind Cas 508 (509): 164 Pun W R 1918: 59 Pun Re 1919.

Note 14.

(1) *Davud Rowther* v. *Paramaswami Pillai*, (1916) 35 Ind Cas 70 (72): 31 Mad L Jour 207. See also *Mani Shankar* v. *Bai Muli*, (1888) 12 Bom 686 (689, 690).

(2) *Kanakayya* v. *Kottayya*, 1921 Mad 587 (587): 41 Mad L Jour 75: 13 Mad L W 637: 1921 Mad W N 437: 63 Ind Cas 285 [Dissenting from 1921 Mad 113].

Note 15.

(1) *Vithal Das* v. *Dattaram*, (1902) 26 Bom 298 (301): 3 Bom L R 887.

O.32, R. 7.
Notes
15—16.

for other reasons.[2] But an application made under paragraph 20 of the Second Schedule is a *suit* and, if, during the pendency thereof the guardian *agrees*, not to object to the filing of the award, the agreement must, like any other agreement, be sanctioned by the Court.[3]

There is a conflict of opinion as to whether this rule applies to agreements to refer to arbitration made *pending* suit. The general consensus of opinion in all the Courts except the High Courts of Allahabad and Calcutta, is that this rule applies to such cases and that the leave of the Court is necessary.[4] According to the High Court of Allahabad the provisions as to arbitration proceedings are self-contained and this rule does not apply to such proceedings.[5] The High Court of Calcutta has taken conflicting views on the matter.[6] It is submitted that the Allahabad view cannot be accepted as correct.

16. Compromise when can be set aside.—A compromise in order to be valid and binding upon the minor must fulfil the following conditions:—

(1) The leave of the Court must have been *expressly* obtained. (*See* Note 3.)

(2) It should have been granted by the Court after the exercise of a judicial discretion as regards the propriety of the compromise in the interests of the minor. (*See also* Note 3.)

(3) It should not be vitiated by fraud or mistake. (*See* Note 4.)

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(2) *Vithaldas* v. *Dattaram*, (1903) 26 Bom 298 (301): 3 Bom L R 887; *Hanmantram* v. *Shivnarayan*, (1918) 48 Ind Cas 238 (243, 244): 20 Bom L R 970: 43 Bom 258; *Vasudeva Ayyar* v. *Sundara Raja Ayyar*, 1930 Mad 38 (42): 30 Mad L W 868: 124 Ind Cas 209; *Balaji* v. *Nana*, (1903) 27 Bom 287 (290): 5 Bom L R 95.

(3) *Mahadev* v. *Krishnabai*, 1896 Bom P J 609 (610).

(4) *Chimanbhai* v. *Keshavlal*, 1923 Bom 402 (403): 25 Bom L R 443: 73 Ind Cas 464: 47 Bom 721; *Sadashivappa Gangappa* v. *Gangappa Chanvirappa Mahmadkoti*, 1931 Bom 500 (501): 33 Bom L R 1033: 134 Ind Cas 1221; *Atmaram Yekoba Vani* v. *Bhila Ganpat Vani*, (1913) 19 Ind Cas 424 (424): 15 Bom L R 223; *Sadashiv Ram Chandra Datar* v. *Trimbak Keshav*, (1920) 56 Ind Cas 399 (402): 22 Bom L R 266: 44 Bom 202 [Obiter]; *Chhajju Mal* v. *Tarloki Nath*, 1926 Lah 665 (666): 8 Lah L Jour 414: 96 Ind Cas 748: 27 Pun L R 729; *Baktawar* v. *Kesar Singh Gurdhit Singh*, (1921) 59 Ind Cas 31 (32): 5 Pun W R 1921; *Muhammad Ibrahim* v. *Allah Baksh*, (1919) 52 Ind Cas 327 (330): 145 Pun Re 1919: 1 Lah L Jour 138; *Ganesa* v. *Mul Chand*, (1912) 15 Ind Cas 161 (167, 168): 159 Pun W R 1912: 95 Pun Re 1912; *Musst Gulab Khatan* v. *Chaudri*, (1916) 32 Ind Cas 250 (251): 99 Pun Re 1915: 207 Pun W R 1915; *Hira* v. *Dina*, 1895 Pun Re No 37; *Sukha Singh* v. *Bur Singh*, 1882 Pun Re No 100; *Ghulam Rasul* v. *Began*, (1919) 55 Ind Cas 218 (220) Lah; *Uda* v. *Mul Chand*, 1907 Pun Re No 4: 20 Pun W R 1907; *Lakshmana Chettiar* v. *Chinnathambi*, (1901) 24 Mad 326 (330); *Davuluru Vijaya Ramayya* v. *Davuluru Venkatasubba Rao*, (1916) 32 Ind Cas 881: 30 Mad L Jour 465: 39 Mad 853: also 64 Mad L Jour Notes of Recent Cases, p 5; *Hanuman Rai* v. *Jagdis Rai*, (1917) 35 Ind Cas 675 (676): 1917 Pat H C C 77; *Sagar Mal* v. *Hira*, 1926 Pat 164 (165): 1925 Pat H C C 324: 91 Ind Cas 799: 7 Pat L Tim 264 [Caution left open]; *Mt Rani Bahu* v. *Amrit Lal*, (1904) 17 C P L R 147 (155); *Gunnomal* v. *Gurdinomal*, 1921 Sind 61 (64): 17 Sind L R 211: 83 Ind Cas 913; *Emnabai* v. *Fakir Mahomed*, 1922 Sind 1 (2): 15 Sind L R 165: 65 Ind Cas 50; *Umer* v. *Mt Dadli*, 1926 Sind 128 (129): 98 Ind Cas 550: 20 Sind L R 116 [Sanction can be implied from the reference]; *Bajrang Singh* v. *Rai Amerpal Singh*, (1912) 14 Ind Cas 6 (6) Oudh [But sanction need not be express]. See also *Shiva Kumar* v. *Thakur Prasad*, 1930 Oudh 432 (434): 7 Oudh W N 815: 128 Ind Cas 748 [Reference after decree—Leave not necessary as the suit not pending on date of reference]; *Sukha Nand* v. *Behari Ram Ishar Das*, 1923 Lah 103 (104): 68 Ind Cas 750 [Suit against a *firm* consisting also minor members made parties—No leave necessary]. See also *Mahomed Sadagat Ali Khan* v. *Muhammad Sajjad Ali Khan*, 1929 Lah 257 (259): 30 Pun L R 17: 11 Lah L Jour 130: 113 Ind Cas 901. But see *Chet Ram* v. *Kanshi Ram*, (1923) 71 Ind Cas 7 (8) Lah; *Budh Singh* v. *Ram Nath*, (1912) 17 Ind Cas 888 (888): 251 Pun W R 1912: 125 Pun Re 1912; *Mir Mian Ghulam Hyderkhan* v. *Musst Hayat Khautun*, (1907) 1 Sind L R 160.

(5) *Hardeo Sahai* v. *Gauri Shanker*, (1906) 28 All 35 (37): 1905 All W N 170: 2 All L J 493; *Latawan* v. *Lachiya*, (1913) 21 Ind Cas 989 (991): 12 All L J 57: 36 All 69.

(6) *Ananda Krishna Dey* v. *Jogendra Nath Dey*, (1908) 8 Cal L Jour 294 (298) [Rule does not apply—*Obiter*]; *Dubir-ud-Din* v. *Amina Bibi*, 1925 Cal 475 (477): 78 Ind Cas 835, (Do.); *Golnur Bibi* v. *Sheikh Abdur Samad*, 1931 Cal 211 (217): 52 Cal L Jour 298: 35 Cal W N 238: 130 Ind Cas 209: 58 Cal 628 [It applies —Assumed].

O. 32, R. 7. Notes 16—18.

(4) There must be proper representation of the minor by the next friend or guardian *ad litem*. He should not have been guilty of fraud or gross negligence in the matter of compromise. (*See* Note 17 and 18 below.)

(5) The minor should have *continued to be a minor* till the passing of the compromise decree. (*See* Note 19 below.)

17. Gross negligence of next friend or guardian.—As has been seen in Notes 12 and 13 to R. 3 *ante* gross negligence on the part of the next friend or guardian *ad litem*, if established, will entitle the minor to avoid any decree passed against him. There must be the strictest good faith on the part of the guardian and his acts must be based on considerations of *actual* necessity and advantage to the minor and not on calculations of any possible benefit.[1] It is his duty to place the Court in possession of all essential and material facts, and any concealment thereof would amount to constructive fraud.[2] But if he acts *bona fide* and compromises a *doubtful claim* with the leave of the Court, the compromise would be binding on the minor.[3] *See also* Note 5 to R. 9 below.

18. Fraud.—A compromise duly entered into by the guardian and sanctioned by the Court in the exercise of its discretion will not be disturbed except upon very strong grounds.[1] The grounds must be such “as to amount to fraud in the party claiming the benefit of the compromise, meaning by fraud, not moral fraud but what in the eye of this Court is considered as amounting to fraud . . . . If there be no fraud and equal knowledge on both sides, the compromise cannot be disturbed, but if there is knowledge on one side which is withheld, the compromise cannot stand, because the withholding of knowledge amounts, in the view of a Court of equity, to fraud.”[1-a] The question is not whether the Court was satisfied with the information before it and could have called for further information, but, whether “the parties having had this further information in their possession were justified in withholding it”.[2] Fraud, however, must be strictly

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Note 17.

(1) *Bodh Mul* v. *Gouree Sankar*, (1866) 6 Suth W R 16 (16); *Bepin Behari* v. *Jotindra Nath*, (1910) 6 Ind Cas 813 (815): 14 Cal W N 1019: 37 Cal 897; *Ganganand Singh* v. *Rameshwar Singh*, 1927 Pat 271 (278): 6 Pat 388: 102 Ind Cas 449: 8 Pat L Tim 730 [Guardian *ad litem* consenting without applying his mind to its terms. Court will ordinarily relieve minor from its effect and give him opportunity to defend the suit—But this is a rule of prudence and not of law]. See also *Ranee Roushan Jahan* v. *Syed Enaet Hossein*, 1864 Gap Suth W R 83 (84): Beng L R Sup Vol App 1: Marsh 196: 2 Hay 298. And *Ranee Roushan Jahan* v. *Syed Enaet Hossein*, (1866) 5 Suth W R 4 (13) [Onus of proving beneficial nature of compromise is on person asserting the same].

(2) *Bishupal Singh* v. *Kedar Nath Singh*, 1925 Oudh 512 (513); *Ram Autar* v. *Mahomed Mumtaz Ali*, (1897) 24 Cal 853 (861): 24 Ind App 107: 1 Cal W N 417: 7 Sar 148. See *Unnoda Dabee* v. *Maria Louisa Stevenson*, (1874) 22 Suth W R 290 (292) [Mortgage by father—Suit against him personally and as guardian of his minor daughter—Decree against him alone—Appeal by him to make her share also liable—Compromise with plaintiff accordingly—Court exercising no control over compromise—Compromise not binding on minor].

(3) *Rameshwar* v. *Lachmi Prasad*, (1908) 31 Cal 111 (131): 7 Cal W N 688; *Annapurnayya* v. *Venkatasubramaniam*, 1925 Mad 1285 (1286): 49 Mad L Jour 549: 22 Mad L W 560: 91 Ind Cas 742 [Subsequent change of law cannot vitiate compromise by guardian]. See also *Subba Reddi* v. *Kotamma*, (1904) 14 Mad L Jour 442 (442).

Note 18.

(1) *Amarpal Singh* v. *Chhabraj Koer*, (1911) 11 Ind Cas 105 (108, 109) Oudh; *Maharaj Bhandudas* v. *Krishnabhai*, 1927 Bom 11 (13): 50 Bom 716: 28 Bom L R 1225: 99 Ind Cas 307; *Chet Ram* v. *Bhim Sain*, 1930 Lah 250: 31 Pun L R 131: 122 Ind Cas 103; *V Srinivasa Varadachariar* v. *Ranganayaki Ammal*, 1929 Mad 349 (350): 118 Ind Cas 291: 30 Mad L W 787; *Ajudhya Pershad* v. *Mahabir Prasad*, (1914) 22 Ind Cas 923 (924); *Amir* v. *Fakira*, (1914) 25 Ind Cas 874 (875): 242 Pun L R 1914: 139 Pun W R 1914. See also *Hemania* v. *Brojendro*, (1890) 17 Cal 875 (882): 17 Ind App 65: 5 Sar 542 P C.

(1-a) *Brooks* v. *Lord Mostyn*, 55 Eng Rep Rolls Court 445, cited in 11 Ind Cas 105 (108).

(2) *Solomon* v. *Abdool Azeez*, (1881) 6 Cal 687 (703): 8 Cal L Rep 169.

O. 32, R. 7, Notes 18—20.

proved. A man cannot complain of fraud simply because he regrets a bargain entered into with open eyes. Nor can a minor attack a compromise sanctioned by the Court on his behalf on the ground of fraud on the Court unless he can prove not merely that the compromise was not profitable to him or that his opponent put forward a false plea but also that the Court was deceived either by that plea or about the facts of the case or was deceived into believing that the compromise had been accepted by the minor's guardian or next friend with free consent and knowledge of the facts when it had not been so accepted.[3]

If the next friend or guardian is proved to be guilty of fraud or collusion then the compromise entered into by him and the decree passed thereon will not bind the minor.[4]

19. **Minor attaining majority pending suit.**—If the defendant who is a minor attains majority during the pendency of suit, a compromise entered into by the guardian subsequently is not binding on the minor even though sanctioned by Court.[1] But the High Court of Lahore[2] has taken a contrary view, which it is submitted is not correct.

20. **Procedure to set aside a compromise decree.**—A minor can file a separate suit to set aside the compromise decree or file an application for review in the same suit.[1] He cannot take any objection as to the validity of the decree in appeal as no appeal lies from a consent decree under the present Code (*vide* S. 96, sub-S. 3).[2] Nor can the validity of the decree be attacked in execution proceedings.[3] *See also* Note 5 above.

If a compromise decree is set aside at the instance of the minor, the effect of it would be to remit the minor to his original position in the suit.[4]

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[3] *Ramaswami Mudaliar* v. *Alagathai Anni*, 1929 Mad 96 (102): 1928 Mad W N 654: 116 Ind Cas 116 [*Per* Reilly, J].

[4] *Raja Ram* v. *Zaman Khan*, (1904) 1 All L J 130 (132); *Karmali* v. *Rahimbhoy*, (1889) 13 Bom 137 (143, 146); *Har Narain* v. *Musst Deoki*, 1893 Pun Re No 24.

Note 19.

[1] *Lanka Sanyasi* v. *Lanka Yerran Naidu*, 1928 Mad 294 (296): 51 Mad 763: 55 Mad L Jour 374: 1927 Mad W N 890. See also *Ranee Roushan Jahan* v. *Syed Enaet Hossein*, 1864 Gap Suth W R 83 (84): Beng L R Sup Vol App 1: Marsh 196: 2 Hay 293 [Compromise by mother as guardian of her daughter of suit after latter's majority not competent].

[2] *Ghulam Nabi* v. *Basheshar Mal*, 1922 Lah 407 (407): 4 Lah L Jour 298: 74 Ind Cas 603.

Note 20.

[1] *Virupaksappa* v. *Shidappa*, (1899) 23 Bom 620 (623): 1 Bom L R 82; *Mirali Rahimbhoy* v. *Rehmoobhoy*, (1891) 15 Bom 594 (597, 598); *Rakhal Muni Dasi* v. *Adwaita Prosad*, (1903) 30 Cal 613 (615): 7 Cal W N 419 (422); *Surendra Nath Ghose* v. *Hemangini Dasi*, (1907) 34 Cal 83 (89, 90) [When a suit lies and when review lies, discussed]; *Barhamdeo Prasad* v. *Banarsi Prasad*, (1906) 3 Cal L Jour 119 (130), (Do.); *Biku Halwai* v. *Mohesh Halwai*, (1908) 8 Cal L Jour 266 (271); *Eshan Chunder* v. *Nundamoni*, (1884) 10 Cal 357 (367); *Srinivasa Rao* v. *Venkatanarasamma*, 1926 Mad 119 (120): 22 Mad W N 629: 91 Ind Cas 727 [Can be reviewed also under S 151]; *Thiraj* v. *Kheausi*, 1924 Lah 427 (428): 22 Pun W R 1923: 77 Ind Cas 588 [Limitation for suit three years from attaining majority]; *Davuluru Vijaya Ramayya* v. *Davuluru Venkatasubba Rao*, (1916) 32 Ind Cas 881 (890): 30 Mad L Jour 465: 39 Mad 858 [Minor can avoid compromise decree in *toto* and not in part].

[2] *Rakhalmoni* v. *Adwaita Prosad*, (1908) 30 Cal 613 (615): 7 Cal W N 419 [Case under 1882 Code—Held no appeal lies]; *Biraj Mohini Dasi* v. *Srimati Chintamoni Dasi*, (1901) 5 Cal W N 877 (878), (Do.); *Kalavati* v. *Chedi Lal*, (1895) 17 All 531 (533): 1895 All W N 126 [Do., but objection entertained in appeal].

[3] *Arunachalam* v. *Murugappa*, (1889) 12 Mad 503 (504, 505); *Sivasubramania Pillai* v. *Rakkumuthu Moopan*, 1924 Mad 645 (646): 19 Mad L W 502: 1924 Mad W N 454: 79 Ind Cas 418; *Ishan Chandra Kundu* v. *Nilratan Adhikari*, 1923 Pat 375 (378): 4 Pat L Tim 311: 1 Pat L R 217: 1923 Pat H C C 184: 72 Ind Cas 1049: 2 Pat 538; *Basdeo* v. *Sheo Adhin*, (1898) 1 Oudh Cas 49 (50). See also *Jagabandhu* v. *Haladhar*, (1917) 41 Ind Cas 269 (271): 27 Cal L Jour 110.

[4] *Partab Singh* v. *Bhabuti Singh*, (1918) 21 Ind Cas 288 (291): 17 Cal W N 1165: 1913 Mad W N 785: 14 Mad L Tim 299: 25 Mad L Jour 492: 11 All L J 901: 16 Oudh Cas 247: 18 Cal L Jour 384: 15 Bom L R 1001: 35 All 487: 40 Ind App 182 P C; *Khajooroonissa, widow of Einayat Hossein* v. *Roshan Jehan*, (1876-77) 2 Cal 184 (196): 3 Ind App 291: 3 Sar 629: 26 Suth W R 36: 3 Suth 287 P C.

R. 8. [S. 447.] (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

Retirement of next friend.

(2) The application for the appointment of a new next friend shall be supported by *an* affidavit showing the fitness of the person proposed, and also that he has no interest adverse to *that of* the minor.

[1877—S. 447. Cf. R. 3, sub-R. (3) and R. 4, sub-Rr. (1) and (4) and Rr. 9 and 10 of this Order.]

Synopsis.

1. **Retirement of next friend.**

Subsequent appointment of guardian under Guardian and Wards Act—Suit to set aside decree on that ground—If lies. See Note 1, F.-N. (1).

1. **Retirement of next friend.**—The provisions of sub-R. (1) are mandatory. The mere fact that a guardian of the person and property of the minor plaintiff is appointed under the Guardian and Wards Act (VIII of 1890), during the pendency of the suit superseding the next friend, will not amount to a valid retirement in the absence of any application on the part of the next friend.[1]

O. 32, R. 9.

R. 9. [S. 446.] (1) *Where* the interest of the next friend of a minor is adverse to that of *the* minor or *where* he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or *where* he does not do his duty, or, *during the* pendency of the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, *and make such other order as to costs as it thinks fit.*

Removal of next friend.

(2) *Where* the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend,

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Order 32, Rule 8—Note 1.

[1] *Banarsi Prasad* v. *Ram Narain,* (1908) 30 All 105 (108, 109): 5 All L J 85: 1908 All W N 23: 8 Mad L Tim 128 [Suit to set aside decree owing to next friend having been superseded under Guardian and Wards Act—Not sustainable.

O. 32, R. 9, Notes 1—4.

the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, *and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.*

[1877—S. 446. Cf. R. 4, sub-Rr. (1) and (2) above and *see* R. 10 below.]

Synopsis.

1. **Legislative changes.**
2. **Where the next friend does not do his duty.**
3. **Adverse interest of next friend.**
4. **Appeal after the expiry of limitation period.**
5. **Non-appearance of next friend.**
6. **Death of next friend. See R. 10, infra.**

1. Legislative changes:—

1. The words "and make such order as to costs as it thinks fit" in sub-R. (1) have been newly added.
2. In sub-R. (2), the words "and shall thereupon appoint the applicant, etc.", are also new.

2. Where the next friend does not do his duty.—The next friend is liable to be removed under this rule if he fails to do his duty,[1] or if he ceases to reside in British India and leaves the country.[2] Where the Court finds that the next friend does not do his duty in relation to the suit, it should not permit him to prejudice the interest of the minor but should adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and the appointment of a new next friend, or in order that the minor plaintiff himself may, on coming of age, elect to proceed with the suit or withdraw from it.[3] Similarly, as seen in Note 2 to R. 7 if the next friend refuses improperly to assent to a compromise which is clearly beneficial to the minor steps may be taken to remove him.[4]

3. Adverse interest of next friend.—If the next friend has an interest adverse to that of the minor plaintiff or his personal interests will come into conflict with his duty towards the minor, he can be removed under this rule.[1]

4. Appeal after the expiry of limitation period.—Where a decree is passed against the minor and the interest of the minor requires that it should

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Order 32, Rule 9—Note 2.

[1] *Ram Kumar* v. *Kushalchand Ganeshdas*, 1928 Nag 166 (167): 107 Ind Cas 668; *Pitambar* v. *Ishan Chunder*, (1872) 18 Suth W R 169 (170).

[2] *Absa Beeni* v. *Maidinsa Rowther*, (1907) 17 Mad L Jour 179 (179); *Fatima* v. *Hassan Khan*, 1923 Lah 271 (272): 3 Lah 417: 69 Ind Cas 561 [Guardian leaving jurisdiction of the Court—Minor can appeal through another next friend—No formal order of removal necessary]. See also *Bikromajeet Mullo* v. *Court of Wards*, (1874) 21 Suth W R 312 (314).

[3] *Doraswamy Pillai* v. *Thungasami Pillai*, (1904) 27 Mad 377 (378): 14 Mad L Jour 159; *Court of Wards* v. *Nundun Singh*, (1871) 16 Suth W R 143 (146); *Peyton* v. *Bond*, (1828) 1 Sim 390, Ref; 5 Cal W N 434 (437); *Rahim* v. *Ahmed*, 1882 Pun Re No 125; *Rajessuree Debia* v. *Jogendro Nath*, (1875) 23 Suth W R 278 (280).

[4] See cases cited in Note 2, foot-note 8 to R 7, *ante*.

Note 3.

[1] *Bejoy Singh Hazari* v. *Mathuriya Debya*, (1920) 56 Ind Cas 97 (106) Cal; *Sri Maruthi Swamiar* v. *Subramaniya Iyer*, 1929 Mad 393 (394): 29 Mad L W 393: 118 Ind Cas 831; *Linga Reddi* v. *Chengalraya Reddi*, (1925) 48 Mad L Jour 417 (418): 21 Mad L W 659: 87 Ind Cas 42: 1925 Mad 734 [*Held*, father acting as next friend possesses no adverse interest and can compromise].

O. 32, R. 9, Notes 4—6.

be appealed against, but the guardian *ad litem* refrains from doing so, with a view to safeguard his own interest and for his private benefit, it has been held that the minor can, on attaining majority, be permitted to appeal and that the delay can be excused under S. 5 of the Limitation Act.[1]

5. **Non-appearance of next friend.**—Where the Court finds that the next friend is guilty of neglect and commits default in appearance, the proper course is to stay further proceedings and not to dismiss the suit for default.[1]

6. **Death of next friend.**—*See* R. 10, *infra.*

O.32, R.10, Note 1.

Stay of proceedings on removal, *etc.* of next friend.

R. **10.** [Ss. 448, 449.] (1) On the *retirement*, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

(2) *Where* the pleader of such minor omits, within *a* reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter *in* issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

[1877—S. 8. *See* Rr. 448 and 9 above.]

Synopsis.

1. **Removal or death of next friend.**

1. **Removal or death of next friend.**—The suit does not abate by reason of the death of the next friend. The Court should either appoint a new next friend or keep the suit pending till the minor attains majority. An order dismissing the suit is a nullity.[1] The same rule will apply where the minors are appellants and their guardian dies pending appeal.[2] Where, however, the decision is given in favour of the minor it is not, on the principle mentioned in Note 1 to O. 32, void by reason merely of the omission to appoint a fresh guardian for him.[3]

O.32, R.11.

Retirement, removal or death of guardian for the suit.

R. **11.** [Ss. 458, 459.] (1) *Where* the guardian for the suit *desires to retire or* does not do his duty, or *where* other sufficient ground *is* made to appear, the Court *may permit such guardian to retire or* may remove him, and may *make such* order *as to* costs *as it thinks fit.*

Note 4.

[1] *Cursandas* v. *Ladkavahoo,* (1896) 20 Bom 104 (109).

Note 5.

[1] *Kirit Narayan* v. *Chanchal Das,* 1921 Pat 103 (103): 6 Pat L Jour 317: 68 Ind Cas 736.

Order 32, Rule 10—Note 1.

[1] *Venkateswara Iyer* v. *Chebresri Madathil Ravunni Nair,* (1914) 25 Ind Cas 597 (597): 27 Mad L Jour 405: 1914 Mad W N 740.

[2] *Chundury Krishnayya* v. *Koripalli Raju,* (1916) 35 Ind Cas 154 (156): 31 Mad L Jour 39.

[3] *Ram Dayal* v. *Ajudhia Prasad,* (1906) 28 All 328 (330): 3 All L J 81: 1906 All W N 40.

(2) *Where* the guardian for the suit *retires*, dies or is removed by the Court *during the* pendency of the suit, the Court shall appoint a new guardian in his place.

[1877—Ss. 458 and 459.]

Synopsis.

1. Retirement of guardian.
2. Removal of guardian.
3. Appointment of new guardian on removal, retirement or death of guardian.
4. Costs.

Guardian unable to find funds—Permission to retire. See Note 1, F.-N. (1).

Notice to minor—For appointment of new guardian. See Note 3, Pt. (4).

1. **Retirement of guardian.**—When once a guardian has been duly appointed, he cannot retire except with the leave of the Court.[1] The Court is not bound to grant permission to retire whenever the guardian wishes to do so. It has a *discretion* to refuse the permission in a proper case.[2]

A mere statement on the part of the guardian that he declines to act has not the effect of removal unless sanctioned by the Court.[3]

2. **Removal of guardian.**—It is the duty of the Court to protect the interests of a minor. A guardian is appointed for that purpose and for that purpose alone. If the Court finds that the guardian is not acting properly, it would be its duty to remove him in the interests of the minor.[1]

3. **Appointment of new guardian on removal, retirement or death of guardian.**—It is the duty of the Court to appoint a new guardian where the guardian *ad litem* dies[1] or retires or is removed by the Court. Where the guardian of a minor respondent dies pending appeal a decree obtained ***against*** him without appointing a fresh guardian for him would, on general principles, be a nullity,[2] though a decree obtained in *favour* of the minor would not.[3] ***See*** Note 1 to O. 32.

It has been held by the High Court of Patna that no notice to minors is necessary before an order of fresh appointment is made.[4]

Order 32, Rule 11—Note 1.

[1] *Raja Babu* v. *Balmukund*, 1925 All 214 (215): 5 L R A Civ 692: 88 Ind Cas 828; *Narendar Singh* v. *Chatrapal Singh*, 1926 All 437 (438): 94 Ind Cas 840; *Jwala Dei* v. *Pirbhu*, (1891) 14 All 35 (37) 1891 All W N 192; *Lank Ramaswamy* v. *Lank Lakshmana*, (1911) 9 Ind Cas 435 (435): (1911) 1 Mad W N 98: 9 Mad L Tim 333 [Guardian unable to find funds —Permitted to retire]; *Narayandas Ramdas* v. *Saheb Husein*, (1888) 12 Bom 553 (555): 13 Ind Jur 109 (Do.).

[2] *Narendar Singh* v. *Chatrapal Singh*, 1926 All 437 (438): 94 Ind Cas 840 [Distinguishing, 1922 All 416]; *Thiagaraja Mudali* v. *Kothandapani Mudaliar*, 1928 Mad 980 (980): 113 Ind Cas 288.

[3] *Kuppusamy Iyengar* v. *Bavaswami Rao*, 1927 Mad 538 (541): 50 Mad 357: 38 Mad L Tim 197: 101 Ind Cas 899.

Note 2.

[1] *Ram Kishen* v. *Radhey Lal*, 1932 All 130 (132): 1931 All L J 1102: 136 Ind Cas 562. See also *Ramappa Naidu* v. *Sambooranathachi*, 1925 Mad 774 (775): 21 Mad L W 328: 87 Ind Cas 117; *Muhammad Abdul Satar Sahib* v. *Mekkena Kondappa Naidu*, (1909) 4 Ind Cas 1108 (1108): 5 Mad L Tim 162.

Note 3.

[1] *Chundury Krishnayya* v. *Karipalli Raju*, (1916) 35 Ind Cas 154 (156): 3 Mad L Jour 39; *Dattu* v. *Bhau Singh*, 1926 Nag 40 (41): 88 Ind Cas 235; *Baldeo Prasad* v. *Kusam Singh*, 1927 Nag 198 (199): 10 Nag L J 27: 101 Ind Cas 288: 23 Nag L R 146; *Mt Kisni* v. *Ghulaji Teli*, (1905) 1 Nag L R 128.

[2] *Jagar Nath* v. *East India Railway Co*, 1928 Pat 168 (168): 106 Ind Cas 540: 9 Pat L Tim 547. But see *Mt Phul Kuer* v. *Mt Najmunnissa*, 1930 Pat 473 (475): 11 Pat L Tim 361: 125 Ind Cas 779 [Submitted wrongly decided].

[3] *Gobardhan Sahi* v. *Mahabir Singh*, (1912) 14 Ind Cas 506 (507): 9 All L J 290: 34 All 321.

[4] *Sri Thakur Radha Krishna Gopal Lalji* v. *Babu Lakshimi Narain*, 1923 Pat 385 (386):

O. 32, R. 11, **Notes 3—4.**

The power of the Court under this sub-rule may be exercised at any time during the pendency of the suit and the same is not taken away by the fact that an order to try the suit *ex parte* has been previously passed.[5] The powers of the Court under this rule are exercisable by the Registrar under S. 105 of the Rangoon Small Cause Court Act (VII of 1920).

4. **Costs.**—S. 35, *ante* empowers the Court to make an order as to costs against any *party* to the suit, while this rule empowers the Court to pass an order for costs against the guardian *ad litem* who is *not a party* to the suit.[1] This rule cannot be construed so as to restrict the operation of S. 35 and, therefore, when the guardian *ad litem* is *himself a party* to the suit, the Court has power apart from the provisions of this rule to make an order for costs against him.[2]

Where the guardian takes upon himself to file an unnecessary and unsuccessful appeal on behalf of his ward,[3] or where he is guilty of gross misconduct in the conduct of the case,[4] the Court will order him to pay the costs.

O. 32, R. 12.

Course to be followed by minor plaintiff or applicant on *attaining majority.*

R. **12.** [Ss. 450 to 453.] (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending *shall*, on *attaining majority*, elect whether he will proceed with the suit or application.

(2) *Where* he elects to proceed with *the suit or application*, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus :—

"A. B., late a minor, by C. D., his next friend, but now *having attained majority.*"

(4) *Where* he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on re-payment of the costs incurred by the defendant or *opposite party* or which may have been paid by his next friend.

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2 Pat 273: 4 Pat L Tim 329: 1 Pat L R 86: 1923 Pat H C C 159: 71 Ind Cas 341.

[5] *Ayya Nadan* v. *Thanammal*, (1920) 55 Ind Cas 945 (947): 11 Mad L W 289: 1920 Mad W N 241: 27 Mad L Tim 171.

Note 4.

[1] *Sibt Ahmad* v. *Amina*, 1929 All 18 (25): 50 All 733: 26 All L J 705: 113 Ind Cas 434; *Narasimha Rau* v. *Lakshimipathi Rau*, (1881) 3 Mad 263 (264): 5 Ind Jur 634. See also *Ram Kishen* v. *Radhey Lal*, 1932 All 130 (133): 136 Ind Cas 562: 1931 All L J 1102 [Guardian applying at a late stage for retirement and appointment of fresh guardian—Costs allowed against him up to that stage].

[2] *Vemulapalli Krishnayya* v. *Katragadda Ramayya*, 1928 Mad 590 (591): 1928 Mad W N 318: 110 Ind Cas 310.

[3] *Shapurji* v. *Monosseh*, (1909) 4 Ind Cas 107 (108): 11 Bom L R 1011: 34 Bom 374.

[4] *Goolam Hossain* v. *Fatmabai*, (1884) 8 Bom 391 (394).

(5) Any application under *this rule* may be made *ex parte*: but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

[1877—Ss. 450 to 453.]

Synopsis.

1. **Scope of the rule.**
2. **Title to be corrected.**
3. **Minor defendant becoming a major during the pendency of suit.**

Non-compliance with rule—Ratification—Effect. See Note 1, Pt. (5).

Notice to quondam minor. See Note 1, Pt. (3).

1. **Scope of the rule.**—The rule is based on the substantive right of a person who has become *sui juris* to himself proceed with a suit instituted on his behalf during his minority.[1] The Court should as a matter of course give him leave to proceed or act in his own name and cannot ignore his application.[2] Where it is discovered in the course of the suit or appeal that the minor has attained majority the Court cannot dismiss the suit or appeal for default but should issue notice to the *quondam* minor to elect whether he intends to proceed with the suit or appeal.[3] If he elects to continue the suit his rights should be determined as on the date on which the suit was originally instituted.[4] Where the minor continues to be represented *bona fide* by a pleader even after his attaining majority and subsequently the *quondam* minor *ratifies* such acts, they cannot be treated as invalid on the ground of non-compliance with this rule.[5]

2. **Title to be corrected.**—It has been held by the High Court of Calcutta that the provision of this rule requiring the title of the suit to be corrected applies only where the suit *is pending* and not to proceedings taken after a final decree has been passed in the suit.[1]

3. **Minor defendant becoming a major during the pendency of suit.**—No provision has been made in the Code in respect of a minor *defendant* attaining majority during the pendency of the suit. The reason for the omission is that while a plaintiff on becoming a major can, as a *dominus litis*, elect either to go on, or put an end to, the litigation, the defendant has no such choice available to him and the suit must proceed against him notwithstanding he becomes a major. The minor defendant who comes of age may if he thinks fit come on the record and conduct the defence himself. If, however, he does not do so, he must be deemed to have elected to abide by the representation of the

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Order 32. Rule 12—Note 1.

[1] *Doorga Mohun* v. *Tahir Ally*, (1894) 22 Cal 270 (274); *Seshagiri Rao* v. *Tangaturi*, (1916) 32 Ind Cas 391 (392): 19 Mad L Tim 93: 39 Mad 1031; *Madhub Chunder* v. *Buktessurree*, (1869) 12 Suth W R 102 (102).

[2] *Ram Kumar* v. *Kushalchand Ganeshdas*, 1928 Nag 166 (168): 107 Ind Cas 668; *Doorga Mohun* v. *Tahir Ally*, (1895) 22 Cal 270 (274).

[3] *Ishar Singh* v. *Bakshish Singh*, 1929 Lah 555 (556): 30 Pun L R 272: 115 Ind Cas 851.

[4] *Lakhmichand Isardas* v. *Firm of Khushaldas Mangatram*, 1925 Sind 330 (340): 18 Sind L R 230: 88 Ind Cas 116.

[5] *Madha Prasad* v. *Ghanayalal*, 1930 Lah 603 (604).

Note 2.

[1] *Doorga Mohun Dass* v. *Tahir Ally*, (1895) 22 Cal 270 (274, 275).

O.32, R.12, Note 3.

quondam guardian and the judgment eventually passed will be binding upon him. The decree passed in such a case cannot be said to be a nullity or made without jurisdiction.[1]

O.32, R.13.

***Where* minor co-plaintiff *attaining majority* desires to repudiate suit.**

R. 13. [S. 454.] (1) *Where* a minor co-plaintiff on *attaining majority desires* to repudiate the suit, *he shall* apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

(2) Notice of the application shall be served on the next friend, *on any co-plaintiff and* on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

(4) *Where the applicant is* a necessary party to the suit, the Court may direct him to be made a defendant.

[*See* R. 12 above. Cf. O. 1, R. 10.]

O.32, R.14.

Unreasonable or improper suit.

R. 14. [S. 455.] (1) A minor on attaining majority may, if a sole plaintiff, apply *that a* suit instituted in his name by his next friend *be* dismissed *on the ground that it was* unreasonable or improper.

(2) Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, *or* make such other order as it thinks fit.

[*See* R. 12, sub-R. (4) above.]

Local Amendment.

MADRAS.

Add the following as R. 14-A:—

14-A. The appointment or discharge of a next friend or guardian for the suit of a minor in a matter pending before the High Court in its appellate juris-

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Note 3.

(1) *Lanka Sanyasi* v. *Lanka Yerran Naidu*, 1928 Mad 294 (294, 295): 51 Mad 763: 55 Mad L Jour 374: 1927 Mad W N 890; *Umra* v. *Barkat Ali*, 1928 Lah 371 (373): 110 Ind Cas 725; *Drupad Chandra Naskar* v. *Bindumoyi Dasi*, 1926 Cal 1053 (1054): 43 Cal L Jour 606: 97 Ind Cas 209 [Minor attaining majority during proceedings—Duty is on minor to apply for discharge of guardian *ad litem*]; *Radakrishnaswami* v. *Annamalai*, 1922 Mad 301 (302): 15 Mad L W 643: 31 Mad L Tim 122: 43 Mad L Jour 92: 1922 Mad W N 655: 70 Ind Cas 365; *Sundarama* v. *Pattabhirami*, (1917) 42 Ind Cas 421 (423): 1917 Mad W N 495: 6 Mad L W 272. See also *Pertab Narain Singh* v. *Trilokinath*, (1884) 11 Cal 186 (195, 196): 11 Ind App 197: 4 Sar 567: 8 Ind Jur 697: R & J 86 P C [*Obiter*: Minor defendant—Not properly represented—After majority, himself continuing proceedings and appeal—Bound by the decree].

O.32, R.14, Note 1.

diction, except in cases under appeal to the King in Council, shall be deemed to be a *quasi*-judicial act within the meaning of S. 128 [2] [i] of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications represented out of time shall be posted before a Judge for disposal.

Synopsis.

1. Scope of the rule.

1. **Scope of the rule.**—This rule deals with the procedure to be followed where a minor plaintiff becomes a major and considers that the suit instituted on his behalf was improper or unreasonable. The Court can in such cases order the next friend to pay the costs of all the parties if it is satisfied as to the impropriety or unreasonableness alleged. But no order as to costs can be made after the death of the next friend.[1]

O.32, R.15, Notes 1—2.

Application of *rules* to persons of unsound mind.

R. **15.** [S. 463.] The provisions contained in *rules* 1 *to* 14, *so far as they are applicable*, shall *extend to* persons adjudged to be of unsound mind *and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.*

[1877—S. 463.]

Synopsis.

1. Persons of unsound mind.
2. Mental infirmity.
3. Persons adjudged to be of unsound mind.
4. Persons of unsound mind not so adjudged.
5. Appointment of next friend or guardian for persons of unsound mind.
6. Decree against lunatic not represented, if can be challenged in execution proceedings.
7. Revision.

Finding as to infirmity—Nature of. See Note 4, Pt. (2).
Legislative changes. See Note 2, Pt. (1).
Lunacy Act—Cases under. See Note 3, F.-N. (1).
Lunatic—Definition of. See Note 3, F.-N. (1).

1. **Persons of unsound mind.**—The present rule places persons of unsound mind in the same position as that of minors and makes the provisions of Rr. 1 to 14 applicable to them. Hence a suit on behalf of a person of unsound mind has to be filed by a next friend and where the defendant is of unsound mind the Court has to appoint a guardian *ad litem*.[1]

2. **Mental infirmity.**—The corresponding section in the old Code was applicable only to persons of unsound mind. Now the scope of the rule has

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Order 32, Rule 14—Note 1.

[1] *Brij Mohan Dayal* v. *Sarap Narain*, (1918) 43 Ind Cas 257 (258): 20 Oudh Cas 300: 5 Oudh L J 106.

Order 32, Rule 15—Note 1.

[1] *Sunder Bai* v. *Basdeo Singh*, (1919) 50 Ind Cas 109 (112): 17 All L J 257. See also *Omrao Singh* v. *Prem Narain*, (1875) 24 Suth W R 264 (265) [Costs against next friend of a lunatic—Executable personally against the next friend who can recover from the estate].

O.32, R.15, Notes 2—4.

been widened by the addition of the words "or mental infirmity". The result is that even a person of weak mind can sue through a next friend provided the Court is satisfied that he is incapable of protecting his interests.[1] The High Court of Lahore[2] has held that the rule applies also to persons who are absolutely deaf and dumb.

The fact that a person of high position has renounced the world and become a *Sanyasi* neglecting worldly affairs would not, of itself, justify the Court in holding that by reason of unsoundness of mind and mental infirmity he was incapable of protecting his interests, within the meaning of this rule. But a persistent delusion of being haunted by demons, of persecution by imaginery voices and religious megalomania which makes him regard himself as destined to be in some sort a saviour of the world are symptoms which would justify the conclusion that the person is suffering from delusional insanity and incapable of managing his own affairs.[3]

3. **Persons adjudged to be of unsound mind.**—A person can be adjudged to be of unsound mind under the provisions of the Lunacy Act, IV of 1912. For cases under the Lunacy Act and evidence relating to lunacy, *see* the following cases.[1]

4. **Persons of unsound mind not so adjudged.**—The old section applied only to "persons of unsound mind adjudged to be so under Act XXXV of 1858 or under any other law for the time being in force." And even so, the decisions under the old Code held that the Court had inherent power to appoint a guardian for persons of unsound mind though not so adjudged.[1]

Note 2.

(1) *Krishna Bai* v. *Kesherao*, 1925 Nag 245 (248): 83 Ind Cas 253.

(2) *Nanak Chand* v. *Banarsi Das*, 1930 Lah 425 (428): 126 Ind Cas 579: 12 Lah L Jour 254. But see *Buggee Ram* v. *Buldeo Singh*, (1870) 2 N W P H C R 414 [Deaf and dumb person not incompetent to sue or to be sued].

(3) *Mahant Rai* v. *Mt Lachmina Kunwar*, 1927 P C 123 (126, 127): 101 Ind Cas 363: 1927 Mad W N 456: 26 Mad L W 94: 31 Cal W N 1087 P C.

Note 3.

(1) Cases under the Lunacy Act.—*Anupurna Bai* v. *Durgapa*, (1896) 20 Bom 150 (154); *Chelathammal* v. *Ammayappa*, (1908) 3 Ind Cas 388 (388): 32 Mad 253; *Trimbak Lal* v. *Hira Lal*, (1896) 20 Bom 659 (664); *Sitarama Charya* v. *Kesava Charya*, (1898) 21 Mad 402 (403); *Kanti Chunder* v. *Bisheswar*, (1898) 25 Cal 585 (591): 2 Cal W N 241 F B. Evidence relating to lunacy, see *Bishrup* v. *Nil Kanth*, (1915) 29 Ind Cas 595 (596): 13 All L J 562; *Sunder Bai* v. *Basdeo Singh*, (1919) 50 Ind Cas 109 (112): 17 All L J 257; *Cowasji Beramji*, In re, (1883) 7 Bom 15 (17): 7 Ind Jur 200; In re *Nagappa Chetty*, (1895) 18 Mad 472 (474, 475). See also *Bhoopendra Narain Roy* v. *Greesh Narain Roy*, (1881) 6 Cal 539 (541, 542): 8 C L R 30 [No sufficient reasons for appointment of guardian under Act XXXV of 1858]; *Mazaharuddin Khan* v. *Serajuddin Khan*, (1906) 4 Cal L Jour 115 (117 to 119) [Lunatic as defined in S 23 of Act XXXV of 1858—Unsound mind and incapacity to manage one's own affairs both needed—Latter without former—Remedy is only under S 6, cl (d) of Act IX of 1879, the Court of Wards Act]; *Sherman* v. *Schorn*, (1875) 24 Suth W R 124 (124) [Unsoundness of mind not sufficient]; *Baboo Gunga Pershad* v. *Musst Wooma*, (1872) 18 Suth W R 326 (326) [Clear grounds for supposing unsoundness of mind needed before issuing notice under Act XXXV of 1858]; *Hurshahoy Lall* v. *Bhuttan Singh*, (1873) 20 Suth W R 55 (55-56) [Enquiry needed]; *Kala Chand* v. *Sreemutty Shoolochana*, (1874) 22 Suth W R 33 (33) [Sufficiency of evidence as to lunacy—Requires careful consideration]; *Jaunda Kuar* v. *Court of Wards*, (1882) 4 All 159 (162, 163): 1881 All W N 172 [High Court of Allahabad—No original jurisdiction in respect of the persons and estates of lunatics who are natives of India in the provinces, under S 12 of Charter Act, but mofussil Courts have it by Act XXXV of 1858].

Note 4.

(1) *Nabukhan* v. *Sita*, (1897) 20 All 2 (5): 1897 All W N 155; *Venkatramana Rambhat* v. *Timappa Devappa*, (1892) 16 Bom 132 (134); *Kirparam* v. *Modia Dayalji*, (1895) 19 Bom 135 (137); *Rasik Lal Satta* v. *Bidhu Mukhi Dasi*, (1906). 33 Cal 1094 (1096, 1098): 10 Cal W N 719: 4 Cal L Jour 306; *Uma Sundari Dasi* v. *Ramjihaldar*, (1881) 7 Cal 242 (244): 9 Cal L Rep 13 (14); *Janba* v. *Joga*, 1905 Pun Re No 31: 54 Pun L R 1905: 36 Pun W R 1905; *Sheve The* v. *Tha Kado*, (1905-1906) 3 L B R 169 (172); *Lakhya Dasya* v. *Umakanto Chuckerbutty*, (1909) 2 Ind Cas 818 (819): 14 Cal W N 256; *Brojonath Muzoomdar* v. *Ram Komul Ghose*, 1864 Suth W R 268 (269); *Kadala Reddi* v. *Narisi*, (1901) 24 Mad 504 (508); *Nga Ku* v. *Nga Tha Hlaing*, 1905 U B R Civ Pro 30. But see *Tukaram* v. *Vithal*, (1889) 13 Bom 656 (659, 660); *Subbayya* v. *Buthayya*, (1883) 6 Mad 380 (381): 7 Ind Jur 414; *Muhammad Khalu Khan* v. *Saifulla Khan*, 1887 Pun Re No 91; *Kanwal Ram* v. *Bhawani Ram*, 1896 Pun Re No 13. See

O.32, R.15, Notes 4—7.

Now, the legislature has given effect to these decisions by providing also for cases of persons not so adjudged. If the defendant alleges that he is of unsound mind, and the plaintiff denies it the Court must hold a judicial enquiry and come to a finding as to whether he is *incapable of protecting his own interests.*[2] A finding in the lunacy proceedings that a person is not of unsound mind and incapable of managing his affairs does not preclude a finding under the present rule that the same person is *by reason of mental infirmity* incapable of protecting his interests in the suit.[3]

5. **Appointment of next friend or guardian for persons of unsound mind.**—As already seen, the Court is bound to appoint a next friend or guardian in the case of persons of unsound mind. If he is not represented by a guardian in the suit, the decree will be *null and void.*[1] *See also* Note 5 to R. 3. Where a manager of the property of the lunatic has been appointed under the Lunacy Act such person ought to be appointed as the next friend or guardian *ad litem* in the suit.[2] *See also* R. 4, sub-R. (2).

6. **Decree against lunatic not represented if can be challenged in execution proceedings.**—As already seen in Note 5 to R. 3, having regard to the decision of their Lordships of the Judicial Committee in *Rashid-un-nissa* v. *Muhammad Ismail*, [I.L.R. 31 All. 572, (P.C.)] an objection as to want of proper representation is not one falling under S. 47 of the Code and cannot be raised in execution proceedings inasmuch as the person not represented cannot be deemed to be a *party* to the suit.[1]

7. **Revision.**—In the undermentioned case[1] the High Court of Allahabad interfered under its inherent powers and ordered a stay of proceedings in the suit, pending decision in the lunacy proceedings against the defendant under the Lunacy Act.

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also *Sanku* v. *Puttamma*, (1890) 14 Mad 289 (292, 293) [Lunatic's property under Court of Wards—Latter suing as next friend—No declaration under Act XXXV of 1858—Suit validly instituted]. But see Ex parte *Cahen*, L R 10 Ch D 183, referred to in 13 Bom 656 (663) [Person not adjudged lunatic—Suit by next friend untenable].

(2) *Ram Sundar Saha* v. *Kali Narain Sen Choudhury*, 1922 Cal 86 (86, 87): 70 Ind Cas 307; *Kamini Kumar Talukdar* v. *Shib Sundari Devi*, (1921) 62 Ind Cas 770 (771) Cal; *Pransukhram* v. *Bai Ladkor*, (1899) 23 Bom 653 (656): 1 Bom L R 88; *Harnand Lal* v. *Chaturbhuj*, 1926 All 212 (214): 24 All L J 375: 93 Ind Cas 265: 48 All 356. See aso *Musst Moorut* v. *Baboo Dhurm*, (1865) 2 Suth W R Mis 7 (7) [Defendant not appearing and alleged insane—Court not to strike off the case but to make enquiry as to insanity under Act XXXV of 1858].

(3) *Chaturbhuj* v. *Har Nandan Lal*, 1928 All 108 (109, 110): 25 All L J 1082: 108 Ind Cas 141: 50 All 335.

Note 5.

(1) *Mootheluth Kanari* v. *Hari Shenoy*, (1916) 34 Ind Cas 428 (430): 3 Mad L W 301: 19 Mad L Tim 245: (1916) 1 Mad W N 273; *Hakimullah* v. *Nobin Chandra*, (1914) 24 Ind Cas 177 (178): 18 Cal W N 1329: 20 Cal L Jour 291; *Samaresh Chakravarthi* v. *Jalpaiguri Banking and Trading Corporation*, 1931 Cal 168 (169): 34 Cal W N 989: 130 Ind Cas 878. But see *Saw Lan* v. *Maung Lun*, (1914) 22 Ind Cas 673 (674) Rang.

(2) *Bai Divali* v. *Hiralal*, (1899) 23 Bom 403 (405, 406); *Chundrabati* v. *Monjilal*, (1896) 23 Cal 512 (514); *Asharfi Lal* v. *The Deputy Commissioner of Bara Banki*, (1895) 22 Cal 729 (734): 22 Ind App 90: 5 Mad L Jour 77: 6 Sar 590 P C; *Mussamat Jandi* v. *Kashi Ram*, 1899 Pun Re No 19; *Debi Charan* v. *Raghubar Dayal*, (1912) 16 Ind Cas 885 (885) Oudh; *Ghassee Khan* v. *Edred*, 1869 Pun Re No 89; *Kasim Mamooji* v. *K B Dutt*, (1915) 27 Ind Cas 459 (464): 19 Cal W N 45. See also *Gouree Nath* v. *Collector of Monghyr*, (1867) 7 Suth W R 5 (6, 7 and 8) [Property of lunatic under manager of Court of Wards—Act XXXV of 1858—Collector not to act as next friend but only the manager can so act—Award good if insane only after award was substantially finished—Alienations by manager good]; *Syud Mahomed Abdool Hye* v. *Lungut Singh*, (1874) 22 Suth W R 200 (201): 13 Beng L R App 14 [Lunatic under Court of Wards—Court of Wards can sue as next friend only during his lifetime—After his death, Court of Wards no right to sue, but legal representatives of the deceased lunatic alone can sue].

Note 6.

(1) *Kalipada* v. *Hari Mohan*, (1917) 35 Ind Cas 856 (857, 858): 24 Cal L Jour 375: 44 Cal 627: 21 Cal W N 1104; *Jang Bahadur Lal* v. *Paltu Tewari*, (1918) 45 Ind Cas 218 (219): 5 Oudh L J 67.

Note 7.

(1) *Harnand Lal* v. *Chaturbhuj*, 1926 All 212 (213): 24 All L J 375: 93 Ind Cas 285: 48 All 356.

Saving for **Princes and Chiefs.**

R. 16. [S. 464.] Nothing in *this Order shall apply* to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State, or being sued by direction of the Governor-General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

[1877—S. 464. *See* Ss. 85 to 87.]

Local Amendment.

MADRAS.

Add the following as R. 17:—

> "17. In suits relating to the person or property of a minor or other person under the superintendence of the Court of Wards the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance."

Synopsis.

1. **Scope of the rule.**

Bengal Court of Wards Act. See Note 1, Pt. (2) also R 7, Note 9, Pt. (1).

Ruling Prince—Not domiciled in British India—Minority. See Note 1, Pt. (1).

1. **Scope of the rule.**—A Ruling Prince not domiciled in British India is not governed by the Indian Majority Act and, therefore, is not a minor for the purpose of O. 32 even though he may be under 18 years of age. He can act through his manager under S. 85 of the Code.[1] For cases under the Bengal Court of Wards Act (IX of 1879), *see* the following decisions.[2]

ORDER XXXIII.

SUITS BY PAUPERS.

Suits may be *instituted in* **forma pauperis**

R. 1. [S. 401.] Subject to the following *provisions,* any suit may be *instituted*[2] by a pauper.

Explanation.—A person[10] is a "pauper" when he is not possessed of sufficient means[3] to enable him to pay the fee pres-

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Order 32, Rule 16—Note 1.

(1) *Ramesh Chandra Das* v. *Birendra Kishore Manikya,* 1925 Cal 513 (514): 29 Cal W N 287: 80 Ind Cas 100.

(2) *Biseswar Roy* v. *Shoshi Sikareswar,* (1889) 17 Cal 688 (693): 17 Ind App 5: 5 Sar 501 P C [Case under Bengal Court of Wards Act IX of 1879]; *Nakymo Dewani* v. *Jerang Dewan,* (1917) 37 Ind Cas 971 (975): 44 Cal 829, (Do.); *Bhoopendro Narain* v. *Baroda Prosad,* (1891) 18 Cal 500 (504), (Do.); *Dinesh Chunder* v. *Golam Mastapha,* (1889) 16 Cal 89 (94, 95), (Do.).

O. 33, R. 1, Note 1.

cribed by law for the plaint in such suit, or, where no such fee is prescribed,[4] when he is not entitled to property[5] worth one hundred rupees other than his necessary wearing-apparel[7] and the subject-matter of the suit.[6]

[1877—S. 401; 1859—S. 297.]

Local Amendment.

BOMBAY.

The following sentence shall be added to the "Explanation" to the R. 1 of O. 33, namely:—

> "In determining whether he is possessed of sufficient means the subject-matter of the suit shall be excluded."

Synopsis.

1. **Suits by paupers.**
2. **Suit may be "instituted" by a pauper.**
3. **"Is not possessed of sufficient means."**
4. **"Where no such fee is prescribed." See Note 3, above.**
5. **When he is not entitled to property.**
6. **Subject-matter of the suit, if can be considered in deciding sufficient means.**
7. **Necessary wearing apparel.**
8. **Minor plaintiff.**
9. **Pauper defendant.**
10. **"Person"—Meaning of.**
11. **Suit by executor, administrator or legal representative of pauper.**
12. **Suit by an official liquidator or official receiver.**
13. **Suit by Mutwalli, trustee or Shebait.**
14. **Married woman.**
15. **Leave to sue in forma pauperis for removal of trustees.**
16. **Award of costs and order for security for costs against pauper.**

Continuing a suit as a pauper. See Note 2, Pt. (1).

1. **Suit by Paupers.**—The State derives a revenue from Court-fee stamps, and a plaintiff suing in Courts is, under the Court Fees Act, 1870, bound to pay the Court-fee prescribed, *at the time of filing the plaint*. But in view of the fact that there may be persons who, by reason of their poverty, are unable to pay the fee, provisions have been enacted in this Order exempting such persons from paying, *in the first instance*, the Court-fee prescribed and allowing them to prosecute their suits in *forma pauperis*.[1] But if such pauper *succeeds* in the suit, the Government can recover the amount of Court-fee, as a first charge, from out of the subject-matter of the suit. (*See* R. 10.) And even if the plaintiff fails in the suit the Court should order him under R. 11, *infra* to pay the Court-fees due by him.

The executor of a deceased person is entitled to obtain a probate in *forma pauperis*, though the petition for grant of probate is not a *suit* in the ordinary sense unless *caveat* is entered.[2]

The provisions of this order are not applicable to proceedings under the Agra Tenancy Act (III of 1926) and the Madras Estates Land Act (I of 1908).

Order 33, Rule 1—Note 1.

(1) *Jotindro* v. *Dwarka*, (1893) 20 Cal 111 (115).

(2) In re *Will of Dawubai*, (1898) 18 Bom 237 (239).

O. 33, R. 1, Notes 2—3.

2. **Suit may be "instituted" by a pauper.**—It is competent to the Court to allow a suit not originally instituted in *forma pauperis* to be *continued* in *forma pauperis.*[1]

3. **"Is not possessed of sufficient means."**—The explanation to this rule furnishes two different tests to determine the pauperism of a person[1]:—

(1) Where a fee is *prescribed* by Law for the plaint in a suit, a person who is not *possessed of sufficient means* to enable him to pay such fee is a pauper for the purposes of that suit. Thus where a claim requires a Court-fee of Rs. 1,775 and the applicant is possessed of means to the extent of Rs. 1,600, only, he is a pauper for the purposes of that suit.[2]

(2) Where *no* such fee is prescribed[3] a person who is not *entitled to property* worth one hundred rupees *other than his necessary wearing apparel and the subject-matter of the suit,* is a pauper for the purposes of that suit.[3-a]

A person may be *entitled to property* but may nevertheless be not *possessed of sufficient means* to pay the Court-fee. It cannot, therefore, be assumed that everyone who is entitled to property, is possessed of means to the value of that property.[4] Where, though a person is entitled to property, yet if it is out of his reach and is thus not a realisable asset, or convertible into cash, it cannot be said that he is *possessed of sufficient means* to pay the Court-fee.[5] Thus a mere finding that the applicant is jointly interested in a property with another, but over which he has no dominion, would only show that he is entitled to property but not that he is *possessed of means.*[6]

The word "means" is, according to the High Court of Lahore intended to cover and include all forms of realisable assets, which can be converted into cash, and as such can be used for financing the litigation.[7] Thus, according to that Court, it would include an interest in a decree[8] or a mortgage[9] in

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Note 2.

(1) *Nirmul* v. *Dayal,* (1877) 2 Cal 130 (131); *Thompson* v. *Calcutta Tramway Co,* (1893) 20 Cal 319 (321); *Suresh Chandra Roy* v. *Showdamani,* 1938 Cal 238 (239): 36 Cal W N 1035: 56 Cal L Jour 148: 141 Ind Cas 135; *Revji* v. *Sakharam,* (1884) 8 Bom 615 (616); *Subbarao* v. *Venkataratnam,* 1929 Mad 828 (829): 30 Mad L W 637: 57 Mad L Jour 677: 58 Mad 43: 121 Ind Cas 857; *A L A C T Solayyappa Chetty* v. *R M M L Lakshmanan Chetty,* (1920) 54 Ind Cas 761 (763): 10 Mad L W 659: 38 Mad L Jour 146: 1920 Mad W N 277 [Assumed]. But see *Selina Seehan* v. *Hafez Muhammad Fateh Nashib,* 1932 Cal 685 (687): 36 Cal W N 567: 136 Ind Cas 520 [No provision exists for subsequent pauperism (obiter)].

Note 3.

(1) *Zillar Rahman* v. *Gazunffur Hossain,* (1915) 23 Ind Cas 974 (974) Cal.

(2) *Gangabai* v. *Shridhar,* (1906) 8 Bom L R 642 (644).

(3) For some such suits, *see* S 19 of the Court Fees Act, 1870.

(3-a) *Savitri Thakurain* v. *Secretary of State,* 1924 Pat 27 (32): 4 Pat L Tim 538: 2 Pat 879: 77 Ind Cas 611.

(4) *Dwarkabai* v. *Sakharam,* 1929 Nag 319 (321): 119 Ind Cas 697: 26 Nag L R 115.

(5) *Lal Chand* v. *Mt Pisto,* 1928 Lah 271 (271): 10 Lah L Jour 159: 29 Pun L R 229: 110 Ind Cas 122.

(6) *Kisan* v. *Manjai,* 1928 Nag 24 (27): 10 Nag L J 177: 105 Ind Cas 30; *Ma Bok* v. *Maung Sein,* 1930 Rang 324 (325): 128 Ind Cas 848 [Burmese Buddhist wife applying to sue as a pauper—Her only property a house jointly belonging to her and her husband—She cannot be said to be possessed of any definite share in the house]. See however, *Ram Prasad Singh* v. *Jag Thamba Prasad,* 1925 All 547 (547): 23 All L J 512: 6 L R A Civ 352: 88 Ind Cas 420: 47 All 872 [Where a minor son of a member of joint Hindu family sues to set aside an alienation by the father, and where there is share which had not been transferred at the time of the suit, the minor cannot sue as a pauper].

(7) *Lalchand* v. *Mt Pisto,* 1928 Lah 271 (271): 10 Lah L Jour 159: 29 Pun L R 229: 110 Ind Cas 122.

(8) *Lal Chand* v. *Mt Pisto,* 1928 Lah 271 (271): 10 Lah L Jour 159: 29 Pun L R 229: 110 Ind Cas 122.

(9) *Nand Kishore* v. *Prabhu,* 1929 Lah 321 (322).

favour of the petitioner. The High Court of Calcutta has, on the other hand, held that a debt which is due from a third person cannot be said to be "means" of which the applicant is possessed, and that the words "is not possessed of" must mean that the applicant has no actual control over it.[10] According to the Judicial Commissioner's Court of Nagpur, a person owning a non-transferable occupancy right which is not capable of conversion into money cannot be considered to be "possessed of means" for the purposes of this rule.[11]

Where the applicant himself is proved to be a pauper he is entitled to the benefit of the rule and the fact that he has co-heirs who are men of means is immaterial.[12]

The burden of proving that a person is a pauper within the meaning of the explanation lies on the applicant.[13]

4. **"Where no such fee is prescribed."**—*See* Note 3 above.

5. **When he is not entitled to property.**—*See* Note 3 above.

It has been held by the Judicial Commissioner's Court of Nagpur, that interest of the tenant of a non-transferable occupancy holding is not "property" but is more in the nature of an expectant claim under an inchoate right.[1]

6. **Subject-matter of the suit, if can be considered in deciding sufficient means.**—The words "other than his necessary wearing apparel or the subject-matter of the suit" do not qualify the first part of the explanation, but apply only to cases where no specific Court-fee is prescribed.[1] But this does not mean that in dealing with the first part of the explanation the subject-matter has always to be taken into consideration.[2] The subject-matter of the suit may, in some cases, be in the possession of the petitioner and in some cases, not. In the former class of cases it cannot be excluded from consideration merely on the ground that it forms the subject-matter of the suit.[3] Thus where *A* files a suit for certain ornaments in the possession of *B* and obtains a decree and *B* applies for leave to appeal in *forma pauperis*, the ornaments in her possession will have to be taken into account in determining whether she has sufficient means to pay the Court-fee on the

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(10) *Mabia* v. *Sheikh Satkari*, 1927 Cal 309 (310): 45 Cal L Jour 68: 100 Ind Cas 264.

(11) *Chandan Singh* v. *Laxman*, 1925 Nag 438 (439, 440): 21 Nag L R 98: 90 Ind Cas 949.

(12) *Mi Hla Min* v. *Mi Ket*, (1910) 8 Ind Cas 474 (475): (1910) 1 U B R 26.

(13) *Sheik Badal* v. *Abdul Rahim*, 1926 Nag 273 (273): 92 Ind Cas 785; *Mt Gunia Bai* v. *Shankar Rao*, 1927 Nag 340 (341): 104 Ind Cas 198.

Note 5.

(1) *Chandan Singh* v. *Laxman*, 1925 Nag 438 (439, 440): 21 Nag L R 98: 90 Ind Cas 949.

Note 6.

(1) *Krishnabai Janardan* v. *Manohar Sundarrao*, (1906) 30 Bom 593 (597): 8 Bom L R 671; *Mianji* v. *Sitaram*, 1924 Nag 105 (108): 7 Nag L J 91: 81 Ind Cas 648; *Sheikh Badal* v. *Abdul Rahim*, 1926 Nag 273 (273): 92 Ind Cas 785; In re *Mahalakshimi Ammal*, 1926 Mad 567 (568): 50 Mad L Jour 114: 23 Mad L W 427: 94 Ind Cas 337; *Provash Chandra Lahiri* v. *Municipal Commissioner*, 1930 Cal 147 (149): 34 Cal W N 188: 57 Cal 980: 125 Ind Cas 102. But see *Sm Mabia Khatum* v. *Sheikh Satkari*, 1927 Cal 309 (310): 45 Cal L Jour 68: 100 Ind Cas 264 [Ornaments in petitioner's possession was treated as being in the nature of wearing apparel and was excluded in determining whether *she was possessed of sufficient means*—This has been dissented from in 1928 Lah 271 (271)].

(2) *Provash Chandra Lahiri* v. *Municipal Commissioner*, 1930 Cal 147 (149, 150): 34 Cal W N 188: 57 Cal 980: 125 Ind Cas 102.

(3) *Dwarkabai* v. *Sakharam*, 1929 Nag 319 (321): 119 Ind Cas 697: 26 Nag L R 115; *Kapil Deo Singh* v. *Ram Rekha Singh*, (1910) 8 Ind Cas 484 (484): 7 All L J 1191: 33 All 237 [Claim for redemption of mortgage—Applicant able to raise money upon security of equity of redemption is not a pauper]. But see *Shaikh Mohamad Mubarik* v. *Shaikh Fazal Ilahi*, 1882 Pun Re No 99.

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O. 33, R. 1,
Notes
6—8.

memorandum of appeal.[4] In the latter class of cases the subject-matter of the suit cannot be taken into consideration. The reason is that the word "possession" sufficiently indicates that any amount which forms the subject-matter of the suit and is not in the actual possession of the petitioner, cannot be taken into account for the purpose of determining his means.[5]

Now suppose that, in answer to an application by a plaintiff to sue as a pauper, the defendant admits a part of the liability and produces or offers to produce into Court the property or the amount in discharge of such liability, can it be considered in determining whether the plaintiff is a pauper or not? The High Courts of Bombay[6] and Calcutta[7] have held that, in such a case, the time when the application for leave to sue as a pauper, is *made* is the point of time which the Court has to consider in determining whether the petitioner is a pauper. The High Court of Madras has, on the other hand, held that if *at the time of the hearing* of the application he has become possessed of sufficient means, the Court has no jurisdiction to grant him leave to sue as a pauper.[8] It has also been held by that High Court in the undermentioned case[9] that where the plaintiff gets a decree in the lower Court, but wants to appeal as a pauper for a higher amount, the amount deposited in Court by the judgment-debtor to the credit of the plaintiff in pursuance of the decree should be taken into consideration in determining whether he should be allowed to appeal as a pauper.

7. **Necessary wearing apparel.**—According to the High Court of Calcutta, ornaments which a woman ordinarily wears should be regarded as being in the nature of wearing apparel.[1] The High Court of Lahore appears to dissent from the above view.[2]

8. **Minor plaintiff.**—Where an application is filed on behalf of a minor for leave to sue in *forma pauperis* the circumstances of the next friend should not be considered; the fact that the next friend is possessed of sufficient means will not disentitle a minor plaintiff from suing in *forma pauperis.*[1]

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(4) *Dwarkabai* v. *Sakharam,* 1929 Nag 319 (321): 119 Ind Cas 697: 26 Nag L R 115.

(5) *Provash Chandar Lahiri* v. *Municipal Commissioner of Howrah,* 1930 Cal 147 (149-150): 34 Cal W N 188: 57 Cal 980: 125 Ind Cas 102; *Vedantah* v. *Perindevamma,* (1879) 8 Mad 249 (250) [Person who applies for permission to sue as a pauper is not bound to try and raise funds by mortgaging his claim]; *Azmat Ali* v. *Kifayathullah,* 1892 All W N 11 (12), (Do.); *Achalsingh* v. *Seth Jiwandas,* 1924 Nag 44 (46): 19 Nag L R 165: 75 Ind Cas 993 [In a suit to redeem a mortgage of property of which the plaintiff is not in possession, the right to redeem the property is the subject-matter of the suit].

(6) *Bai Balagavri* v. *Motilal,* 1923 Bom 247 (248): 25 Bom L R 199: 72 Ind Cas 224: 47 Bom 523; *Fatma Bai* v. *Dossabhoy Umrigar,* (1910) 5 Ind Cas 688 (689): 12 Bom L R 102: 34 Bom 638. But see *Dwarka Nath* v. *Madhavarav,* (1886) 10 Bom 207 (210) [Dissented from in 5 Ind Cas 688 and 1923 Bom 247].

(7) *Provash Chandra Lahiri* v. *The Chairman of the Municipal Commissioner of Howrah,* 1930 Cal 147 (149, 150): 34 Cal W N 188: 57 Cal 980: 125 Ind Cas 102.

(8) *Mudappa* v. *Rudramma,* 1921 Mad 97 (93): 13 Mad L W 76: 61 Ind Cas 958.

(9) In re *Mahalakshmi Ammal,* 1926 Mad 567 (568): 50 Mad L Jour 114: 23 Mad L W 427: 94 Ind Cas 387.

Note 7.

(1) *Sm Mabia Khatun* v. *Sheikh Satkari,* 1927 Cal 309 (310): 45 Cal L Jour 68: 100 Ind Cas 264.

(2) *Lalchand* v. *Mt Pisto,* 1928 Lah 271 (271): 10 Lah L Jour 159: 29 Pun L R 229: 110 Ind Cas 122.

Note 8.

(1) *Venkatanarasayya* v. *Ackemma,* (1881) 3 Mad 3 (4); *Nemichand* v. *Keralchand,* 1924 Bom 440 (441): 26 Bom L R 380: 80 Ind Cas 748; *Nanibala Dassya* v. *Jamini Sundari,* 1923 Cal 656 (656): 37 Cal L Jour 394: 70 Ind Cas 919; *Sharan Singh* v. *Mt Man Kuer,* 1929 Lah 716 (747): 121 Ind Cas 381; *Mussammat Amir [illegible]* v *Secretary of State,* (1920) 58 Ind Cas 445 (446): 23 Cal W N 955. But see *Chando Mal* v. *Tajulbai,* 1933 Sind 82 (84): 26 Sind L R 491 [Mears of next friend considered and minors petition for leave refused. Revision disallowed].

O. 33, R. 1, Notes 9—11.

Nor will the fact that such next friend is himself a pauper disentitle him from suing on behalf of the minor in *forma pauperis.*[2]

9. **Pauper defendant.**—It has been held by the High Court of Calcutta in the undermentioned cases[1] that a defendant may, under the inherent powers of the Court, be allowed to defend a suit in *forma pauperis,* although there is no provision to that effect in the Code. But the Chief Court of Punjab has taken a contrary view.[2] The High Court of Rangoon also has taken a view contrary to that of the Calcutta High Court. It has further held that, in any case, the Court has no inherent power to allow a party to prosecute in *forma pauperis* an application for *review* of an order passed in appeal.[3]

10. **"Person"—Meaning of.**—The word "person" occurring in the explanation to this rule has not been defined in this Code. According to the definition given in the General Clauses Act (X of 1897) it includes not only individual human beings but also companies or associations or bodies of individuals whether incorporated or not. It has, therefore, been held by the High Court of Madras that the word "person" indicates a juridical person.[1] But the High Court of Rangoon has, however, held that it means a natural person, that is, a human being and that it does not include a juridical person.[2] Even according to this view, a firm can be considered to be a person. Thus, where a firm brings a suit for damages and afterwards becomes insolvent and the Official Assignee refuses to prosecute the suit and the suit is dismissed, the firm can be granted leave to appeal as a pauper.[3]

11. **Suit by executor, administrator or legal representative of pauper.**—The High Court of Madras has held that an executor or an administrator or the legal representative of a deceased person is entitled to institute or maintain or continue a suit in *forma pauperis* in his representative capacity, provided he has not come into possession of sufficient means out of the estate of the deceased.[1] It proceeds on the view that the plaintiff in his private capacity and in the capacity of the representative are two different persons in the eye of the law. The High Courts of Bombay and Calcutta have taken a contrary view that he could not do so, unless and until it was shown that he himself is a pauper.[2] The above view is based on the ground that the provisions of

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(2) *Golaupmonee* v. *Prosonnomoye,* (1873) 11 Beng L R 373.

Note 9.

(1) *Doorga Churn* v. *Nittokally,* (1880) 5 Cal 819 (820): 6 Cal L Rep 120; *Hukum Chand Boid* v. *Kamalanand Singh,* (1905) 33 Cal 927 (932): 3 Cal L Jour 67; *Nand Kishore Singh* v. *Ram Golam Sahu,* (1912) 18 Ind Cas 207 (208): 40 Cal 955: 16 Cal L Jour 508.

(2) *Coates* v. *Secretary of State,* 1905 Pun Re No 54: 1905 Pun L R 121: 1905 Pun W R 66.

(3) *Ma Nyein Yone* v. *P D Patel,* 1930 Rang 280 (281): 8 Rang 423: 127 Ind Cas 470.

Note 10.

(1) *Sivagami* v. *Gopalaswamy,* 1925 Mad 765 (766): 87 Ind Cas 372: 48 Mad L Jour 390: 1925 Mad W N 176: 22 Mad L W 586.

(2) *S M Mitra* v. *Corporation of the Royal Exchange Assurance,* 1930 Rang 259 (262, 263, 264): 126 Ind Cas 650.

(3) *D K Cassim & Sons* v. *Abdul Rahman,* 1930 Rang 272 (272): 127 Ind Cas 175.

Note 11.

(1) *Ammakannammal* v. *V K Damodara Mudaliar,* 1928 Mad 66 (67, 68): 109 Ind Cas 258; *Sivagami* v. *Gopalaswamy,* 1925 Mad 765 (766-767): 87 Ind Cas 372: 48 Mad L Jour 390: 1925 Mad W N 176: 22 Mad L W 586; *In re* Bill, (1884) 7 Mad 390 (391); *Nanack Chand* v. *Harnam Singh,* 1930 Lah 735 (736): 125 Ind Cas 611. See also *Bhagbut Doss* v. *Bulorum Doss,* (1865) 3 Suth W R Mis Rul 20 (20). But see In re *Radhakrishna Iyer,* 1925 Mad 819 (819): 88 Ind Cas 91: 21 Mad L W 550.

(2) *Manaji Rajuji* v. *Khandoo Balu,* (1911) 36 Bom 279 (281, 282): 13 Bom L R 577: 11 Ind Cas 724. *See also* In the matter of the will of *Dawubai,* (1894) 18 Bom 237 (239); *Lalit Mohan Mandal* v. *Satish Chandra Das,* (1906) 33 Cal 1163 (1168): 4 Cal L Jour 234.

O. 33, R. 1, Notes 11—14.

this Code "seem to negative the idea of anybody but an actual pauper, a real pauper, a man without means," being permitted to maintain a suit in *forma pauperis*. The decisions of the High Court of Lahore are conflicting.[3]

See also Note 10 to O. 22, R. 1 and the undermentioned case.[4]

12. **Suit by an official liquidator or Official Receiver.**—Applying the definition of the word "person" as mentioned in Note 10, *ante,* the High Court of Madras has held that the Official Liquidator of a company, though not a pauper himself, may file a suit in *forma pauperis* on behalf of a pauper company.[1] The High Court of Allahabad has applied the same principle to the case of an Official Receiver of the estate of an insolvent.[2] A contrary view has been taken by the High Court of Rangoon that the word "person" in this rule does not include a juridical person such as a receiver.[3] *See also* Note 10, *ante.* It is submitted that this view of the High Court of Rangoon is not correct.

13. **Suit by Mutwalli, trustee or Shebait.**—As has already been observed in Note 11, *ante,* the character of a person suing in a *representative* character must be kept distinct from his *personal* capacity. Thus, when a plaintiff sues in a representative character, for example as a *mutwalli,* trustee or a *shebait,* unless he is in possession of property belonging to the *wakf* estate or trust or the idol for whom he sues, sufficient to enable him to pay the Court-fee, he may be allowed to sue as a pauper, even if it is shown that he has sufficient personal property of his own.[1]

Where a *shebait* brought a suit for recovery of endowed property against one who claimed to be the alienee of that property and against three of his *co-shebaits* who purported to have alienated it and the plaintiff did not either in his personal capacity or in the capacity of a *shebait* possess sufficient means to pay the Court-fee, it was held that the mere fact that the *shebait*-defendants possessed sufficient properties belonging to the idol, did not disentitle him from suing as a pauper.[2]

14. **Married woman.**—The fact that the applicant's husband has got sufficient property to pay the Court-fees due on her plaint is not a ground for refusing the application of a pauper married woman for permission to sue as a pauper.[1]

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(3) *Nanak Chand* v. *Harnam Singh,* 1930 Lah 785 (786): 125 Ind Cas 611 [Can sue as a pauper]; *Sher Singh* v. *Autar Singh,* 1927 Lah 665 (665): 104 Ind Cas 847 [Cannot continue suit as a pauper].

(4) *Akbar Husain* v. *Alia Bibi,* (1903) 25 All 137 (138): 1902 All W N 206 [Decree in favour of pauper in ignorance of his death—Appeal by defendant against Legal Representative—Remand and decree on retrial—Defendant cannot object that plaintiff is not entitled to sue as a pauper].

Note 12.

(1) *Perumal* v. *Thirumalarayapuram Nidhi, Ltd,* (1917) 45 Ind Cas 164 (166): 41 Mad 624: 34 Mad L Jour 421.

(2) *Mohammad Zaki* v. *The Municipal Board of Mainpuri,* (1918) 47 Ind Cas 577 (577): 16 All L J 440.

(3) *S M Mitra* v. *Corporation of the Royal Exchange Assurance,* 1930 Rang 259 (261, 263): 126 Ind Cas 650.

Note 13.

(1) *Mabia* v. *Sheikh Satkari,* 1927 Cal 309 (310): 45 Cal L Jour 68: 100 Ind Cas 264.

(2) *Nanda Lal* v. *Dwarka Nath,* (1911) 11 Ind Cas 892 (892).

Note 14.

(1) *Sharifunnessa* v. *Nazni Khandun,* (1918) 44 Ind Cas 723 (723): 3 Pat L Jour 178.

15. **Leave to sue in forma pauperis for removal of trustees.**—S. 402 of the old Code imposed certain restrictions on the right to sue as a pauper. It was held under that section that it did not preclude a person, who had obtained leave to sue under S. 18 of the Religious Endowments Act (XX of 1863) for the removal of the trustees of a temple, from being permitted to sue in *forma pauperis.*[1] The said section has now been omitted in this Code.

16. **Award of costs and order for security for costs against pauper.**—It has been held by the High Court of Bombay that the Court cannot pass an order for costs against the pauper in interlocutory applications in the suit.[1] The High Court of Rangoon has, on the other hand, held that the Court has power to pass an order for costs against the pauper in such cases.[2]

A woman who has been permitted to sue as a pauper cannot be asked to furnish security for costs under O. 25, R. 1.[3] The reason is that it would render nugatory the order permitting her to sue as a pauper.

An order for security for costs passed in a suit ceases to operate as regards the antecedent costs, if leave is given to continue the suit as a pauper, before the period for furnishing the security has expired.[4]

See also Note 10 to O. 25, R. 1.

Contents of application.

R. 2. [S. 403.] *Every* application for permission to sue *as* a pauper shall contain the particulars required in regard to plaints in suits: a schedule of any moveable or immoveable property belonging to the *applicant,* with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of *pleadings.*

[1877—S. 403; 1859—Ss. 299, 300.]

Synopsis.

1. **Contents of application.**
2. **Verification.**
3. **Cause of action.—See Notes to Rule 5.**
4. **Death of applicant. See O. 22, R. 1, Note 10.**

1. **Contents of application.**—Application for leave to sue in *forma pauperis* should set forth with the utmost good-faith a schedule of all the moveable and immoveable property belonging to the applicant, with the estimated value thereof.[1] Where the applicant fails to do so the application is not properly framed and is liable to be rejected under Cl. (*a*) of R. 5, *infra.*[2]

Note 15.

[1] *Gurusami* v. *Krishnasami,* (1901) 24 Mad 419 (421).

Note 16.

[1] *Ambaji* v. *Hanumantrao,* 1922 Bom 385 (385): 24 Bom L R 924: 47 Bom 104: 69 Ind Cas 207 [Application for amendment of plaint].

[2] *Lin Pin Sin* v. *Eng Wan Hack,* 1928 Rang 306 (307): 6 Rang 561 [Costs of adjournment].

[3] *Ma Gun* v. *Tha Him,* (1916) 36 Ind Cas 320 (320): 8 L B R 337: 10 Bur L Tim 105.

[4] *Bai Laxmi* v. *Harjivan Nathu,* (1911) 12 Ind Cas 588 (589): 36 Bom 415: 13 Bom L R 955.

Order 33, Rule 2—Note 1.

[1] *Durga Prasad* v. *Srinivas Sureka,* 1930 Pat 368 (369): 128 Ind Cas 398: 11 Pat L Tim 567.

[2] *Durga Prasad* v. *Srinivasa Sureka,* 1930 Pat 368 (369): 128 Ind Cas 398: 11 Pat L Tim 567; *Sheonarain Lal* v. *Mt Munaqqa,* 1923 Oudh 118 (119): 9 Oudh L Jour 610: 74 Ind Cas 344; *Muhammad Salamat-Ul-lah* v. *Ram Jiwan,* (1908)

O. 33, R. 2, Notes 1—4.

It does not, however, follow that this rule is to be meticulously interpreted against the petitioner. The Code is not designed as a trap which a litigant must try to avoid by all means in his power.[3] The object of the rule being to help the Government in ascertaining whether the applicant is in a position to pay the Court-fee payable on the plaint, the Court should not throw out the application unless the omission was an act of bad faith.[4] Thus the application should not be rejected merely on the ground that an item of property has been omitted to be given in the schedule[5] or that the schedule has not been signed and verified by the applicant,[6] or that the applicant was unable to name all the persons in possession of the property left by the deceased in an administration suit.[6-a] The proper course in such cases will be to return the application for amendment,[7] and on such amendment being made, the presentation will be deemed to be a proper presentation as from the date of the original presentation.[7-a]

Where a plaint is filed with a stamp duty and registered as a suit and it is subsequently found that additional Court-fee is required and the plaintiff, thereupon, applies to continue the suit in *forma pauperis,* the fact that the application is not in the form prescribed by this rule will not necessarily entail the dismissal of the application.[8]

2. **Verification.**—Where the verification of the statements made in the application is not made in accordance with the provisions of O. VI, R. 15, the Court is bound to reject the application under R. 5, *infra.*[1] But where the applicant did not verify the contents of the petition at the foot of the petition, but did so by a separate affidavit in which the statements contained in the several paragraphs in the application were said to be true, it was held that the affidavit might be treated as part of the application.[2] The *schedule of property* need not, however, be signed and verified by the applicant, and in any case, the omission to do so will not, as has been seen in Note 1 above, entail the rejection of the application.

3. **Cause of action.**—*See* Notes to R. 5.

4. **Death of applicant.**—*See* O. 22, R. 1, Note 10.

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11 Oudh Cas 19 (20) [Following 1895 All W N 84—Case of appeal]; *Kali Kumar Sen* v. *Burjorjee,* (1913) 20 Ind Cas 640 (641): 6 Bur L Tim 141: 7 L B R 60.

(3) *Praphul* v. *Sham Lal,* 1932 Lah 328 (329, 330): 138 Ind Cas 335.

(4) *Mt Chamela Kuar* v. *Pursottam Dass,* 1932 Pat 308 (309): 13 Pat L Tim 538.

(5) *Kuppusamy Iyer* v. *Muthuswami,* (1915) 27 Ind Cas 891 (892): 1 Mad L W 1068: 1915 Mad W N 81; *Jhanda Mal* v. *Dit Mal,* 1887 Pun Re No 27; *Birj Ballab Lallji* v. *Beney Krishna,* 1928 Pat 28 (29): 8 Pat L Tim 794: 194 Ind Cas 364; *Mt Chamela Kuar* v. *Pursottam Dass,* 1932 Pat 308: 13 Pat L Tim 538.

(6) *Amar Nath* v. *Rattan Chand Kapur,* 1932 Lah 548 (549): 138 Ind Cas 652: 33 Pun L R 738 [There is no provision which requires the *schedule* to the application to sue in *forma pauperis* to be verified].

(6-a) *Praphul Dev* v. *Sham Lal,* 1932 Lah 328 (330): 138 Ind Cas 335.

(7) *See* cases cited in foot-note (6) above.

(7-a) *Vora* v. *Japan Cotton Trading Co, Ltd,* 1931 Bom 47 (50): 32 Bom L R 1343 [Application in time—Verification and signature after limitation].

(8) *Subbarao* v. *Venkataratnam,* 1929 Mad 828 (829): 30 Mad L W 637: 57 Mad L Jour 677: 53 Mad 43: 121 Ind Cas 857.

Note 2.

(1) *Narsiah* v. *Vaithilingam Thingandar,* (1912) 16 Ind Cas 83 (85): 5 Bur L Tim 123: 6 L B R 117.

(2) *Pirji Ashraf Ali* v. *Rameshwar Nath,* 1923 Lah 684 (684): 77 Ind Cas 908 [6 L B R 117 to the contrary not followed].

Presentation of application.

R. 3. [S. 404.] Notwithstanding anything contained in *these rules*, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by *an* authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

[1877—S. 404; 1859—S. 301.]

Synopsis.

1. **Presentation to Court.**
2. **Presentation by applicant in person.**
3. **Purdanashin woman.**
4. **Authorised agent.**
5. **Presentation of pauper appeals. See Notes to O. 44, R. 1.**
6. **Limitation. See Notes to R. 7, infra.**

1. **Presentation to Court.**—The insistence in the rule is on the words "in person" and not on the words "to the Court" as meaning "to the judge himself".[1] Therefore where the application is presented to the *Sheristadar* of the Court[2] or to an officer of the Court who places it before the judge and the petitioner appears before the judge, the presentation will be valid.[3]

2. **Presentation by applicant in person.**—This rule is mandatory as regards the requirement as to the presentation in *person,* and a Court is bound to reject under R. 5 an application for leave to sue as a pauper, if it is not presented by the applicant in person, except in cases where he is exempted from appearing in Court.[1] Where one only out of several applicants presents the application in person, the Court should reject the application as against those persons who have not joined in presenting it in person.[2] Where, however, the law, by reason of the fact that personal appearance in Courts is impossible either by reason of the party being a company, or an infant, or a lunatic, allows an appearance by somebody else, an appearance by such person would be sufficient compliance with the law.[3]

The provisions of this rule as regards presentation in person do not apply to a case where a plaint, returned by one Court, is presented to another Court,[4] or where a plaintiff is allowed to *continue* his suit as a pauper.[5]

Order 33, Rule 3—Note 1.

[1] *Chidambaram* v. *Kadar Mohiddeen,* 1924 Mad 901 (902): 47 Mad L Jour 622: 20 Mad L W 622: 1924 Mad W N 749: 48 Mad 785: 84 Ind Cas 968.

[2] *Ibid.*

[3] *Jairam* v. *Motilal,* 1921 Nag 106 (107): 58 Ind Cas 961 (963): 17 Nag L R 22.

Note 2.

[1] *Devgir Gurru Sambayir, Ex Parte,* (1866-67) 4 Bom H C R 91.

[2] *Burgess* v. *Sidden,* (1887) 10 Mad 198 (194); *Shammim-Ud-Din* v. *Amir Hussain,* (1909) 4 Ind Cas 777 (780): 12 Oudh Cas 381.

[3] *Perumal* v. *Thirumalarayapuram Nidhi, Ltd,* (1918) 45 Ind Cas 164 (165): 34 Mad L Jour 421: 41 Mad 624; *Jaindi* v. *Kanshi Ram,* 1899 Pun Re No 19 [Presentation of appeal in *forma pauperis* by manager appointed under Act XXXV of 1858 is proper].

[4] *Papathi Ammal* v. *Karuppiah Pillai,* 1931 Mad 418: 1930 Mad W N 582: 132 Ind Cas 296.

[5] *Subba Rao* v. *Venkataratnam,* 1929 Mad 828 (829): 30 Mad L W 637: 57 Mad L Jour 677: 53 Mad 43: 121 Ind Cas 857; *Papathi*

O. 33, R. 3, Notes 3—6.

3. **Purdanashin woman.**—A woman who is exempted under S. 132 from personal appearance in Court, (*e.g.,*) a Purdanashin lady, is entitled to present an application for leave to sue as a pauper through an authorised Agent.[1]

4. **Authorised Agent.**—The term "authorised agent" does not mean the same thing as the expression "recognised agent" in O. 3, R. 2, *ante.*[1] A pleader may be a duly authorised agent within the meaning of this rule.[2] But he must be *specially* authorised to present an application under this order and must fulfil the other conditions detailed in this rule.[3]

5. **Presentation of pauper appeals.**—*See* Notes to O. 44, R. 1.

6. **Limitation.**—*See* Notes to R. 7, *infra.*

O. 33, R. 4, Note 1.

Examination of applicant.

R. 4. [S. 406.] (1) *Where* the application is in proper form and duly presented, the *Court* may, if *it* thinks fit, examine the *applicant,* or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

If presented by agent, Court may order applicant to be examined by commission.

(2) *Where* the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

[1877—S. 406; 1859—Ss. 302, 304.]

Synopsis.

1. **Scope of the rule.**
2. **Right to cross-examine applicant.**

1. **Scope of the rule.**—This rule empowers the Court to examine the applicant when the application is duly presented, not only with reference to the question of his *pauperism,* but also with reference to the *merits* of the claim in order to ascertain whether the allegations in the petition do or do not show a cause of action.[1] An enquiry under this rule should be made by the judge himself.[2]

Ammal v. *Karuppiah Pillai,* 1931 Mad 418 (419): 1930 Mad W N 582: 132 Ind Cas 296.

Note 3.

(1) *Wazir-Un-Nissa* v. *Ilahi Bakhsh,* (1902) 24 All 172 (178): 1901 All W N 213 [A case of pauper appeal]; *Mt Jaindi* v. *Kashi Ram,* 1899 Pun Re No 19 [Katri woman is exempt from personal appearance]; *Bibi Sogra* v. *Radha Kishen,* 1929 Pat 27 (28): 7 Pat 825: 10 Pat L Tim 46: 114 Ind Cas 210.

Note 4.

(1) *Mt Bibi Sogra* v. *Radha Kishun,* 1929 Pat 27 (28): 7 Pat 825: 10 Pat L Tim 46: 114 Ind Cas 210.

(2) *Kishore Mohun* v. *Gour Monee,* (1871) 15 Suth W R 198 (199, 200).

(3) *Sakina Bibi* v. *Charanjit Singh,* (1915) 28 Ind Cas 448 (448): 60 Pun L R 1915: 217 Pun W R 1915; *Bhugobutty* v. *Ganesh,* (1874) 21 Suth W R 308 (308) [Ordinary retainer not sufficient].

Order 33, Rule 4—Note 1.

(1) *Jogendra* v. *Durga,* (1919) 52 Ind Cas 610 (611): 46 Cal 651; *Sita Nath Shah* v. *Radha Raman Shah,* (1919) 50 Ind Cas 676 (677) Cal; *Nawab Bahadur of Murshadabad* v. *Harish Chandra Acharjee,* (1911) 11 Ind Cas 55 (57): 13 Cal L Jour 593 [No hard and fast Rule can be laid down regarding the extent of investigation].

(2) *In the matter of the petition of Eknath Bin Madoba,* (1862-65) 1 Bom H C R 102 [And not by Shastri of the Court].

O. 33, R. 4, Notes 1—2.

As to whether persons other than the applicant can be examined on the merits, *see* Notes to Rr. 5 and 7, *infra.*

2. **Right to cross-examine applicant.**—Where the applicant who seeks permission to sue as a pauper is examined under this rule, the opposite party has a right to cross-examine him on the merits of the claim in order to test the statements he makes in his application.[1]

O. 33, R. 5, Notes 1—2.

Rejection of application.

R. **5.** [Ss. 405, 407.] The Court shall reject *an* application *for permission to sue as a pauper*—

(*a*) *where it is* not framed *and* presented in the manner prescribed by *rules* 2 *and* 3, or

(*b*) *where* the applicant is not a pauper, or

(*c*) *where* he has, within two months next before the presentation of the application, disposed of any property fraudulently or *in order to be able to apply for permission to sue as a pauper*, or

(*d*) *where* his allegations do not show a *cause of action*, or

(*e*) *where* he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

[1877—Ss. 405, 407; 1859—Ss. 302, 304. *Cf.* O. 7, R. 11.]

Synopsis.

1. Legislative changes.
2. Applicability of the rule.
3. Clause (a).
4. Clause (b).
5. Clause (d).
6. Clause (e).
7. Appeal.
8. Letters Patent Appeal.
9. Revision.
10. Doctrine of lis pendens.

Rule to be strictly construed. See Note 2, "Shall reject." See Note 2, Pt. (1). Pt. (2).

1. **Legislative changes :—**

The clause "when his allegations do not show a *cause of action*" has been substituted for the clause "that his allegations do not show a *right to sue* in such Court" which occurred in the old section.

2. **Applicability of the rule.**—The rule provides that an application for permission to sue as a pauper shall be rejected in the events enumerated in the rule.[1] It is restrictive of the right which every litigant has to seek

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Note 2.

[1] *Radha Raman Shah* v. *Sitanath,* (1921) 60 Ind Cas 738 (739) Cal.

Order 33, Rule 5—Note 2.

[1] *Howa* v. *Sit Shein,* (1917) 42 Ind Cas 803 (804): 9 L B R 93: 11 Bur L Tim 77; *Paramarath Gir* v. *Ram Sarup Singh,* 1932 All 487 (489): 1932 All L J 303: 138 Ind Cas 269 [Cause of action not disclosed—Application was rejected].

O. 33, R. 5, Notes 2—5.

the aid of a Court of Justice, and should therefore be interpreted strictly.[2]

As in the case of an order rejecting a plaint under O. 7, R. 11, an order of rejection of an application under this rule must be made on preliminary grounds, before notice is issued, and before an enquiry is held into the applicant's pauperism.[3]

3. **Clause (a).**—*See* Note 1 to R. 2 and Note 2 to R. 3, *supra*. Where an applicant had not calculated the value of the suit for purposes of Court-fee in accordance with S. 7 (*v*) (*b*) of the Court-Fees Act, it was held that the application was liable to be rejected.[1] But in proper cases the Court has power to allow an application to be amended so as to make it conform to the law.[2]

4. **Clause (b).**—The question of the applicant's pauperism has to be decided with reference to the definition given in R. 1. The Court in this respect is bound to proceed on the valuation given in the *plaint*, and cannot go into an investigation of the question, whether the suit has been overvalued.[1] Nor can it go into the merits of the case when dealing with the question of pauperism of the applicant.[2]

Where the applicant is found to be a pauper it is not necessary for the Court to give a finding on the other matters enumerated in the rule, unless it finds that the application has to be rejected for any of the other reasons mentioned therein.[3]

5. **Clause (d).**—The words used in clause (*c*) of S. 407 of the old Code were "right to sue." The expression was, however, held not to be limited to questions of jurisdiction alone, but to include a good and "subsisting cause of action, capable of enforcement in Court, and calling for an answer, and not barred by the law of Limitation or any other law."[1] The present clause (*d*) gives effect to this view by substituting the words "cause of action" for the words "right to sue" so that, the Court has got the power to reject an application for permission to sue in *forma pauperis* where the claim is

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(2) *Chatter Pal* v. *Raja Ram*, (1885) 7 All 661 (668): 1885 All W N 156: 10 Ind Jur 70 [Per Mahmood, J].

(3) *Ranchod* v. *Bezanji*, (1896) 20 Bom 86 (94) [Per Ranade, J].

Note 3.

(1) *Maung Pe Kye* v. *Maung Shwe Zin*, 1929 Rang 128 (129): 7 Rang 359: 118 Ind Cas 416.

(2) *Kanagammal* v. *Panchapakesa Udayar*, (1914) 23 Ind Cas 82 (84): 26 Mad L Jour 348: 1914 Mad W N 327. See also *Hari Krishna Datta* v. *K R Khosla*, (1933) 141 Ind Cas 570 (571) Lah.

Note 4.

(1) *Tulshi* v. *Gajadhar*, (1921) 61 Ind Cas 891 (891) Pat; *Lakha* v. *Mt Rama*, 1881 Pun Re No 81 [Where a Court finds that an applicant who applies to sue in *forma pauperis* is unable to pay the Court-fees upon his claim, it should allow him to sue as a pauper for the whole amount claimed, and it is illegal on the part of the Court, to confine the permission to part of the claim, because it finds that he may succeed only as to that part]; *Mangalasheri Illath Krishnan* v. *Kesavan*, (1912) 16 Ind Cas 612 (614): 1912 Mad W N 38.

(2) *Ranganayaka Ammal* v. *Venkata Chellapati*, (1882) 4 Mad 323 (324); *Debo Das* v. *Mohunt Ram Charan*, (1898) 2 Cal W N 474 (478, 479); *Gopal Chandra* v. *Bigoo Mistry*, (1904) 8 Cal W N 70 (79). See also *Ram Lal Sah* v. *Allahabad Bank, Ltd*, (1929) 118 Ind Cas 669 (669): 1929 All L J 1059.

(3) *Firm Bhajan Ram Gil Raj Mal* v. *Mt Narain Devi*, 1926 Lah 642 (643): 96 Ind Cas 830.

Note 5.

(1) *Chattarpal* v. *Raja Ram*, (1885) 7 All 661 (664): 1885 All W N 156: 10 Ind Jur 70 F B; *Kamrakh Nath* v. *Sundar Nath*, (1898) 20 All 299 (301): 1898 All W N 36; *Dulari* v. *Vallab Das*, (1889) 13 Bom 126 (128): 13 Ind Jur 265; *Rustomji and Co* v. *Hussain Khan*, (1913) 18 Ind Cas 491 (491): 58 Pun L R 1913: 29 Pun W R 1913; *Amirtham* v. *Alwar*, (1904) 27 Mad 37 (39); *Sheo Pal* v. *Sukh Karan*, (1908) 11 Oudh Cas 67 (68).

O. 33, R. 5, Note 5.

prima facie barred by limitation,[2] or is unlawful,[3] or is immoral or opposed to public policy.[4] But in considering the question whether the applicant has a cause of action or not, the Court has to look only into the *allegations* made by the applicant. This does not mean that the Court should confine itself to the allegations in the *petition*. It is open to the Court to consider not only the allegations contained in the plaint but also the facts appearing in the examination of the applicant.[5] Beyond this, however, the Court cannot go.[6] In fact, even in an inquiry under R. 7 the Court can confine itself to the evidence of the plaintiff and refuse to go into other evidence.[7] Consequently, complicated questions of limitation,[8] or of *res judicata*,[9] or of local jurisdiction[9-a] cannot be gone into for deciding the application. Nor can the Court refuse the application on the ground that, on the merits, the litigation is very likely to end in failure.[10] The Court should exercise great caution in considering the question of cause of action inasmuch as the applicant is often without the advantage of the aid of Counsel.[11] Further the opposite party will have the opportunity of urging these very objections under R. 7.[12]

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(2) *Chattarpal* v. *Raja Ram*, (1885) 7 All 661 (664): 1885 All W N 156: 10 Ind Jur 70; *Har Kaur* v. *Munni Lal*, (1919) 53 Ind Cas 441 (441): 134 Pun Re 1919: 46 Pun L R 1920; *Muhammad Tahir* v. *Secretary of State for India*, 1894 Pun Re No 130; *Natesa Ayyar* v. *Manoyya Ayyar*, (1920) 54 Ind Cas 462 (463): 10 Mad L W 589: 27 Mad L Tim 323; *Subramanian* v. *Kulayappan*, (1915) 26 Ind Cas 90 (91): 1 Mad L W 668. See however *Bhajja* v. *Mahomed Said Khan*, 1932 All 543 (546): 1932 All L J 489: 138 Ind Cas 396 [Question of limitation should properly be determined after the plaint is admitted].

(3) *Maung Sanya* v. *Indian Telegraph Association Club*, (1917) 38 Ind Cas 566 (567): 9 Bur L Tim 228 [Suit for recovery of amount won at a lottery].

(4) *Dulari* v. *Vallabhdas*, (1889) 13 Bom 126 (130): 18 Ind Jur 265; *Ratansi* v. *Jagjiva Ram Hans Raj*, (1889) 13 Bom 130 (131) [Marriage brocage contracts].

(5) *Jogendra* v. *Durga*, (1919) 52 Ind Cas 610 (611): 46 Cal 651; *Sita Nath* v. *Radha Raman*, (1919) 50 Ind Cas 676 (677); *Nawab of Murshidabad* v. *Harish Chandra*, (1911) 11 Ind Cas 55 (57): 13 Cal L Jour 598; *Parsottam Gir* v. *Pars Ram Gir*, (1909) 4 Ind Cas 975 (976): 91 Pun L R 1909: 131 Pun W R 1909; *Ranganayaka Ammal* v. *Venkatachalapathi*, (1882) 4 Mad 323 (324); *Vasanbai* v. *Radhibai*, 1928 Sind 118 (119): 108 Ind Cas 657: 22 Sind L R 441; *Kamrak Nath* v. *Sundar Nath*, (1898) 20 All 299 (301): 1898 All W N 86; *Bai Chandan* v. *Chhotalal Tekisondas*, 1932 Bom 584 (585): 34 Bom L R 1278: 140 Ind Cas 381; *Nawab Bahadur of Moorshedabad* v. *Harish Chandra Acharjee*, (1911) 11 Ind Cas 55 (57): 13 Cal L Jour 598.

(6) *U Maung Gyi* v. *Naungbo Co-operative Credit Society*, 1929 Rang 209 (209): 120 Ind Cas 897; *U Ba Dwe* v. *Mg Lu Pan*, 1932 Rang 107 (112-113): 10 Rang 357: 139 Ind Cas 265 F B [Evidence relating to merits not admissible.] [1929 Rang 273 overruled]; *Ram Lal Sah* v. *Allahabad Bank, Ltd*, (1929) 118 Ind Cas 669 (669): 1929 All L J 1059, (Do.).

(7) See Notes to Rule 7, *infra*.

(8) *Govindasami Pillai* v. *Municipal Council, Kumbakonam*, (1918) 45 Ind Cas 95 (96): 41 Mad 620: 34 Mad L Jour 399; *Bangaruswami Naicker* v. *Sundera Doss Thevar*, 1926 Mad 135 (135): 1925 Mad W N 779: 92 Ind Cas 415: 23 Mad L W 406; *Kaliani Amma* v. *Achutan Nair*, (1919) 53 Ind Cas 239 (241): 10 Mad L W 174: 37 Mad L Jour 309: 1919 Mad W N 573; *Allah Wasai* v. *Ramzan*, 1929 Lah 498 (498): 117 Ind Cas 95; *Mi Mya* v. *Mya Gyi*, (1910) 8 Ind Cas 475 (476): (1910) 1 U B R 29.

(9) *Lachmi* v. *Ram Bahadur*, 1925 All 276 (276): 23 All L J 200: 86 Ind Cas 781. But *see* In the matter of *Ganga Das Adikari*, (1870) 14 Suth W R 281 (282): 11 Beng L R App 23 Notes.

(9-a) *Hari Krishna Datta* v. *K R Khosla*, (1933) 141 Ind Cas 570 (571) Lah.

(10) *Sumatra Devi* v. *Hazari Lal*, 1930 All 758 (759): 1930 All L J 901: 126 Ind Cas 1: 52 All 927; *Changia* v. *Joti Pershad*, (1910) 6 Ind Cas 703 (703) All; *Faiz Mohammad* v. *Azizunnissa*, 1893 All W N 218 (219); *Muhammad Husain* v. *Ajudhia Prasad*, (1888) 10 All 467 (472): 1888 All W N 179; *Sourendra Nath Mitra* v. *Jatindra Nath Ghose*, 1925 Cal 990 (990): 87 Ind Cas 737; *Gopal* v. *Bigoo*, (1904) 8 Cal W N 70 (73); *Debo Das* v. *Mohunt Ram Charn*, (1898) 2 Cal W N 474 (478, 479); *Mt Bhagwanti* v. *Bua Ditta*, 1924 Lah 659 (660): 76 Ind Cas 40; *Nathu* v. *Sheikh Shah Muhammad*, 1885 Pun Re No 25; *Somnath* v. *Ganga Nath*, 1866 Pun Re No 122; *Mt Daya Kour* v. *Thakur Singh*, 1888 Pun Re No 155; *Tabo* v. *Nau Nihal*, 1900 Pun Re No 17; *Parsotam* v. *Pars Ram*, (1909) 4 Ind Cas 975 (976): 1909 Pun L R 91: 131 Pun W R 1909; *Bolimati* v. *Nalla*, 1924 Mad 80 (80): 18 Mad L W 53: 1928 Mad W N 412: 73 Ind Cas 946; *Kaliani* v. *Matathil*, (1919) 53 Ind Cas 239 (241): 10 Mad L W 174: 37 Mad L Jour 309: 1919 Mad W N 573; *Manglasheri Illath Krishnan Nambudri* v. *Keshavan Nambudri*, (1912) 16 Ind Cas 612 (614): 1912 Mad W N 38; *Venkatarama Ayyar* v. *Kittammal*, (1912) 15 Ind Cas 184 (185): (1912) 1 Mad W N 173: 11 Mad L Tim 187; *Rupibai* v. *Sadashiv*, (1923) 75 Ind Cas 744 (745) Nag; *Ma E Htai* v. *U Hmai*, 1931 Rang 79 (80): 131 Ind Cas 64; *Sein Tun U* v. *Aung Zan U*, (1911) 11 Ind Cas 857 (858): 4 Bur L Tim 191; *Perozshaw* v. *Gauridutt*, (1905-1906) 8 L B R 248 (249).

(11) *Dulari* v. *Vallabadas Pragji*, (1889) 13 Bom 126 (128): 18 Ind Jur 265.

(12) *Amirtham Alwar* v. *Manikkam*, (1900) 27 Mad 37 (40); *Sankararama* v. *Subramania*,

6. **Clause (e).**—The object of the provisions of this order is to help *bona fide* litigants. Where, therefore, a litigation is not *bona fide,* and the plaintiff has been set up by another for the purpose of evading the Court-fee, the Court will not allow him to sue as a pauper.[1]

The clause will apply only if the agreement has reference to the *subject-matter* of the suit and is of a champertous character.[2] Further, the agreement must be one between the pauper and a third party. Thus, where a Company has gone into liquidation and the liquidator sues in *forma pauperis* to recover a debt due to the company, the fact that the liquidator is paid a percentage of the collections will not bring the application under this clause.[3]

It is however not necessary that the "interest" should be a vested and completed interest. Thus, an agreement with pleader appearing in the pauper suit, that he is to recover his fee out of the *fruits of the decree* that may be obtained in that suit by the plaintiff, is within the prohibition of the clause.[4] But a mere agreement to pay the fees when the decree is obtained without any condition by which the pleader could recover the fees *from the decretal amount,* will not fall under the clause.[5]

7. **Appeal.**—An order rejecting an application for permission to sue in *forma pauperis* is not appealable as it is neither a decree nor an order coming within any of the clauses of O. 43, R. 1.[1]

8. **Letters Patent Appeal.**—An order of a Single Judge of the High Court, sitting on the Original Side, allowing, or refusing to allow, a plaintiff to sue in *forma pauperis* is a "judgment" within the meaning of the Letters Patent and is appealable as such.[1]

9. **Revision.**—*See* Note 26 to S. 115 and also the undermentioned cases.[1]

(1904) 27 Mad 120 (121): 13 Mad L Jour 425. See also *Venkoba Rao* v. *Thunia Nataraja Chetty,* (1908) 4 Mad L Tim 302 (303); *Mt Devupalli Ammanna* v. *Pediredla Narayanaswami Naidu,* (1915) 30 Ind Cas 689 (689) Mad.

Note 6.

[1] *Charu Sila* v. *Haran Chandar,* (1919) 50 Ind Cas 520 (522): 1919 Pat H C C 232; *Asanand* v. *Gossain Madan Mohan Nand,* 1927 Pat 352 (352): 8 Pat L Tim 810: 103 Ind Cas 448; *Hanifa Bai* v. *Haji Sidick,* (1907) 30 Mad 547 (548): 17 Mad L Jour 447: 3 Mad L Tim 11 [Where on the date of the institution of a suit in *forma pauperis* the plaintiff has allowed third parties to obtain an interest in the subject-matter of the suit by virtue of an agreement falling within the terms of this clause and the interest subsists on the date of the presentation of the appeal the Appellate Court cannot grant leave to appeal in *forma pauperis*].

[2] *Mansa Puri* v. *Harbhagat Puri,* (1917) 37 Ind Cas 172 (173) All.

[3] *Perumal Goundan* v. *Venkataswami Naidu,* (1918) 45 Ind Cas 164 (166): 41 Mad 624: 34 Mad L Jour 421.

[4] *Monohar Ram Chandra* v. *Lakshman,* (1885) 9 Bom 371 (372): 10 Ind Jur 32. See also *Hesse* v. *Husain Ally and Co,* (1892-1896) Upp Bur R 272.

(5; *Firm Bhajan Ram Gil Raj Mal* v. *Narain Devi,* 1926 Lah 642 (643): 96 Ind Cas 830; *Skeena Bibi* v. *Abdul Aziz,* 1932 Rang 68 (69): 138 Ind Cas 831.

Note 7.

[1] *Chattarpal Singh* v. *Raja Ram,* (1885) 7 All 661 (663): 1885 All W N 156: 10 Ind Jur 70; *Secretary of State* v. *Jillo,* (1899) 21 All 133 (136): 1898 All W N 204 F B; *Mitra* v. *Corporation of the Royal Exchange Assurance,* 1930 Rang 259 (259): 126 Ind Cas 650; *Mi Mya* v. *Mi Gyi,* (1910) 8 Ind Cas 475 (476): (1910) 1 U B R 28; *Bhagbut Dos* v. *Buloram Das,* (1865) 3 Suth W R Misc 20 (20); *Ma Mya Thin* v. *Ma Chu,* 1931 Rang 129 (130): 132 Ind Cas 705: 9 Rang 86.

Note 8.

[1] *Sadashiv* v. *Soondardas,* 1931 Bom 166 (166-167): 32 Bom L R 1647: 130 Ind Cas 24; *Babu* v. *Purushothama,* 1925 Mad 167 (168): 47 Mad L Jour 932: 20 Mad L W 845: 35 Mad L Tim 136: 85 Ind Cas 201: 48 Mad 700; *Mitra* v. *Corporation of the Royal Exchange Assurance,* 1930 Rang 259 (260, 262): 126 Ind Cas 650.

Note 9.

[1] *Mt Kako* v. *Sohna,* 1927 Lah 56 (56): 98 Ind Cas 879; *Barkat Ali* v. *Gulam Kadir,* 1885 Pun Re No 21 [Revision lies when the lower Court acted illegally or with material irregularity]; *Venkataraman* v. *Kittammal,* (1912) 15

O. 33, R.5, Note 10.

10. **Doctrine of Lis pendens.**—*See* Notes to R. 8, *infra.*

O. 33, R.6, Notes 1—2.

Notice of day for receiving evidence of applicant's pauperism.

R. 6. [S. 408.] *Where* the Court sees no reason to *reject* the application on any of the grounds stated in *rule* 5, it shall fix a day (of which at least ten days' *clear* notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

[1877—S. 408; 1859—S. 305.]

Synopsis.

1. Notice.
2. **Evidence of pauperism. See R. 7, infra.**

1. **Notice.**—The provision directing notice is imperative[1] and therefore an order made without notice to the Government pleader or to the opposite party is one made without jurisdiction and is open to revision.[2]

As to the form of notice under this rule, *see* App. H, Form No. 12.

2. **Evidence of pauperism.**—*See* R. 7, *infra.*

O. 33, R.7.

Procedure at hearing.

R. 7. [S. 409.] (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in *rule* 5.

Ind Cas 184 (184): 1912 Mad W N 178: 11 Mad L Tim 187, (Do.); In re *Parkash Ojha* v. *Dashruth Ojha,* (1876) 25 Suth W R 74 (74) [Revision lies when Court embarks upon an enquiry by examining other witnesses where it has no power to do]; *Ali Hamza* v. *Ahsan Ali,* 1888 All W N 150 (151) [Or when the leave is refused on the ground that the petitioner has a weak case on the merits]; *Faiz Muhammad Khan* v. *Azimunnissa,* (1893) 13 All W N 218 (219), (Do); *Chhangia* v. *Joti Prasad,* (1910) 6 Ind Cas 703 (703) All, (Do.); *Kuppuswami* v. *Muthuswami,* (1915) 27 Ind Cas 891 (892): 1 Mad L W 1068: 1915 Mad W N 31, (Do.); *Indri* v. *Balkishen,* (1917) 39 Ind Cas 942 (942) All, (Do.); *Kamarakh Nath* v. *Sundar Nath,* (1898) 20 All 299 (302): 1898 All W N 86 [But no revision lies when the Court has not acted with material irregularity or illegality]; *Haur Kaur* v. *Munni Lal,* (1919) 53 Ind Cas 441 (441): 134 Pun Re 1919: 46 Pun L R 1920, (Do.); *Khodejoonissa, In re Petitioner,* (1867) 7 Suth W R 486 (487) [No revision lies from an order granting leave]; *Muhmad Ayub* v. *Mahmood,* (1910) 6 Ind Cas 831 (832): 7 All L J 741: 32 All 623, (Do.); *Ma Mya Thin* v. *Ma Chu,* 1931 Rang 129 (131): 132 Ind Cas 705: 9 Rang 66 [Order refusing leave to sue in *forma pauperis* is subject to revision]; *Bai Chandan* v. *Chhotalal,* 1932 Bom 584 (588): 34 Bom L R 1273: 140 Ind Cas 881 [Revision lies where provisions of this order are violated]; *Chandumal* v. *Tejulbai,* 1933 Sind 82 (83, 84): 26 Sind L R 491 [Revision lies against order refusing leave]. See also *Hari Krishna Datta* v. *K R Khosla,* (1933) 141 Ind Cas 570 (571) Lah [Order granting leave is a 'case' within the meaning of S 115].

Order 33, Rule 6—Note 1.

[1] *Noni Krishna* v. *Nabamonjuri,* 1927 Cal 464 (464): 100 Ind Cas 726; *Zillar Rahman* v. *Guzunfur Hossain,* (1914) 28 Ind Cas 974 (974).

[2] *Noni Krishna* v. *Nabamonjuri,* 1927 Cal 464 (464): 100 Ind Cas 726.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

[1877—S. 409; 1859—S. 306.]

Synopsis.

1. **Scope of the enquiry under this rule.**
2. **Sub-R. (2). See Note 1, ante.**
3. **Review of order under this rule. See Note 1 to R. 15, infra.**
4. **Limitation when the application is granted.**
5. **Limitation when application is refused.**
6. **Limitation when application is converted into a plaint on payment of Court-fee.**
7. **Limitation where plaintiff is dispaupered.**
8. **Death of applicant—Legal representative if can continue proceedings. See Note 10 to O. 22, R. 1 and Note 11 to R. 1 above.**
9. **Order rejecting application whether appealable.**
10. **Appeal from decree—Whether propriety of order allowing suit in forma pauperis can be questioned.**
11. **Dismissal of application for default. See R. 15, infra.**

Evidence—Whether should be confined to pauperism alone. See Note 1, Pt. (2).

Examination of pauper—Who can conduct. See R. 4, Note 2.

"The Court shall hear argument." See Note 1, Pt. (6-b).

1. **Scope of the enquiry under this rule.**—Two kinds of examinations are contemplated by this Order:—

(1) An examination of the applicant under R. 4, *ante*, and

(2) An examination under this rule.[1]

It is important to remember the following distinction between the two kinds of examinations:—

(1) An examination under R. 4 takes place *before* issuing notice to the Government pleader and to the opposite party, while the examination under this rule takes place *after* such notice. There is thus no cross-examination of the applicant under the former rule.

(2) The examination under R. 4 is only of the *applicant* and none else, while the examination under this rule may be not only of the applicant but also of his *witnesses*.

(3) The examination under R. 4 may be in respect of the applicant's *pauperism* as well as the *merits* of the case, while the examination under this rule is confined to the question of the applicant's *pauperism*.[2] It has accordingly been held that a Court has no

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Order 33, Rule 7—Note 1.

[1] *S Venkataramana Ayyar* v. *Kittammal*, (1912) 15 Ind Cas 184 (184): 1912 Mad W N 178: 11 Mad L Tim 187 [The Court is bound to enquire into plaintiff's pauperism unless petition is rejected under R 5]; *Amirmai* v. *Secretary of State*, (1920) 58 Ind Cas 445 (446): 23 Cal W N 955, (Do.). See also *Devupalli Ammanna* v. *Pediredla Narayanaswami Naidu*, (1915) 30 Ind Cas 689 (689) Mad.

[2] *Jogendra Narayan Ray* v. *Durga Charan Guha Thakurta*, (1919) 46 Cal 651 (662): 52 Ind Cas 610; *Manphul Singh* v. *Hakim Hamid Ali Khan*, 1923 All 577 (577): 45 All 548: 21 All L J 441: 73 Ind Cas 538: 4 L R All (Civ) 252; *Chattarpal Singh* v. *Raja Ram*, (1885) 7 All 661 (663, 664): 1885 All W N 156: 10 Ind Jur 70; *Nawab of Murshidabad* v. *Harish Chandra*, (1911) 11 Ind Cas 55 (57): 13 Cal L Jour 593; *Ratnam Pillai* v. *Pappa Pillai*, (1903) 13 Mad L Jour 292 (295, 296) F B [19 Mad 197 overruled]; *Koka Ranganayaka* v. *Koka Venkatachalapathi*, (1882) 4 Mad 323 (324); *U Aung Din* v. *Ma Ngwe*, 1927 Rang 72 (73): 5 Bur L Jour 174: 99 Ind Cas 760; *Sitanath* v. *Radharaman*, (1919) 50

O. 33, R. 7, Note 1.

power to allow the examination of witnesses on questions other than the *pauperism* of the applicant such as questions as to the existence of a cause of action[3] or as to the title of the applicant to institute the suit[4] or as to limitation[5] or as to *res judicata*[6] and decide the application on such evidence. It is, however, not clear as to whether, when the *applicant* is examined under this rule as to his *pauperism*, he can be cross-examined as to matters relating to the cause of action or limitation.[6-a]

It is only the *examination of witnesses* on questions other than the *pauperism* of the applicant that is prohibited by this rule. The Court is not precluded from hearing *arguments* on the question whether the applicant is or is not subject to any of the prohibitions specified in R. 5.[6-b] But even arguments are confined to the matters specified in R. 5 and the Court has no jurisdiction to reject the applicant on other grounds than those specified.[7] Thus the Court cannot reject the application on the ground that other co-heirs who are not paupers are seeking to establish their rights through the applicant who is admittedly a pauper.[8] Nor can it reject the application on the construction of documents filed by parties[9] or on any complicated questions of law such as limitation, *res judicata*, etc.[10]

Even if the other party does not offer any arguments as provided under sub-R. (2), the Court is not precluded from considering *suo motu* if the application is subject to the prohibitions under R. 5.[11] This rule in so far it relates to the manner of taking evidence does not apply to proceedings under the N.W.

Ind Cas 676 (677) Cal. But see *Charu Sita Dasi* v. *Haran Chandra Mukherjee*, 1919 Pat H C C 232 (234): 50 Ind Cas 520; *Bai Chandan* v. *Chhotalal Jekisondas*, 1932 Bom 584 (588): 34 Bom L R 1273 [No provision in O 33 to file a written statement].

[3] In the matter of *Gangadass Adhikaree*, (1873) 11 Beng L R App 23 Note: 14 Suth W R 281; *Debo Das* v. *Mohant Ram*, (1898) 2 Cal W N 474 (478) [*See* comments on this case in 46 Cal 651]; *Sein Tun U* v. *Aung Zan U*, (1911) 11 Ind Cas 857 (858): 4 Bur L Tim 191; *Ma Shopjambi* v. *Mubarak Ali*, 1929 Rang 273 (274): 7 Rang 361: 120 Ind Cas 131; *Bai Chandan* v. *Chhotalal Jekisondas*, 1932 Bom 584 (588): 34 Bom L R 1273.

[4] *Mt Shauran Bibi* v. *Abdus Samad*, 1923 All 577 (578): 45 All 548: 21 All L J 441: 73 Ind Cas 538: 4 L R (All) Civ 252.

[5] *Jogendra Narayan Ray* v. *Durga Charan Guha Thakurta*, (1920) 46 Cal 651 (657): 52 Ind Cas 610; *Parkash* v. *Dusruth*, (1876) 25 Suth W R 74 (74); *Venkoba Rao* v. *Thuniya Nataraja Chetty*, (1909) 3 Ind Cas 829 (829): 6 Mad L Tim 359; *Shaikh Muhammad Nasrulla* v. *Sheikh Muhammad Shukurulla*, 1925 Pat 30 (31): 3 Pat 275: 83 Ind Cas 871: 1925 Pat H C C 134: 6 Pat L Tim 209.

[6] *Rathnampillai* v. *Pappa Pillai*, (1903) 13 Mad L Jour 292 (295, 296) F B [19 Mad 197 which took a contrary view, overruled].

[6-a] See In the matter of *Ganga Dass Adhikaree*, (1873) 11 Beng L R App 23 Note: 14 Suth W R 281.

[6-b] *U Ba Dwe* v. *Nga Lu Pan*, 1932 Rang 107 (109): 10 Rang 357: 139 Ind Cas 265 F B.

[7] *Rathnam Pillai* v. *Pappa Pillai*, (1903) 13 Mad L Jour 292 (295, 296); *Debo Das* v. *Mohunt Ram*, (1898) 2 Cal W N 474 (478); *Gopal Chandra Neogy* v. *Bigoo Mistry*, (1903-4) 8 Cal W N 70 (73); *Koka Ranganayaka Ammal* v. *Koka Venkatachallapathi Naidu*, (1882) 4 Mad 323 (324); *Sheikh Muhammad Nasrullah* v. *Sheikh Muhammad Shukurullah*, 1925 Pat 30 (31): 3 Pat 275: 83 Ind Cas 871: 1925 Pat H C C 134: 6 Pat L Tim 209.

[8] *Mi Hla Min* v. *Mi Ket*, (1910) 8 Ind Cas 474 (475): (1910) 1 U B R 26.

[9] *Gopal Chandra Neogy* v. *Bigoo Mistry*, (1904) 8 Cal W N 70 (73); *S A Natesa Ayyar* v. *S A Manoyya Ayyar*, (1920) 54 Ind Cas 462 (463): 10 Mad L W 589: 27 Mad L Tim 323. See also *Ramachandra Raju* v. *Venkiah*, 1927 Mad 441 (442): 52 Mad L Jour 380: 101 Ind Cas 18. But see In the matter of *Gunga Das Adhikaree*, (1870) 14 Suth W R 281 (283): 11 Beng L R App 23 Note.

[10] *Mt Bhagwanti* v. *Bua Ditta*, 1924 Lah 659 (660): 76 Ind Cas 40; *Govindaswami Pillai* v. *The Municipal Council*, (1918) 45 Ind Cas 95 (95): 34 Mad L Jour 399: 41 Mad 620; *Kalliani Amma* v. *Achuthan Nair*, (1919) 53 Ind Cas 239 (240): 10 Mad L W 174: 1919 Mad W N 573: 37 Mad L Jour 309.

[11] *Amirtha Alwar* v. *Manikkam*, (1904) 27 Mad 37 (39).

F. P. Regulation (VII of 1901) (S. 46, Cl. 2) and the Oudh Courts Act (IV of 1925), S. 16, Cl. 2.

2. **Sub-R. (2).** *See* Note 1, *ante.*

3. **Review of order under this rule.**—*See* Note 1 to R. 15, *infra.*

4. **Limitation when the application is granted.**—Where an application to sue in *forma pauperis* is granted, the suit is deemed to be instituted on the date of the *presentation* of the application, and not on the date when the applicant is *allowed* to sue as a pauper.[1] Therefore where an application to sue in *forma pauperis* was made before the amendment of the Court-Fees Act (Madras Act, 1922), but was registered as a suit after the amendment, the amount of Court-fees to be entered in the decree should be calculated on the basis of the old Court-Fees Act.[2]

As to appeals in *forma pauperis, see* O. 44, *infra.*

5. **Limitation when application is refused.**—Where the application to sue in *forma pauperis* is rejected, the proceedings come to an end, and if the applicant thereafter brings a regular suit on payment of the Court-fees prescribed, the suit will be deemed to be instituted only on the date when the Court-fees are paid, and not on the date of presentation of the rejected application.[1] As to whether, at the time of refusing the application, the Court can grant time for the payment of the Court-fees on the plaint, and whether if the Court-fees are paid within the time so granted, the suit would be deemed to be instituted on the date of the presentation of the *application, see* Note 10 to S. 149, *supra,* and the case cited below.[2]

As to appeals in *forma pauperis, see* O. 44, R. 1, Note 7, *infra.*

6. **Limitation when application is converted into a plaint on payment of Court-fee.**—Where during the *pendency* of an application to sue as a pauper, the applicant pays the Court-fee in respect of the plaint, and thereupon the plaint is registered as a suit, does the institution of the suit date back to the date of presentation of the application? Their Lordships of the Privy Council in *Skinner* v. *Orde*[1] observed: "The petition is filed, and proceedings are taken to enquire into the pauperism, which are delayed by various orders of the Court . . . . until a very considerable period of time has elapsed. Then, pending that enquiry, the plaintiff by paying the amount of stamp-fees into Court, admits he is no longer desirous to sue as a pauper, and gives up so much of the prayer of his petition as asks to be allowed so to sue, but no more . . . . Is there then anything in the Act which requires that in such a state of things the petition of plaint shall be rejected altogether, and the plaintiff be compelled

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Note 4.

[1] *Seetaram Cower* v. *Goluknath Dutt,* (1862) Marsh 174; *Dhavle* v. *Samvat,* (1867) 4 Bom H C A C J 39; *Thangathammal* v. *Iravatheswara,* (1915) 28 Ind Cas 504 (505): 1915 Mad W N 228; *Khem Karan* v. *Har Dayal,* (1882) 4 All 37 (39): 1881 All W N 129: 6 Ind Jur 382. See also *Naragunty Lutchmee Davamah* v. *Vengamma Naidu,* (1861) 9 Moo Ind App 66 (94, 95): 1 W R P C 30: 1 Suth 460: 1 Sar 826.

[2] *Kaman Mada* v. *Malli,* 1926 Mad 159 (159): 49 Mad L Jour 588: 22 Mad L W 732: 91 Ind Cas 802.

Note 5.

[1] *Navaint Kuar* v. *Mukhan Lal,* (1895) 17 All 526 (528): 1895 All W N 106; *Keshav Ramachandra* v. *Krishna Rao Venkatesh,* (1898) 20 Bom 508 (510); *Aubhoya* v. *Bisseswari,* (1897) 24 Cal 889 (891).

[2] *Heshavlal Hiralal* v. *Mayabhai Premchand,* (1907) 9 Bom L R 204 (206, 207) [Time cannot be granted *after* the petition is dismissed].

Note 6.

[1] (1880) 2 All 241: 6 Ind App 126; 4 Cal L Rep 331: 4 Sar 31: 3 Ind Jur 334: 3 Suther 627 [Reversing 1 All 230].

to commence *de novo*? . . . . . The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, ... In their view . . . . . . the suit must be deemed to be instituted when the application was filed''. Though *Skinner* v. *Orde* was decided under the Code of 1859, the principle has been followed in cases arising under the later Codes, and it has been held that where the application is *bona fide*, the suit will be deemed to be instituted on the date of the application to sue in *forma pauperis* and not on the date, when the Court-fees are paid.[2] But if the application is *mala fide* and it is found that the applicant was, even at the time of the application, possessed of means to pay the Court-fees, the suit will be deemed to be instituted only on the date on which Court-fees are paid, and not on the date when the application was presented.[3]

7. **Limitation where plaintiff is dispaupered.**—A plaintiff dispaupered under R. 9, is entitled to continue the suit on payment of Court-fees and no question of limitation arises.[1]

8. **Death of applicant—Legal representative if can continue proceedings.**—*See* Note 10 to O. 22, R. 1 and Note 11 to R. 1 above.

9. **Order rejecting application whether appealable.**—No appeal lies from an order rejecting an application to sue in *forma pauperis* whether under R. 5 or under R. 7,[1] but in proper cases it may be open to revision by the High Court.[2] (*See* Note 26 to S. 115.) The final order, on such an application of a Judge sitting on the Original Side of the High Court is however a "judgment" under Cl. 15 of the Letters Patent, and is therefore appealable as such.[3]

10. **Appeal from decree—Whether propriety of order allowing suit in forma pauperis can be questioned.**—In an appeal from the *decree* it is not open to the appellate Court to entertain the plea that the plaintiff should not

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[2] *Jankdhary Sukul* v. *Janki Koer*, (1901) 28 Cal 427 (430); *Alayakammal* v. *Subbaraya*, (1905) 28 Mad 493 (495): 15 Mad L Jour 219; *Maria Thangathammal* v. *Iravatheswara Ayyar*, (1915) Mad W N 228 (229): 28 Ind Cas 504; *Veeraswami Naidu* v. *Sivagurunatha Pillai*, 1925 Mad 793 (793): 21 Mad L W 111: 86 Ind Cas 284; *Gopikrishan* v. *Bulakdas*, 1922 Nag 160 (161): 65 Ind Cas 506: 18 Nag L R 44; *Wali Muhammad* v. *Daulat-un-Nissa*, (1917) 37 Ind Cas 921 (923): 3 Oudh L J 647; *Sooklal* v. *Dal Chand*, 1923 Rang 256 (257): 1 Rang 196: 74 Ind Cas 835; *Amjad Ali* v. *Sarfaraz Ali*, (1901) 4 Oudh Cas 250 (251); *Raja Ram* v. *Tilok Chand*, (1903) Pun Re No 59; *Golucknath* v. *Seetharam*, Suth W R Sp. No. 53 (53): Ind Jur (O S) 66: 1 Hay 378 F B. But see *Abbasi* v. *Nanhi*, (1896) 18 All 206 (209): 1896 All W N 33.

[3] *Model Mills, Ltd, Nagpur* v. *Kurban Hussain*, 1928 Nag 296 (296): 112 Ind Cas 875; *Veeraswami Naidu* v. *Sivagurunatha Pillai*, 1925 Mad 793 (793): 21 Mad L W 111: 86 Ind Cas 234; *Sook Lal* v. *Dal Chand*, 1923 Rang 256 (257): 1 Rang 196: 74 Ind Cas 835.

Note 7.

[1] *Naraini* v. *Makan Lal*, (1895) 17 All 526 (528): 1895 All W N 106.

Note 9.

[1] *Collis* v. *Manchar Das*, (1875) 1 All 746 (747) F B; *Lekha* v. *Bhanna*, (1896) 18 All 101: 1895 All W N 238 F B; *Secretary of State* v. *Jillo*, (1899) 21 All 133 (136): 1898 All W N 204 F B; *Hurrie Singh* v. *Jeet Singh*, 1870 Pun Re No 62; *Mi Mya* v. *Mi Gyi*, (1910) 8 Ind Cas 475 (476): (1910) 1 U B R 28. See *Atul Chandra Sen* v. *Peary Mohun Mookerje*, (1916) 33 Ind Cas 812 (813): 20 Cal W N 669.

[2] *Muhammad Hussain* v. *Ajudia Prasad*, (1888) 10 All 467 (470): 1888 All W N 179; *Chattarpal Singh* v. *Raja Ram*, (1885) 7 All 661 (669, 672): 1885 All W N 156: 10 Ind Jur 70 F B; *Azmat Ali* v. *Kifayat Ullah Khan*, 1893 All W N 11 (12); *Mansa Puri* v. *Har Bhagat Puri*, (1917) 37 Ind Cas 172 (173) All; *Ram Sahai Singh* v. *Moniram*, (1880) 5 Cal 807 (810, 811): 6 Cal L Rep 228; *Shaikh Babur Ali* v. *Gokul Lal*, (1875) 24 Suth W R 62 (62); *Nanak Chand* v. *Harnam Singh*, 1930 Lah 735 (736): 125 Ind Cas 611.

[3] See however *Shanker Ban* v. *Ram Deo*, 1926 All 446: 24 All L J 557: 94 Ind Cas 484: 48 All 493; *Baba Sah* v. *Purushottam Sah*, 1925 Mad 167 (168): 47 Mad L Jour 932: 20 Mad L W 845: 35 Mad L Tim 186: 85 Ind Cas 201: 48 Mad 700.

O. 33, R.7, Notes 10—11.

have been allowed to sue as a pauper, as the matter is one affecting the *institution* of the suit, and not one affecting the *decision*.[1]

11. **Dismissal of application for default.**—*See* R. 15, *infra.*

O. 33, R.8, Notes 1—2.

Procedure if application admitted.

R. 8. [S. 410.] *Where* the application *is* granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted *in the ordinary manner*, except that the plaintiff shall not be liable to *pay* any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

[1877—S. 410; 1859—S. 308.]

Synopsis.

1. **Scope of the rule.**
2. **Limitation when application is granted. See R. 7, ante.**
3. **Security for costs. See Note 10 to O. 25, R. 1 and Note 16 to R. 1 above.**
4. **"Except that the plaintiff shall not be liable to pay any Court-fee."**
5. **Insolvency of plaintiff.**
6. **Lis pendens.**
7. **Appeal. See R. 7, ante.**

Proceedings prior to filing and numbering as a suit. See Note 1, Pts. (1) to (4).

Stamp duty and penalty—Not governed by this rule. See Note 4, Pt. (1).

1. **Scope of the rule.**—The application to sue as a pauper cannot be deemed to be a plaint till leave to sue is granted, and therefore the Court has no jurisdiction to order the return of the plaint under the provisions of O. 7, R. 10 for presentation to the proper Court.[1] *See also* Note 6 to O. 7, R. 10. Until the leave is granted, there is no *suit* in existence,[2] and, therefore, the Court cannot direct an attachment of properties before judgment.[3] *See also* Note 5 to O. 38, R. 5.

Where a plaint is filed with insufficient Court-fee, and the plaintiff being unable to pay the additional Court-fee applies to *continue* the suit in *forma pauperis* it has been held that the Court has to ascertain if the plaint discloses a cause of action, and then to direct an enquiry into the pauperism of the applicant. If he is found to be a pauper, he should be allowed to *continue* the suit as a pauper, as the procedure under Rr. 2 and 8 is impossible under such circumstances.[4]

2. **Limitation when application is granted.**—*See* R. 7, *ante.*

Note 10.

[1] *Mumatzan v. Rasulan,* (1901) 23 All 364 (365).

Order 33, Rule 8—Note 1.

[1] *Nur Muhammad v. Firm Maulvi Jamil Ahmad,* (1919) 52 Ind Cas 688 (689).

[2] *Janardhan Vithal v. Anant Mahadev,* (1888) 7 Bom 373 (376); *Dwarka Nath v. Madhavrav,* (1886) 10 Bom 207 (209).

[3] *Poorna Chandra Chabri v. Tara Prosad Maity,* (1917) 38 Ind Cas 600 (601): 25 Cal L Jour 159: 21 Cal W N 870.

[4] *Subba Rao v. Venkataratnam,* 1929 Mad 828 (829): 30 Mad L W 687: 57 Mad L Jour 677: 53 Mad 43: 121 Ind Cas 857.

3. **Security for costs.**—*See* Note 10 to O. 25, R. 1 and Note 16 to R. 1 above.

4. **"Except that the plaintiff shall not be liable to pay any Court-fee."**—The exemption does not extend to the liability to pay stamp duty or penalty in respect of a document which owing to defect in stamp is inadmissible in evidence.[1]

5. **Insolvency of plaintiff.**—Where the plaintiff, permitted to sue as a pauper, is subsequently adjudged an insolvent, the Official Receiver is entitled to *continue* the suit.[1]

6. **Lis Pendens.**—The doctrine of *Lis pendens* will apply to suits instituted in *forma pauperis*.[1]

7. **Appeal.**—*See* R. 7, *ante*.

O. 33, R.9.

Dispaupering.

R. 9. [S. 414.] The Court may, *on the application of* the defendant, or *of* the Government pleader, of which *seven days' clear* notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

(*a*) if he is guilty of vexatious or improper conduct in the course of the suit;

(*b*) if it appears that his means are such that he ought not to continue to sue as a pauper; or

(*c*) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter.

[1877—S. 414. *Cf.* R. 5, *supra.*]

Synopsis.

1. Scope of the rule.
2. "Vexatious or improper conduct."
3. "Ought not to continue to sue as a pauper."
4. "Agreement with reference to the subject-matter."
5. Death of plaintiff after institution of the suit. See O. 22, R. 1, Note 10 above.
6. Appeal in forma pauperis. See O. 44, infra.
7. Limitation where plaintiff is dispaupered. See R. 7, ante.

Appeal. See R. 5, Note 7, Pt. (1); R. 7, Note 9, Pt. (1).)

Suit disposed of—Rule inapplicable. See Note 1, Pt. (1).

Note 4.

(1) *Golam Guffoor v. Ekram Hossain,* (1868) 10 Suth W R 357 (358).

Note 5.

(1) *Mohammad Zaki v. Municipal Board of Mainpuri,* (1918) 47 Ind Cas 577 (577): 16 All L J 440. See also *Chidambaram Chettiar v. Kather Moytheen Rowther,* 1925 Mad 791 (791): 48 Mad L Jour 491: 87 Ind Cas 720.

Note 6.

(1) *Ambika Pratab Singh v. Dwarka Prasad,* (1907) 30 All 95 (102): 4 All L J 795: 1908 All W N 29: 2 Mad L Tim 514.

O. 33, R. 9, Notes 1—4.

1. **Scope of the rule.**—This rule applies to cases where the suit is *pending,* and therefore the plaintiff cannot be dispaupered after the suit or appeal has been disposed of on a settlement between the parties.[1]

2. **"Vexatious or improper conduct".**—A fraudulent concealment of property will amount to vexatious or improper conduct, but a mere omission to state in the list of assets a life insurance policy worth about Rs. 245 where the Court-fee to be paid on the plaint was over Rs. 500 was held not to be a sufficient ground to dispauper the plaintiff under this rule.[1] Intentional delay in prosecuting proceedings such as failure to bring the legal representatives of a deceased defendant on the record within a reasonable time may amount to vexatious or improper conduct within the meaning of this rule.[2]

3. **"Ought not to continue to sue as a pauper".**—The plaintiff cannot be dispaupered under this rule on the ground that he was in receipt of an interim allowance during the suit barely sufficient for his maintenance,[1] or that he had a rich relation,[2] or that he appeared by an eminent counsel.[3] Where it is proved that the applicant has received a sum of money sufficient to pay the Court-fee after the date of the application he ceases to be a pauper and the fact that the money was paid to a creditor will not prevent the Court from holding that he is no longer a pauper.[4]

4. **"Agreement with reference to the subject-matter".**—*See also* Note 6 to R. 5 above.

This clause is intended to prevent the prosecution of a suit where the plaintiff has entered into a champertous agreement with another for the prosecution of the litigation[1] and also to prevent a party continuing his suit as a pauper even after a third party has acquired an interest in the subject-matter, and therefore an interest in paying Court-fees to Government.[2] Thus an agreement by the plaintiff with his advocate promising to pay him a large sum of money in the event of his success was held to amount to such an agreement as is contemplated by Cl. (*c*) of this rule.[3] But this clause does not apply to cases where the parties have settled their differences in order to put *an end* to litigation.[4]

Order 33, Rule 9—Note 1.

(1) *Bai Chandabai* v. *Kuver Saheb Bapu,* (1894) 18 Bom 464 (467).

Note 2.

(1) *Shankarbhat* v. *Shankarambhat,* 1922 Bom 215 (215): 24 Bom L R 734: 46 Bom 1017: 70 Ind Cas 964.

(2) *Khatijan Bai* v. *Nur Mahomed,* 1929 Sind 136 (136): 116 Ind Cas 111.

Note 3.

(1) *Savitri Thakurain* v. *Secretary of State,* 1924 Pat 27 (28, 29): 4 Pat L Tim 538: 2 Pat 879: 77 Ind Cas 611.

(2) *Savitri Thakurain* v. *Secretary of State,* 1924 Pat 27 (28, 29): 4 Pat L Tim 538: 2 Pat 879: 77 Ind Cas 611.

(3) *Savitri Thakurain* v. *Secretary of State for India,* 1924 Pat 27 (30): 4 Pat L Tim 538: 2 Pat 879: 77 Ind Cas 611. But see *Girdhari Lal* v. *Abdul Rahaman,* (1915) 28 Ind Cas 87 (88): 39 Pun L R 1915: 226 Pun W R 1915.

(4) *Gadigi Muddappa* v. *Rudramma,* 1921 Mad 97 (98): 13 Mad L W 76: 61 Ind Cas 958.

Note 4.

(1) *Bai Chandabai* v. *Kuver Saheb Bapu,* (1894) 18 Bom 464 (467).

(2) *Edulji Cowasji* v. *Dadabhoy,* (1913) 21 Ind Cas 536 (537): 7 Sind L R 52.

(3) *Maung Tun Yin* v. *Maung Din,* 1927 Rang 283 (284): 6 Bur L Jour 152: 104 Ind Cas 316.

(4) *Bai Chandabai* v. *Kuver Sahib Bapu,* (1894) 18 Bom 464 (467).

O. 33, R.9, Notes 5—7.

5. **Death of plaintiff after institution of the suit.**—*See* O. 22, R. 1, Note 10 above.

6. **Appeal in forma pauperis.**—*See* O. 44, *infra*.

7. **Limitation where plaintiff is dispaupered.**—*See* R. 7, *ante*.

O.33, R.10, Note 1.

Costs *where* pauper succeeds.

R. **10.** [S. 411] *Where* the plaintiff succeeds in the suit, the Court shall calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

[1877—S. 411; 1859—S. 309.]

Synopsis.

1. Scope of the rule.
2. Amount of Court-fee to be a first charge.
3. Effect of the first charge.
4. Crown entitled to precedence in respect of Court-fees.
5. Recovery of Court-fees by Government from party ordered to pay the same.
6. Mode of realisation of Court-fees.
7. Appeal.

Pauper succeeding only in part. See Note 1, Pt. (1).

1. **Scope of the rule.**—This rule and the next are intended to secure to the Government its rights to Court fees, the payment of which is temporarily suspended when the plaintiff is permitted to sue in *forma pauperis*.[1] This rule deals with the case of a pauper plaintiff who succeeds in the suit and R. 11 deals with the case of a pauper plaintiff who *fails* in the suit. No provision has been made in the Code for the case of a plaintiff succeeding in part and failing in part. In the absence of any such provision, presumably the Court is intended to deal with the case by combining the provisions of the two rules and by appropriating the Court-fees payable between the plaintiff and the defendant in proportion to the extent of success of each party.[1-a] The High Courts of Allahabad,[2] Madras[3] and Patna[4] have held that it is not open to the Court to direct the defendant to pay Court-fees exceeding the amount which would be payable on that portion of the plaintiff's claim on which the

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Order 33, Rule 10—Note 1.

[1] See however the observations in *Panalal Jagannath* v. *Collector of Mandalay*, 1930 Rang 342 (343): 8 Rang 294: 127 Ind Cas 606.

[1-a] See *Ganga Dahal Rai* v. *Gaura*, (1916) 35 Ind Cas 46 (48): 38 All 469: 14 All L J 657. See also *Shostee Churn* v. *The Collector of Chittagong*, (1870) 13 Suth W R 155 (156) [An order directing Court-fee to be paid to Government by parties in proportion to their success cannot be altered by the same Court so as to make parties jointly liable].

[2] *Ganga Dahal* v. *Gaura*, (1916) 35 Ind Cas 46 (48): 38 All 469: 14 All L J 657.

[3] *Rami Reddi* v. *Polamma*, 1930 Mad 1000 (1001): 32 Mad L W 172: 53 Mad 780: 129 Ind Cas 66; *Srinivasa Ayyar* v. *Lakshmi Ammal*, 1928 Mad 216 (223): 54 Mad L Jour 580: 108 Ind Cas 712: 28 Mad L W 828; *The Secretary of State for India in Council* v. *Tripurna Sundarammal*, 1926 Mad 474 (475): 50 Mad L Jour 280: 1926 Mad W N 363: 96 Ind Cas 112; *Chandraseka* v. *Secretary of State for India*, (1891) 14 Mad 163 (165). See however *Balamani* v. *Rama*, 1925 Mad 786 (787): 48 Mad L Jour 273: 21 Mad L W 528: 1925 Mad W N 163: 87 Ind Cas 57 [Pauper appeal allowed on a point not touching merits—Court ordered Court-fees to be paid by parties in equal moieties].

[4] *Badrinath* v. *Jagdip Sahay*, 1930 Pat 353 (354): 122 Ind Cas 152: 11 Pat L Tim 267.

O.33, R.10, Notes 1—2.

plaintiff succeeds. The High Court of Calcutta[5] has on the other hand, held that this rule leaves the discretion entirely with the Court to direct which of the parties should pay the Court-fees due to the Government and that the Court should not be fettered by any hard and fast rule but must only be guided by the equities of the case.

As has been seen already this rule is applicable only where the plaintiff *succeeds* in the suit. Where, in a pauper suit, the amount decreed to the plaintiff, fell short of the amount payable by him as costs to the defendant, he was held not to have succeeded within the meaning of this rule because, so far as the plaintiff was concerned the decree was, in the result, not a success in view of O. 21, R. 19 of the Code.[6]

This rule is applicable also to Chartered High Courts in the exercise of their Original Civil Jurisdiction.[7]

2. **Amount of Court-fees to be a first charge.**—The Court-fee payable to the Government under this rule is a *first charge* on the subject-matter of the suit.[1] "The Crown has a right to receive certain fees at the institution of every suit; it temporarily foregoes its right in the case of pauper plaintiffs, and places means in their hands to proceed to judgment against their defendants. Without the forbearance of the Government to insist on its ordinary rule, the suit, in such a case, could not have been brought or the money realised. It is, therefore, reasonable that the Crown, in consideration of its giving up its right to those fees, should have for their defrayal, the first claim on the proceeds of the pauper suit".[2]

The rule creates two distinct and separate rights exercisable at the option of the Crown, *viz.*:—

(1) A right *in rem* against the property recovered in the suit, and

(2) A right in *personam* against the party ordered by the decree to pay the Court-fee.

In the event of the Crown not succeeding in realising the amount by pursuing the personal remedy it has a right to recover the same from the subject-matter of the suit.[3] The charge is enforceable in *execution* by attachment

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(5) *Rohini Kumar Pal* v. *Kusumkamini Pal*, 1928 Cal 196 (198): 32 Cal W N 48: 105 Ind Cas 725: 55 Cal 488.

(6) *Chakrapani Iyengar* v. *The Government of India*, 1922 Mad 125 (126): 42 Mad L Jour 191: 31 Mad L Tim 38: 69 Ind Cas 743: 14 Mad L W 529: 1921 Mad W N 806.

(7) *Yelumalai* v. *Kuppammal*, 1928 Mad 385 (387): 54 Mad L Jour 263: 27 Mad L W 760: 109 Ind Cas 173 [Madras High Court Fees Rules (O S), O 2, R 2 is not inconsistent with O 33, Rr 10 and 11, C P Code].

Note 2.

(1) *Ganpat Putaya* v. *Collector of Canara*, (1875-77) 1 Bom 7 (9): 1 Mad Jur 214; *Gulzari Lal* v. *The Collector of Bareilly*, (1875-78) 1 All 596 (598): 2 Ind Jur 722; *Dost Muhammad Khan* v. *Mani Ram*, (1907) 29 All 537 (540): 1907 All W N 157: 4 All L J 720 F B; In the matter of the Will of *Dawubai Haji Khan Habib Khan*, (1894) 18 Bom 237 (240) [Probate proceeding in *forma pauperis*—Joint charge will be on property covered by probate]; *Puthia Valappil Barga* alias *Kunhunha Umma* v. *Veloth Assenar*, (1902) 25 Mad 733 (735): 12 Mad L Jour 405 [But first charge may be lost by waiver or consent]. See *Prankristo* v. *The Collector of Murshidabad*, (1871) 15 Suth W R 205 (206).

(2) *Ganpat Putaya* v. *The Collector of Kanara*, (1875) 1 Bom 7 (9, 10).

(3) *Babui Girija Kuer* v. *Secretary of State for India*, (1919) 50 Ind Cas 315 (317): 4 Pat L Jour 166: 1921 Pat H C C 42.

O.33, R.10, Notes 2 –4.

and sale of the properties covered by the charge and not by a separate suit.[4] *See* R. 13, *infra*.

The Court-fee payable to the Government is to be calculated as on the date of the presentation of the application for leave to sue *in forma pauperis*. Where the Court-Fees Act was amended after the institution of the suit and before the decree, the calculation of Court-fees has to be made in accordance with the law at the time of the institution.[5]

3. **Effect of the first charge.**—The effect of the first charge is that, a sale in execution of the same prevails as against a subsequent sale. Thus where a property was sold in 1896 for the Court-fees due to the Government under a decree of 1893 and it was again sold in 1899 in execution of a money decree obtained by a third person in 1894 on a debt anterior to 1893, the former purchase was held to prevail over the latter.[1] Similarly the claim of the Government against any amounts due to the plaintiff under the decree will prevail against any cross claim or claims under cross decrees against the plaintiff in favour of the defendant, provided the defendant has not taken out execution for the balance under O. 21, Rr. 18 or 19. In the case cited below[2] *A* sued *B in forma pauperis* to recover a property of the value of Rs. 60,000 and obtained a decree for a sum of Rs. 1,500-0-0. He was ordered to pay a sum of Rs. 1,200-0-0 to the Government as Court-fees. In an application by the Government to recover the amount of the Court-fees from the decree amount of Rs. 1.500-0-0 due from *B* to *A*, *B* contended that a sum of Rs. 1,000-0-0 was due to him from *A* as costs of the suit and that a sum of Rs. 800-0-0 was also due from him under another cross decree against him making a total sum of Rs. 1,800 and *B* claimed to be entitled to set-off against this total sum the above amount of Rs 1,500-0-0 due to *A*. It was held that under the circumstances the Government was entitled to recover the amount of Court-fee from the decretal amount of *A* in the hands of *B* in preference to the cross claims of *B*. It would be otherwise if in the above case *B* had, before the application by the Government was made, actually applied to execute his decree against *A* for the balance after making the set-off.[3]

4. **Crown entitled to precedence in respect of Court-fees.**—It is a principle recognised by the laws of all countries that claims of the state are entitled to precedence over other claims.[1] The amount of Court-fees due to the Crown is therefore entitled to precedence over the claims of other creditors of a pauper decree-holder. This rule is only an enabling one, indicating the manner in which the Crown may realise the debt; it does not preclude the Crown or its representatives from urging its prerogative rights of precedence

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(4) *Ram Das* v. *Secretary of State*, (1896) 18 All 419 (421, 422): 1896 All W N 121 [Even though the properties have passed from the judgment-debtor to the decree-holder]; *Babui* v. *Secretary of State*, (1919) 50 Ind Cas 815 (318): 4 Pat L Jour 166: 1921 Pat H C C 42.

(5) *Secretary of State* v. *Tripurna Sundarammal*, 1926 Mad 474 (475): 50 Mad L Jour 280: 1926 Mad W N 363: 96 Ind Cas 112.

Note 3.

(1) *Puttia Valappil Barga* alias *Kunhunha Umma* v. *Veloth Assenar*, (1902) 25 Mad 733 (735): 12 Mad L Jour 405.

(2) *Janki* v. *The Collector of Allahabad*, (1887) 9 All 64 (67): 1886 All W N 300.

(3) *Chakrapani* v. *The Government of India*, 1922 Mad 125 (126): 42 Mad L Jour 191: 31 Mad L Tim 88: 69 Ind Cas 748: 14 Mad L W 529: 1921 Mad W N 805.

Note 4.

(1) *The Secretary of State* v. *The Bombay Landing and Shipping Co*, (1868) 5 Bom H C (O C) 23.

O.33, R.10,
Notes
4—6.

in any other manner.[2] So when a successful pauper plaintiff attached and sold, for costs due to her, certain property other than the property in suit, belonging to the judgment-debtor and the sale proceeds were paid into Court, and both the plaintiff and the Government solicitor applied for payment out of the said sum, it was held that the Government solicitor was entitled to be paid out in preference to the plaintiff, and that it was not obligatory on the Government to *attach* the fund in Court before getting payment.[3]

But though in respect of the Court-fees the Government is entitled to precedence among ordinary creditors, it cannot claim precedence over *lien* holders. "It is only when claims of the Crown and claims of common persons come into competition that the Crown is preferred. It is a matter of common justice and common honesty that the Crown has no more right than a common person to seize *A's* property and apply it in or towards the discharge of a debt due from *B*."[4] Accordingly it was held that the Government could not attach and sell a defendant's property for Court-fees so as to destroy the rights of a previous *mortgagee* of the defendant.[5]

5. **Recovery of Court-fees by Government from party ordered to pay the same.**—The party ordered by the Court under this rule to pay the amount of Court-fee due to the Government is the person who is liable to pay the same to the Government. The Government can proceed against that person personally or against his properties as the case may be.[1]

6 **Mode of realisation of Court-fees.**—An order under this rule for the recovery of the Court-fees due to the Government is equivalent to a decree in its favour[1] and may be executed by the Government, at its option, either by enforcing the charge on the subject-matter of the suit, or by proceeding in execution against the person or property of the party ordered to pay the Court-fee.[2] No separate *suit* lies for the recovery of the same.[3] *See* R. 13 below. The fact that the property, the subject-matter of the suit, has ceased to be in the possession of the party, directed to pay the costs and has come into the possession of the successful party does not affect the right of the Govern-

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(2) *Gayanoda Bala Dassee* v. *Butto Krishna Das Bairagee,* (1906) 33 Cal 1040 (1045): 10 Cal W N 857.

(3) *Srimaty Gayanoda Bala Dasee* v. *Butto Krishna Dase Bairagee,* (1906) 33 Cal 1040 (1046): 10 Cal W N 857.

(4) *Ragho Prosad* v. *Mewa Lal,* (1912) 15 Ind Cas 177 (179, 180): 11 Mad L Tim 193: (1912) 1 Mad W N 311: 14 Bom L R 212: 34 All 223: 16 Cal W N 433: 15 Cal L Jour 327: 9 All L J 401: 22 Mad L Jour 457 [Per Sir John Edge at page 179—Crown and Government are not the same—*See also* 7 Mad 434 (435)]; *Ramachandra* v. *Pitchaikanni,* (1883) 7 Mad 434 (436).

(5) *Ragho Pershad* v. *Mewa Lal,* (1912) 15 Ind Cas 177 (180): 11 Mad L Tim 193: (1912) 1 Mad W N 311: 14 Bom L R 212: 34 All 223: 16 Cal W N 433: 15 Cal L Jour 327: 9 All L J 401: 22 Mad L Jour 457 P C; *Dost Muhammad Khan* v. *Mani Ram,* (1907) 29 All 537 (540): 1907 All W N 157: 4 All L J 720 F B [Overruling 2 All 196]. See also *Gadadhar Mandal* v. *Manaka Dassi,* 1926 Cal 859 (860): 94 Ind Cas 391 [Maintenance decreed in pauper suit with charge on defendant's properties. Government selling said properties for Court-fees—Government's right is subject to maintenance charge].

Note 5.

(1) See *Jetha Mulchand* v. *Gulraj,* (1884) 8 Bom 577 (582).

Note 6.

(1) *Jwala Sahai* v. *Masiat Khan,* (1904) 26 All 346 (348): 1904 All W N 35: 1 All L J 53.

(2) *Babui Girija Kuer* v. *The Secretary of State for India in Council,* (1919) 50 Ind Cas 315 (317): 4 Pat L Jour 166: 1921 Pat H C C 42; *Ram Das* v. *Secretary of State,* (1896) 18 All 419 (421): 1896 All W N 121.

(3) *Babui Girija Kuer* v. *The Secretary of State for India,* (1919) 50 Ind Cas 315 (318): 4 Pat L Jour 166: 1921 Pat H C C 42; *Ram Das* v. *Secretary of State,* (1896) 18 All 419 (421): 1896 All W N 121.

O.33, R.10, Notes 6—7.

ment to enforce the charge.[4] When a decree is attached in execution of another decree, the proper course, in realising the fruits of the latter decree is not to *sell* the former decree attached as aforesaid, but to execute the attached decree itself at the instance of the attaching decree-holder or otherwise, as provided in O. 21, R. 53. This principle applies to the Government as well, and the fact of the Government possessing a first charge on the subject-matter of the suit under this rule will not entitle the Government to *sell* the decree passed in favour of the pauper plaintiff.[5] The proper method of recovering Court-fee from a pauper plaintiff who has obtained a decree for future maintenance, is by the appointment of a receiver to collect the maintenance amount and pay the Government the Court-fee due by the plaintiff.[6]

In proper cases, the decree-holder may be allowed to take out execution against the judgment-debtor for the Court-fee due to Government also, in case he has already paid the fee to the Government, or on the Court taking sufficient precaution to have the Court-fee amount paid over to the Government.[7]

A sale for Court-fee wrongly believed to be due[8] or of the property of a third person in execution of an order for the Court-fee due to the Government[9] is a nullity.

An application by the Government for recovery of the amount of the Court-fee is subject to the Law of Limitation and must be made within 3 years from the date of the decree.[10]

7. **Appeal.**—There was a difference of opinion under the old Code as to whether the Government, in proceedings under the Chapter corresponding to this order was a *party* to the suit within the meaning of S. 47.[1] R. 13 now provides that the Government in such cases is a party within S. 47. An order on application by the Government for payment of the Court-fee under this order, will therefore now be an order under S. 47 and as such will be appealable as a *decree*.[2]

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(4) *Girija Kuer* v. *Secretary of State*, (1919) 50 Ind Cas 315 (318, 319): 4 Pat L Jour 166: 1921 Pat H C C 42; *Ram Das* v. *Secretary of State*, (1896) 18 All 419 (421, 422): 1896 All W N 121.

(5) See *Jotindra Nath* v. *Dwarka Nath*, (1893) 20 Cal 111 (115).

(6) *Secretary of State for India* v. *Sarvepalli Venkata Laxmanna*, 1926 Mad 565 (565): 50 Mad L Jour 279: 23 Mad L W 602: 1926 Mad W N 362: 94 Ind Cas 254: 49 Mad 567 [A portion of each instalment of future maintenance may be reserved for the decree-holder to live upon]. See also *Rajindra* v. *Sundar Bibi*, 1925 P C 176 (176): 41 Cal L Jour 383: 23 All L J 634: 27 Bom L R 849: 87 Ind Cas 295: 3 Pat L R 142: 47 All 385: 52 Ind App 262: 49 Mad L Jour 244: 1925 Mad W N 630: 22 Mad L W 284: 6 L R P C 138: 30 Cal W N 818 P C [Decree for future maintenance not attachable under S 60, C P C. But receiver may be appointed and portion of collection may be paid to creditors of maintenance holder, *see* S 60, N 22].

(7) *Surjan Kunwari* v. *Shantanand Gir*, 1929 All 905 (906): 118 Ind Cas 191 [A case where the decree-holder was under the decree bound to pay Court-fee to Government and entitled to recoup himself from the judgment-debtor].

(8) *Balwant Rao* v. *Muhammad Hussain*, (1893) 15 All 324 (326): 1893 All W N 140.

(9) *Jwala Sahai* v. *Masit Khan*, (1904) 26 All 346 (352): 1904 All W N 35: 1 All L J 53.

(10) *The Collector of Broach* v. *Desai Raghunath*, (1883) 7 Bom 546 (549, 552, 553); *Collector of Beerbhoom* v. *Sreehurry*, (1874) 22 Suth W R 512 (512): 14 Beng L R 143 F B; *Appaya* v. *The Collector of Vizagapatam*, (1882) 4 Mad 155 (157). See however *Shamee Muhammad* v. *Moonshee Mahomed Ali Khan*, (1869) 11 Suth W R 67 (68): 2 Beng L R (App) 22.

Note 7.

(1) *See* Note 10 to S 47, *Ante*; see also *Shaikh Abdul* v. *Collector*, 1898 Bom Print Judgt 406.

(2) *Secretary of State* v. *Narayan*, (1911) 35 Bom 448 (450): 13 Bom L R 686: 12 Ind Cas 29.

Procedure where pauper fails.

R. 11. [S. 412] *Where* the plaintiff fails in the suit or is dispaupered, or *where* the suit is *withdrawn or* dismissed,—

(*a*) *because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fee or postal charges* (*if any*) *chargeable for such service, or*

(*b*) *because the plaintiff does not appear when the suit is called on for hearing,*

the Court shall order the plaintiff, or any person *added as a* co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

[1877—S. 412.]

Synopsis.

1. **Legislative changes.**
2. **Scope of the rule.**
3. **Where the suit is withdrawn or dismissed.**
4. **Costs.**
5. **Costs of successful defendant.**
6. **The Court shall order the plaintiff to pay the Court-fees. See Note 2 above.**

Failure of Court to provide for Court-fees— Remedy. See Note 2.

1. Legislative changes.—

1. The corresponding section in the old Code contained a penal clause to the effect that if it was found that the suit is vexatious or frivolous the pauper plaintiff was liable to a fine not exceeding Rs. 100 or imprisonment for a term which may extend to a month or both. The said clause has been omitted in the present rule.

2. The word "withdrawn" has been newly added. *See* Note 3, below.

2. Scope of the rule.—The provisions of this rule are mandatory and the Court when it passes a decree in the suit must provide in that decree for payment by the plaintiff of the Court-fee due to the Government.[1] As to the remedy of the Government in case the Court omits to make an order as to Court-fee, *see* Rr. 12 and 13 below and the notes thereto.

3. Where the suit is withdrawn or dismissed.—The old Code did not contain the words "when the suit is withdrawn" and there was a conflict of decisions as to whether the words "if the plaintiff *fails* in the suit" included also cases where the suit was *withdrawn*.[1] The introduction of the words "where the suit is *withdrawn*" has now set the conflict at rest.

Order 33, Rule 11—Note 2.

(1) *Secretary of State* v. *Bhagwanti Bibi*, (1891) 13 All 326 (329): 1891 All W N 97.

Note 3.

(1) *Chandabai* v. *Kuver Saheb*, (1894) 18 Bom 464 (467) (No); *Collector of Kanara* v. *Krishnappa*, (1890) 16 Bom 77 (78, 79) (No); *The Secretary of State for India in Council* v.

O.33, R.11, Notes 3—6.

It has been held by the High Courts of Bombay[2] and Madras[3] that even where a suit is dismissed on grounds other than those specified in Cls. (*a*) and (*b*) of this rule, the plaintiff must be deemed to have failed in the suit and that the Court is bound to make an order for the payment of the Court-fees by him to the Government.

Where a plaint *in forma pauperis* is returned for presentation to the proper Court the plaintiff cannot be said to have *failed* in the suit and, therefore, no order for payment of Court-fee can be made under this rule.[4] Similarly where an application to sue as a pauper is rejected because the applicant is a minor and unrepresented, and no enquiry is made as to pauperism, an order under this rule for payment of the Court-fees from the estate of the minor applicant is not legal.[5]

4. **Costs.**—It is already seen in S. 35 *ante*[1] that a Court can under certain circumstances order a next friend or a guardian of a minor to pay the costs of the suit personally though he is not a *party* to the suit. Can this Court in a pauper suit order the next friend or the guardian to pay the *Court-fees* due to Government? It has been held that it can do so under the combined operation of S. 35 and this rule. Though the Court-fee may not be costs but only *revenue* so far as the Government is concerned, it is costs incurred by the party paying it, and S. 35 is wide enough to cover such a case.[2]

5. **Costs of successful defendant.**—This rule makes a provision for the payment of Court-fees due to the Government and does not deal with the power of the Court to order costs of a defendant who has succeeded in a suit *in forma pauperis.* But it does not follow that in the case of a pauper suit, the Court cannot order the plaintiff to pay the costs of the successful defendant. Orders as to costs as between the parties to the suit are governed by S. 35 as much in suits by paupers as in other suits.[1]

6 **The Court shall order the plaintiff to pay the Court-fees.**—*See* Note 2 above.

O.33, R.12.

Government may apply for payment of Court-fees.

R. **12.** [New.] *The Government shall have the right at any time to apply to the Court to make an order for the payment of Court-fees under rule* 10 *or rule* 11.

Narayan Balakrishna Kulkarni, (1905) 29 Bom 102 (105): 6 Bom L R 1122 (Yes); *The Secretary of State for India v. Bhagirathibai,* (1907) 81 Bom 10 (15): 8 Bom L R 689 F B (Yes); *Secretary of State for India v. Surju Das,* (1908) Pun Re No 104: 160 Pun W R 1908 (Yes).

(2) *Secretary of State v. Narayan Kasht Ram,* (1911) 12 Ind Cas 29 (30): 13 Bom L R 686: 35 Bom 448 [Under the new Code]. But see *Collector of Kanara v. Krishnappa,* (1890) 15 Bom 77 (78, 79) [Under the old Code—Overruled in 81 Bom 10 F B].

(3) *Collector of Vizagapatam v. Abdul Kharim,* (1897) 21 Mad 113 (114): 8 Mad L Jour 4: Reference under Court Fees Act, S 5 (1894) 4 Mad L Jour 98 (99).

(4) *The Collector of Ratnagiri v. Janardhan Vithal Kamat,* (1881-82) 6 Bom 590 (592): 7 Ind Jur 36.

(5) *Amichand Talakchand v. Collector of Sholapur,* (1889) 13 Bom 284 (236).

Note 4.

(1) *See* N 19, S. 35, *ante;* see also *Brijessuree Dossia v. Kishore Dass,* (1876) 25 Suth W R 316 (316).

(2) *Elumalai Naicker v. Kuppammal,* 1931 Mad 249 (250, 251): 1930 Mad W N 289: 58 Mad L Jour 623: 31 Mad L W 633: 53 Mad 716: 128 Ind Cas 156.

Note 5.

(1) *Jetha Mulchand v. Gulraj Jasrup,* (1884) 8 Bom 577 (579): F B.

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Synopsis.

1. Scope of the rule. 2. Appeal.

1. Scope of the rule.—This rule is new and entitles the Government to apply to the Court *at any time* to make an order under R. 10 or R. 11.[1] In the undermentioned case[2] it was held that the present rule being a rule of procedure had a retrospective effect and applied to cases of dismissal of suits before the new Code came into force.

2. Appeal.—An order passed on an application by the Government under this rule for payment of Court-fee is an order under S. 47 and is therefore appealable.[1] *See* Note 7 to R. 10, *ante*.

O.33, R.13, Note 1.

Government to be deemed a party.

R. 13. [New.] *All matters arising between the Government and any party to the suit under rule* 10, *rule* 11 *or rule* 12 *shall be deemed to be questions arising between the parties to the suit within the meaning of section* 47.

Synopsis.

1. Scope and object of the rule.

1. Scope and object of the rule.—This rule is new. It sets at rest the conflicting rulings of the several High Courts under the old Code as to whether the Government is to be deemed a party to the pauper application and suit. (*See* Note 7 to R. 10.). Questions arising under Rr. 10 to 12 between the Government and any of the parties are now questions to be determined under S. 47 and therefore this rule operates as a bar to the institution of an independent suit whether by the Crown or any other party with reference to such matters.[1]

O.33, R.14, Note 1.

Copy of decree to be sent to Collector.

R. 14. [New.] *Where an order is made under rule* 10, *rule* 11 *or rule* 12, *the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.*

Synopsis.

1. Scope of the rule.

1 Scope of the rule.—All that the Court should do under this rule is to send to the Collector a copy of the decree which it has passed and which contains an order that the plaintiff shall pay a certain sum to Government. What the Collector does after the receipt of the copy is no concern of the Court and the Court cannot forward the decree to him *with a direction* to collect the sum payable by plaintiff.[1]

Order 33, Rule 12—Note 1.

(1) The cases under the old Code in the absence of such a provision were conflicting, see *Secretary of State*, In re, (1878) 2 Cal L Rep 461 (462) [Government could not apply]; *Collector of Canara* v. *Krishnappa Hedge*, (1891) 15 Bom 77 (79) (Can). See also *Secretary of State* v. *Narayan Balkrishna*, (1905) 29 Bom 102 (103, 106): 6 Bom L R 1122.

(2) *Secretary of State* v. *Narayan*, (1911) 12 Ind Cas 29 (30): 35 Bom 448: 13 Bom L R 686.

Note 2.

(1) *Secretary of State* v. *Narayan*, (1911) 12 Ind Cas 29 (30): 35 Bom 448: 13 Bom L R 686.

Order 33, Rule 13—Note 1.

(1) *Girija Kuer* v. *Secretary of State*, (1919) 50 Ind Cas 815 (818): 4 Pat L Jour 166: 1921 Pat H C C 42.

Order 33, Rule 14—Note 1.

(1) *Panalal Jagannath* v. *Collector of Mandalay*, 1930 Rang 342 (348): 8 Rang 294: 127 Ind Cas 606.

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.

R. 15. [S. 413.] An order *refusing* to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by *the* Government *and by the opposite party* in opposing his application for leave to sue as a pauper.

[1877—S. 413; 1859—S. 310.]

Synopsis.

1. Scope of the rule.
2. Bar to subsequent application.
3. Dismissal of an application for default.
4. "Right to sue."
5. Costs incurred.

Pauper appeal. See Note 1, Pt. (4).

1 Scope of the rule.—The rule provides that an order *refusing* an application to sue in *forma pauperis* shall operate as a bar to a similar subsequent *application*. It does not, however, bar a subsequent *suit* provided the costs of the Government and of the opposite party are paid.[1] Nor does the refusal of the pauper application bar an application for a *review* of that order.[2] As to whether the Court can, after the refusal of the application, allow the pauper applicant to pay the requisite Court-fee within a time to be fixed by it and validate the plaint, *see* Note 10 to S. 149, and the case cited below.[3]

The provisions of this rule apply also to applications for leave to *appeal* as a pauper.[4]

2. Bar to subsequent application.—The rule specifically provides that an order "*refusing*" the pauper application will operate as a bar to a subsequent application of the like nature in respect of the same right to sue. R. 7, *ante*, empowers the Court under the circumstances mentioned therein, either to allow or *refuse* to allow an application to sue as a pauper. There is a conflict of opinion as to whether an order of *rejection* of an application under R. 5 of this Order is an order of "refusal" within the meaning of this rule. In *Atul Chandra Sen* v. *Peary Mohun*,[1] it was observed by the

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Order 33, Rule 15—Note 1.

[1] *Naraini Kuar* v. *Makhan Lal*, (1895) 17 All 526 (528): 1895 All W N 106; *Narain Singh* v. *Jaswant Singh*, (1899) 21 All 359 (360, 361): 1899 All W N 123 [O 2, R 2 is no bar]; *Keshav Ramchandra* v. *Krishna Rao*, (1896) 20 Bom 508 (510); *Aubhoya Ohurn* v. *Bissesswari*, (1897) 24 Cal 889 (890); *Indri* v. *Balkishen*, (1917) 39 Ind Cas 942 (943) All; *Mahadeo Sahai* v. *Secretary of State*, 1932 All 312 (314): 1932 All L J 254: 140 Ind Cas 125.

[2] *Adarji Edulji* v. *Manikji Edulji*, (1880) 4 Bom 414 (415); *Mahomed Gazee* v. *Dullab Bibee*, (1870) 11 Suth W R 22 (22, 23): 5 Beng L R 318 Note; In the matter of *Rani Umasundari*, (1903) 5 Beng L R App 29; *Umda Bibi* v. *Naima Bibi*, (1898) 20 All 410 (411): 1898 All W N 95 [No Court-fee is payable on an application for review like the plaint].

[3] *Mrinalini Debi* v. *Tinkori Debi*, (1912) 14 Ind Cas 297 (298): 16 Cal W N 641 [Following 24 Cal 889].

[4] *Bai Ful* v. *Manorbhai*, (1898) 22 Bom 849 (859) [Farran, C J dissenting as to the reasoning]; *Sheik Buffati* v. *Kallo Khan*, (1905-06) 3 L B R 194 (195). See also *Allah Bux* v. *Mordar*, (1911) 11 Ind Cas 160 (160): 4 Sind L R 268 [The applicant can file a fresh appeal].

Note 2.

[1] (1916) 33 Ind Cas 812 (813): 20 Cal W N 669. See also *Khondar Ali Afzal* v. *Purna Chandra Tewari*, 1924 Cal 1039 (1039): 40 Cal L Jour 188: 84 Ind Cas 703.

O.33, R.15, **Notes 2—4.**

High Court of Calcutta that there is no distinction between an order of rejection under R. 5 and an order of refusal under R. 7 and both kinds of orders alike bar a subsequent application under this rule.

The order in that case was, however, one passed *after evidence* and, therefore, presumably one passed under R. 7.[2] The High Courts of Allahabad,[3] Bombay,[4] Lahore,[5] Madras[6] and Rangoon[7] have, on the other hand, held that the bar under this rule does not extend to an order of rejection passed under R. 5. It is submitted that the latter view is correct.

An order returning the application for presentation to the proper Court does not amount to an order of refusal within the meaning of this rule.[8]

The bar under this rule being one which affects the jurisdiction of the Court to entertain a fresh application, the Court is bound to take notice of it although it is raised at a late stage in subsequent proceedings.[9]

3. **Dismissal of an application for default.**—According to the High Court of Calcutta[1] a dismissal of an application for default of appearance operates as a bar to the entertainment of a fresh application under this rule. But according to the other High Courts[2] such a dismissal does not amount to an order of refusal within the meaning of this rule and a second application is not barred.

In *Ranchod Marar* v. *Bezanji*,[3] it was held by the High Court of Bombay that an order rejecting the application as the applicant did not wish to proceed with the same amounted to an order of refusal within the meaning of the corresponding S. 409 of the old Code and barred a second application. This view was followed in the undermentioned cases by the High Courts of Calcutta[4] and Lahore.[5] The High Court of Rangoon[6] has, however, taken a contrary view.

4. **"Right to sue."**—The words "right to sue" and "cause of action" are intended to cover the same ground, consequently if the cause of action for a second application to sue as a pauper is *different* or *arose subsequent* to that in the prior application, the bar under this rule cannot apply. Thus where *A* sued in *forma pauperis* for maintenance against her husband, and her appli-

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(2) *See* the observations in respect of that case in *Mt Bal Kuar* v. *Shib Das*, (1920) 56 Ind Cas 207 (208): 1 Lah 151.

(3) *Chattarpal Singh* v. *Raja Ram*, (1885) 7 All 661 (664): 1885 All W N 156: 10 Ind Jur 70 F B.

(4) *Ramchod Moror* v. *Bezangi Edulje*, (1896) 20 Bom 86 (94, 95).

(5) *Mussamat Bal Kaur* v. *Shib Das*, (1920) 56 Ind Cas 207 (208): 1 Lah 151.

(6) *Krishnamurthy* v. *Ramayya*, 1926 Mad 875 (876): 51 Mad L Jour 79: 96 Ind Cas 962: 50 Mad 63.

(7) *Maung Shwe Tha* v. *Ma U Kra Zan*, 1932 Rang 195 (196): 10 Rang 475: 140 Ind Cas 162 [1926 Rang 200: 42 Ind Cas 803 F B and 1929 Rang 128 were held overruled by 1932 Rang 107 F B].

(8) *Skinner* v. *Orde*, (1874) 6 N W P H C 225; *Atul Chandra Sen* v. *Peary Mohan*, (1916) 33 Ind Cas 812 (813): 20 Cal W N 669.

(9) *Ranchod Morar* v. *Bezanji Edulji*, (1896) 20 Bom 86 (96).

Note 3.

(1) *Khondkar Ali Afzal* v. *Purna Chandra Tewari*, 1924 Cal 1039 (1040): 40 Cal L Jour 188: 84 Ind Cas 703.

(2) But see *Kedar Nath* v. *Tula Bibi*, (1906) 10 Cal W N Civ (104-N); *Chinnammal* v. *Papathiamma*, 1925 Mad 986 (987): 85 Ind Cas 982; *Bhoj Singh* v. *Mahakonwer*, (1868) 3 Agra Mis 1; *Achru* v. *Ditta Mal*, 1896 Pun Re No 64; *Maung Aung Tun* v. *Ma E Kin*, 1924 Rang 161 (161): 2 Bur L Jour 217.

(3) (1896) 20 Bom 86.

(4) *Baroda Dasi* v. *Upendra Nath*, (1919) 52 Ind Cas 562 (563) Cal.

(5) *Begum* v. *Jaffar Hussain*, 1924 Lah 312 (313): 73 Ind Cas 897.

(6) *Ma E Hlai* v. *U Hmai*, 1931 Rang 79 (80): 131 Ind Cas 64.

O.33, R.15, Notes 4—5.

cation to sue as a pauper was dismissed as disclosing no cause of action, it was held that a second application to sue as a pauper for the maintenance which fell due *subsequent to the dismissal of the prior application*, was not barred.[1]

5. **Costs incurred.**—The old Code did not contain any provision as to the payment of the costs of the opposite party. Under the present rule the pauper applicant can file a fresh suit only if he pays the costs of the Government and also of the opposite party.[1]

O.33, R.16, Notes 1—2.

Costs.

R. **16.** [S. 415.] The costs of an application for permission to sue as a pauper and of an inquiry into pauperism *shall be* costs in the suit.

Synopsis.

1. **Costs of amendment.**
2. **Security for costs. See R. 8, Note 3.**

1. **Costs of amendment.**—Where leave to sue in *forma pauperis* is granted and thereafter the plaintiff applies for the amendment of the plaint, it is not competent for the Court after allowing the amendment to direct him to pay the costs of the amendment, and then dismiss the suit for default of payment of such costs.[1] The High Court of Rangoon has held, that an order making the payment of the costs of the adjournment, a condition for allowing time for amendment of the plaint, can be made.[2]

2 **Security for costs.**—*See* R. 8, Note 3.

ORDER XXXIV.

Suits relating to Mortgages of Immoveable Property.

O. 34, R. 1.

Parties to suits for foreclosure, sale and redemption.

R. **1**. [New; Act IV of 1882, S. 85.] *Subject to the provisions of this Code,*[4] *all persons having an interest either in the mortgage-security or in the right of redemption*[5] *shall*[19] *be joined as parties to any suit*[6] *relating to the mortgage.*

Explanation.—*A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee*[10] *a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.*

[*See* O. 1, Rr. 1, 3, 9 and 10; O. 31, R. 1.]

Note 4.

(1) *Ratanamala Dasi* v. *Kamakshya Nath Sen*, (1920) 57 Ind Cas 9 (10): 81 Cal L Jour 351.

Note 5.

(1) See also *Jetha Mulchand* v. *Gulraj Jasrup*, (1884) 8 Bom 577 (579); *Puthia Valappil Barga* alias *Kunhunna Umma* v. *Veloth Assenar*, (1902) 25 Mad 733 (735): 12 Mad L Jour 405 [Government entitled to first charge]; *Pran Kristo* v. *Collector of Moorshidabad*, (1871) 15 Suth W R 205 (206), (Do.).

Order 33, Rule 16—Note 1.

(1) *Ambaji Balwant* v. *Hanmant Rao Bajirao*, 1922 Bom 885 (385): 24 Bom L R 924: 47 Bom 104: 69 Ind Cas 207.

(2) *Lim Pin Sin* v. *Eng Wan Hock*, 1928 Rang 306 (307): 6 Rang 561.

Synopsis.

1. **Suits relating to mortgages.**
2. **Transfer of Property Act, S. 85.**
3. **Scope and object of the rule.**
4. **"Subject to the provisions of this Code."**
5. **"Persons having an interest either in the mortgage security or in the right of redemption."**
6. **Parties to a suit for foreclosure, sale or redemption.**
    7. **Trustees, executors or administrators.**
    8. **Benamidar.**
    9. **Sub-mortgagee.**
    10. **Prior mortgagees—Explanation.**
    11. **Mahomedan co-heirs.**
    12. **Joint Hindu family.**
    13. **Assignee of mortgage.**
    14. **Receiver in insolvency.**
    15. **Lessee.**
    16. **Landlord.**
    17. **Kanomdar.**
18. **Parties to appeals.**
19. **Effect of non-joinder.**
20. **A person cannot be both a plaintiff and a defendant.**
21. **Joinder of parties.**
22. **Revision.**

Adverse claimants. See Note 5, Pts. (3) to (16).
Contingent or reversionary interests. See Note 6, Pt. (2).
Decree not affecting interests of persons not impleaded. See Note 19, Pts. (8) and (12) to (32).
Interest under customary law. See Note 12, Pt. (18).
Necessary or proper parties. See Note 21, Pts. (2) and (3).
Notice now immaterial. See Note 2.
Puisne mortgagee's rights and duties. See Note 19.
Rival claimants of deceased mortgagee's estate. See Note 5, Pts. (17) to (18). See also Note 6, F.-N. (4).
Suits confined to part of hypotheca. See Note 6, Pts. (18) to (20-a).
Suit for contribution. See Note 6, F.-N. (21).

1. **Suits relating to mortgages.**—This order is new. It incorporates, with certain alterations, Ss. 85-90, 92-94, 96, 97 and 99 of the Transfer of Property Act of 1882 which dealt with the procedure governing suits relating to mortgages. The chief objects with which this Order was enacted were:—

(1) To set at rest the conflict of decisions under the Transfer of Property Act, 1882 as to whether an application for an order absolute after a preliminary decree for sale was an application in execution or was one in the *suit* itself for a further decree. (It is now made clear that the application is for a further decree.)

(2) To put an end to the conflict of decisions as to the applicability of Art. 178 (now Art. 181) of the Limitation Act, to applications for orders absolute, in mortgage suits.[1] (It is now established that Art. 181 applies to an application for a final decree.)

(3) Under the Transfer of Property Act there was no provision for the passing of a final decree where payment was made in accordance with the preliminary decree. This omission has been rectified in this Order.

In suits relating to mortgages, Courts should be guided by the provisions of O. 34 and not by the English practice.[2] The High Court on its original

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Order 34, Rule 1—Note 1.

[1] *Amlook Chand* v. *Sarat*, (1911) 11 Ind Cas 943 (945): 38 Cal 913: 16 C W N 49.

[2] *Abu Jafar* v. *Raghoindra Partab Sahai*, 1926 Oudh 113 (114): 2 Oudh W N 826: 91 Ind Cas 258.

O. 34, R.1, Notes 1—3.

side is also governed by these provisions.[3]

This order applies not only to mortgages of *immoveable property* but also to mortgages of *chattels*[4] and to charges[5] *see* R. 15 below.

2. **Transfer of Property Act, S. 85.**—This rule corresponds to S. 85 of the Transfer of Property Act with the following material alterations:—

(1) The words "all persons having an interest either in the mortgage security or in the right of redemption" have been substituted for the words "All persons having an interest in the property comprised in a mortgage."

(2) The words "provided that the plaintiff has notice of such interest" which occurred at the end of S. 85 have been omitted.

(3) An "explanation" has been added.

The omission of the proviso to S. 85 in the present rule shows that a person may be a necessary party to a mortgage suit though the plaintiff may not be *aware* of that person's interest in the mortgaged property.[1] Cases under S. 85 of the Transfer of Property Act bearing on the question of notice are only of academic interest now.[2]

The other effects of the changes introduced by the rule have been discussed in their proper places in the commentary on this rule.

3. **Scope and object of the rule.**—The object of the present rule as to joinder of parties in mortgage suits is to avoid multiplicity of suits.[1] The rule applies only to suits relating to mortgages (*i.e.*, suits for sale, foreclosure or redemption) and to suits to enforce *charges* but not to suits for *ejectment.*[2] The rule does not *prohibit* the joining of any party but merely lays down that all persons interested in the mortgage security or in the right of redemption should be made parties.[3]

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(3) *Sarat Chandra Roy Chowdhury* v. *Nahapiet*, (1910) 37 Cal 907 (910): 8 Ind Cas 1142.

(4) *Mahamaya Debi* v. *Haridas Haldar*, (1915) 27 Ind Cas 400 (406): 19 Cal W N 208: 20 Cal L Jour 183: 42 Cal 455. *See also* Note 20 to R. 2; *Co-operative Hindustan Bank, Ltd.* v. *Surendra Nath Dey*, 1932 Cal 524 (533): 36 Cal W N 263: 59 Cal 667: 138 Ind Cas 852 [Rule as to costs applicable to mortgage of chattels]. But *see Official Assignee of Bombay* v. *Chunni Ram Moti Lal*, 1933 Bom 51 (54, 55): 34 Bom L R 1615

(5) *Mangal Prasad* v. *Chandra Mall*, (1905) 1 Nag L R 117 (120).

Note 2.

(1) *Jaddo Kuar* v. *Sheo Shankar Ram*, (1910) 7 Ind Cas 902 (904): 33 All 71: 7 All L J 945.

(2) *Basiruddin* v. *Debendra*, (1908) 12 Cal W N 911 (913): *Ram Taran Goswami* v. *Rameswar Malia*, (1907) 6 Cal L Jour 719 (722): 11 Cal W N 1078; *Ram Avtar Singh* v. *Chowdhuri Nursingh Narain Singh*, (1877-78) 3 Cal L Jour 12 (13, 14); *Jian* v. *Gopadya*, (1909) 3 Ind Cas 570 (571): 5 Nag L R 117; *Halli Jha* v. *Lal Singh*, (1915) 27 Ind Cas 425 (427) Cal; *Ragho Ram Singh* v. *Rajani Kanta Banerjee*, (1915) 29 Ind Cas 752 (753): 21 Cal L Jour 452; *Sheo Shanker Ram* v. *Jaddo Kunwar*, (1914) 24 Ind Cas 504 (506): 18 Cal W N 968: 16 Mad L Tim 175: 1914 Mad W N 593: 1 Mad L W 645: 20 Cal L Jour 282: 36 All 383: 12 All L J 1173: 16 Bom L R 810: 41 Ind App 216 P C; *Bijai Bahadur Singh* v. *Mewa Lal and Lachminarain*, (1899) 21 All 195 Note; *Ramnath* v. *Lachman*, (1899) 21 All 193 (194): 1899 All W N 27; *Sitla Baksh Singh* v. *Mewa Lal*, 1899 All W N 34 (34).

Note 3.

(1) *Mata Din* v. *Kazim Husain*, (1891) 13 All 432 (459) F B; *Balmakund* v. *Mussamut Sangari*, (1897) 19 All 379 (381): 1897 All W N 94; *Lala Suraj Prosad* v. *Golab Chand*, (1901) 28 Cal 517 (530): 5 Cal W N 640; *Gokul Chandra Roy* v. *Rasheswari Chowdhurani*, (1911) 11 Ind Cas 826 (826): 14 All L J 108; *Shahsaheb Sabdur Ali* v. *Sadashiv*, (1919) 51 Ind Cas 223 (224): 43 Bom 575: 21 Bom L R 369; *Ramanayanimgar* v. *Maharaja of Venkatagiri*, 1927 P C 32 (36): 51 Ind App 68: 50 Mad 180: 8 Pat L Tim 307: 1927 Mad W N 261: 29 Bom L R 805: 45 Cal L Jour 395: 31 Cal W N 670: 39 Mad L Tim 224: 25 Mad L W 621: 100 Ind Cas 86: 52 Mad L Jour 338 P C; *Parshadi Lal* v. *Laiq Singh*, 1924 All 107 (108): 21 All L J 701: 5 L R All (Civ) 31: 74 Ind Cas 943.

(2) *Armugham Pillai* v. *Kathana Pillay*, (1909) 1 Ind Cas 560 (560): 9 Cr L Jour 809.

(3) *Tej Singh* v. *Patiram*, (1920) 55 Ind Cas 433 (434) Nag.

O. 34, R. 1, **Notes 4—5.**

4. **"Subject to the provisions of this Code".**—This expression has been substituted for the words "Subject to the provisions of the Code of Civil Procedure, S. 437" (Now O. 31, R. 1) which occurred in the Transfer of Property Act, S. 85. Hence the present rule is subject not only to O. 31, R. 1 but also to other provisions of the Code, as, for instance, O. 1, R. 9[1] or O. 30. (Suits by or against firms.)[2]

5. **"Persons having an interest either in the mortgage security or in the right of redemption".**—Under S. 85 of the Transfer of Property Act the plaintiff in a suit relating to a mortgage was bound to implead all persons having an interest in the "*Property* comprised in the mortgage". This gave rise to a conflict of decisions. According to one view the words "Property comprised in the mortgage" referred to the *interest*, as distinguished from the *physical property* which the mortgagor was competent to transfer by way of mortgage at the date of the transaction.[1] In other words, **no person, according to this view, who had no interest either in the *mortgage security*** or in the *right of redemption* could be made a party. The High Court of Allahabad, on the other hand, held that the word "property" meant the *physical property* mortgaged and that it was therefore necessary to implead all persons claiming interest in the property though they had no interest in the mortgage security or in the right of redemption.[2] The present rule has adopted the former view and the Allahabad view is now no longer law.

All the High Courts were, however, agreed, even in cases coming under S. 85 of the Transfer of Property Act, that a person claiming adversely to the mortgagor and the mortgagee, *i.e.*, a person claiming a *paramount* title was not a necessary or a proper party to a suit relating to a mortgage.[3] The same principle has been held to apply under the present rule also.[4] Thus a person impleaded as the legal representative of a deceased mortgagor cannot have a paramount title to the property which he sets up adversely to the mort-

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Note 4.

(1) *Parshadi Lal v. Laiq Singh*, 1924 All 107 (108): 21 All L J 701: 5 L R All Civ 31: 74 Ind Cas 943. See also *Haidar Ali Khondkar v. Mahamed Safiud-din Kazi*, 1932 Cal 34 (35, 36): 54 Cal L Jour 118: 134 Ind Cas 1068. See also Note 19, Pt. (3) below.

(2) *Hardwari Mal v. Atherton West*, (1911) 12 Ind Cas 629 (630) All.

Note 5.

(1) *Jaggeswar Dutt v. Bhuban Mohan Mitra*, (1906) 33 Cal 425 (432): 3 Cal L Jour 205.

(2) *Mata Din v. Kazim Husain*, (1891) 13 All 432 (461, 462).

(3) *Jaggeswar v. Bhuban Mohan*, (1906) 33 Cal 425 (440): 3 Cal L Jour 205; *Khairati v. Banni Begam*, (1908) 30 All 240 (242): 1908 All W N 100: 5 All L J 604; *Joti Prasad v. Aziz Khan*, (1909) 31 All 11 (12, 13): 1908 All W N 263: 5 Mad L Tim 47: 1 Ind Cas 53: 6 All L J 5.

(4) *Punjab National Bank v. Adamji Lookmanji*, 1927 Sind 265 (266, 267): 100 Ind Cas 195; *Mehdi v. Walayat Husain*, 1930 Oudh 97 (99): 7 Oudh W N 25: 121 Ind Cas 277: 5 Luck 658; *Maung San Myaing v. U Pon Gyaw*, 1924 Rang 240 (240): 2 Rang 106: 80 Ind Cas 753; *Ramasamy Pillay v. Marimuthu Goundan*, 1928 Mad 764 (767); *Venkatanarayana v. Ramanna*, 1927 Mad 945 (946): 106 Ind Cas 574; *Namberumal Chetty v. Raghavachariar*, 1921 Mad 701 (704): 14 Mad L W 563: 71 Ind Cas 390 [Investigation of mortgagor's title to land is not necessary]; *Nirode Kanta v. Nripendrakumar*, 1926 Cal 1192 (1192, 1193): 96 Ind Cas 698; *Bhuban Mohan v. Co-operative Bank*, 1925 Cal 973 (976, 978): 29 Cal W N 784: 88 Ind Cas 866; *Tinkarhi Dasee v. Narendranath*, 1932 Cal 512 (513): 59 Cal 548: 138 Ind Cas 671; *Lachmi Narayan Marwari v. Bhagwat Singh*, (1920) 58 Ind Cas 83 (84): 1 Pat L Tim 629; *Satagauda Appanna v. Satapa Dari Gauda*, (1920) 57 Ind Cas 577 (578): 44 Bom 698: 22 Bom L R 815; *Dudali Uayal v. Belo Bibi*, (1920) 54 Ind Cas 806 (806) Cal; *Keshobati Kumari v. Satyaniranjan Chakrabarty*, (1918) 47 Ind Cas 179 (187): 1918 Pat H C C 305; *Gopal Chundra Shah v. Jadu Moni Dassi*, (1911) 11 Ind Cas 201 (202): 15 Cal W N 915; *Bruel & Co v. Kesheorao*, 1926 Nag 67 (68): 89 Ind Cas 446 [Mortgage suit—Person entitled to redeem, but setting up paramount title in himself cannot be added as a party under O. 1, R. 10]; *Brij Lal and Sons v. Punjab and Kashmir Bank, Ltd.*, (1932) 33 Pun L R 240 (241): 136 Ind Cas 728.

O. 34, R.1, Note 5.

gagor, determined in the suit.[5] A person who, in a redemption suit, claims the right of redemption in opposition to the plaintiff cannot be said to be claiming a title paramount to that of the mortgagor and the *mortgagee* and may be a proper party to the suit.[6] The High Court of Madras seems to draw a distinction between a suit for *redemption* and a suit for the enforcement of a mortgage and is inclined to hold that persons claiming the property adversely to the mortgagor and mortgagee can be joined as parties to a suit for redemption.[7] But the judgments in these cases do not show why the general rule as to the exclusion of questions relating to paramount or adverse title from mortgage suits should not apply to suits for redemption. On the other hand, it has been held by the Patna High Court[8] that even in suits for *redemption* persons asserting a paramount title to the mortgaged property should not be joined as parties. Where a person asserting a paramount title to the property has been erroneously made a party to a suit relating to a mortgage, he should be discharged from the suit.[9] But an objection on the ground of the joinder of such a person is not one affecting jurisdiction but is only an *irregularity* in the matter of the joinder of parties and can be cured under S. 99 of the Code.[10] Where, therefore, a party allows the suit to go on and the Court adjudicates on his claim to paramount title he will be bound by the decision and cannot subsequently contend that the question was not within the purview of the suit.[11]

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(5) *M V A L Viswanathan Chettiar* v. *Ma Aye*, 1926 Rang 208 (209): 4 Rang 214: 98 Ind Cas 11; *Md Iqbal* v. *Labha Mal*, 1930 Lah 1068 (1069): 122 Ind Cas 575: 31 Pun L R 998; *Kalidas Roy* v. *Girindra Mohan*, 1921 Cal 343 (343): 33 Cal L Jour 301: 25 Cal W N 192: 63 Ind Cas 92; *Punjab National Bank, Ltd* v. *Firm of Adamji Lookmunji and Sons*, 1927 Sind 265 (266, 267): 100 Ind Cas 195; *Rukmani Ammal* v. *Ankama Naidu*, 1926 Mad 744 (746): 23 Mad L W 664: 96 Ind Cas 26: 1926 Mad W N 938; *Gobardhan* v. *Manna Lal*, (1918) 46 Ind Cas 559 (560): 16 All L J 639: 40 All 584; *Syam Peary Dassya* v. *Eastern Mortgage and Agency Co, Ltd*, (1917) 40 Ind Cas 865 (888) Cal; *Radha Kunwar* v. *Reoti Singh*, (1916) 35 Ind Cas 939 (940): 14 All L J 1002: 43 Ind App 187: 38 All 488: 20 Cal W N 1279: 20 Mad L Tim 211: (1916) 2 Mad W N 220: 31 Mad L Jour 571: 18 Bom L R 850: 24 Cal L Jour 308: 5 Mad L W 456 P C; *Sukh Kunwar Chandur* v. *Bhagwani*, (1914) 25 Ind Cas 233 (235): 12 All L Jour 1088; *Maharaj Singh* v. *Lachman Das*, (1914) 24 Ind Cas 871 (872): 1 Oudh L J 261; *Joti Prasad* v. *Aziz Khan*, (1909) 31 All 11 (13): 6 All L J 5: 5 Mad L Tim 47: 1908 All W N 263; *Ghanshyam Das* v. *Ragho Singh*, 1931 Pat 64 (68): 11 Pat L Tim 898: 130 Ind Cas 257: 10 Pat 234; *Bisnath Miser* v. *Mt Ram Kali*, 1927 Oudh 607 (608): 102 Ind Cas 435; *Ramanna* v. *Venkatanarayana*, 1927 Mad 301 (304): 52 Mad L Jour 52: 25 Mad L W 238: 38 Mad L Tim 20: 99 Ind Cas 468; *Asmatullah* v. *Gamir*, 1929 Cal 672 (673): 33 Cal W N 659; *Priya Sakhi* v. *Bereshwar Samant*, (1917) 37 Ind Cas 277 (281): 44 Cal 425: 21 Cal W N 177: 27 Cal L Jour 212; *Krishna Ayyar* v. *Muthukumaraswamiya*, (1906) 29 Mad 217 (224); *Sitla Baksh* v. *Lalta*, (1902) 5 Oudh Cas 94 (95); *Jago Mohan* v. *Duadoong*, (1908) 12 Cal W N 94 (95, 96). But see *Nafar Chandra* v. *Ratnamala Debi*, (1910) 7 Ind Cas 921 (922): 15 Cal W N 66: 13 Cal L Jour 85. See also *Sonabannessa* v. *Abdul Hamid*, 1932 Cal 12 (13): 35 Cal W N 510: 58 Cal 1222: 134 Ind Cas 892; *Debi Baksh Singh* v. *Parshotam Das*, (1916) 36 Ind Cas 64 (65): 3 Oudh L J 322: 19 O C 58 [Mortgage suit against father, manager of Hindu joint family—Sons impleaded—Sons can contend that the mortgage does not bind the family estate].

(6) *Fateh Din* v. *Ram Rakha*, (1910) 8 Ind Cas 225 (226): 32 Pun L R 1910; *Bhoop Singh* v. *Narsingh Rai*, (1868) 3 Agra 144; *Basdeo Prasad* v. *Dwarika Pandey*, 1924 Patna 234 (234): 2 Pat 805: 83 Ind Cas 478.

(7) *Pumulli Manakal Narayanan* v. *Venkitajela Aiyar*, (1917) 40 Ind Cas 414 (414): 5 Mad L W 615: 1917 Mad W N 417. See also In re *Krishnaswami Pathan*, (1910) 8 Ind Cas 885 (886): 9 Mad L Tim 173.

(8) *Loknath Singh* v. *Santokhi Misser*, 1927 Pat 45 (45): 7 Pat L Tim 737: 97 Ind Cas 415: 27 Cr L Jour 1240.

(9) *J C Galstaun* v. *Abid Husain*, 1924 Oudh 19 (23): 10 Oudh L J 263: 73 Ind Cas 428; *Nirode Kanta* v. *Nripendra Kumar*, 1926 Cal 1192 (1192, 1193): 96 Ind Cas 698; *Bhagirathi Dass* v. *Baleswar Bhagirati*, (1913) 19 Ind Cas 686 (688): 17 Cal W N 877: 19 Cal L Jour 155: 41 Cal 69.

(10) *Balaji* v. *Pandūrang*, 1928 Nag 306 (307); *Bhuban Mohan Ghose* v. *Co-operative Hindusthan Bank, Ltd*, 1925 Cal 973 (976, 978): 29 Cal W N 784: 88 Ind Cas 866; *Pumalli Manakal Narayanan* v. *Venkitajela Aiyar*, (1917) 40 Ind Cas 414 (414): 5 Mad L W 615: 1917 Mad W N 417.

(11) *Galstaun* v. *Abid Husain*, 1924 Oudh 19 (23): 10 Oudh L J 263: 73 Ind Cas 428; *Adam Khan* v. *Dattaram*, 1921 Nag 67 (68): 17 Nag L R 176; *Sadhu Behere* v. *Debakur Tarai*, 1929 Pat 678 (679): 10 Pat L Tim 645: 121 Ind Cas 353: 9 Pat 539; *P Sami Gurukkal* v. *Thirupathiya*, 1924 Mad 193 (196): 18 Mad L W 288: 72 Ind Cas 798; *Priya Sakhi* v. *Bereshwar Samant*, (1917) 37 Ind Cas 277 (281): 21 Cal W N 177: 44 Cal 425: 27 Cal L Jour 212; *Basdeo*

O. 34, R.1, Note 5.

Moreover, the rule as to the exclusion of paramount title is not an inflexible one and, in proper cases, persons asserting a paramount title to the property can be conveniently made parties to a mortgage suit and their claims can be adjudicated upon in such suit.[12] Thus, where the person claiming paramount or adverse title is in *possession* of the mortgaged property and is likely to resist the claim of the plaintiff if the latter succeeds in the suit, it may be convenient to join him as a party so as to avoid a multiplicity of suits.[13] Similarly, where it is alleged that the person claiming paramount title is only a *benamidar* for the mortgagor, he can be joined as a party to the suit and the question can be decided therein.[14] So also in the case of a mortgage of joint family property by the manager of joint Hindu family the other members of the family, who are joined as defendants to a suit on the mortgage, can question the validity of the mortgage.[15]

Where a person is dismissed from a suit on a mortgage on the ground of his claiming a paramount title to the property, he cannot subsequently sue for redemption.[16]

The question whether a person other than one claiming a paramount title, may be made a party to a suit relating to a mortgage and whether the questions raised by him can be gone into in such suit will depend upon the applicability of the provisions of O. 1 and 2 thereto. As has been seen in Note 30 to O. 1, R. 10, *ante,* questions raised purely as between the plaintiffs or between the defendants *inter se* and in which the opposite side is not concerned, are not "questions involved in the suit" and need not be gone into in the suit. Thus in a suit on a mortgage in favour of a deceased person a person claiming the estate of the deceased mortgagee in opposition to the plaintiff is not a necessary party to the suit.[17] Similarly where the plaintiff mortgagee dies

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Narain v. *Bachan Chowdhurani,* (1916) 32 Ind Cas 358 (358) Cal; *Bhaju Chowdhury* v. *Chunni Lal,* (1907) 5 Cal L Jour 95 (104): 11 Cal W N 284. See also *Nirode Kanta* v. *Nripendra Kumar,* 1926 Cal 1192 (1192, 1193): 96 Ind Cas 698 [Plaintiff impleading person claiming paramount title—He cannot subsequently claim at late stage that such person should be discharged].

(12) *Zakir Raza* v. *Madusudan Das,* (1918) 46 Ind Cas 691 (698): 4 Pat L W 417; In re *Obalampalli Ramalakshmanna,* (1914) 22 Ind Cas 976 (976): 1914 Mad W N 623; *Gokul Chandra Roy* v. *Rasheswari Chowdhurani,* (1911) 11 Ind Cas 826 (826): 14 Cal L Jour 108; *Nageshwar Shukal* v. *Jashodra,* (1917) 40 Ind Cas 288 (288): 4 Oudh L J 352 [Suit on mortgage—Persons alleging that they are owners of property and executants of the subsequent mortgage, the mortgagee in which, was impleaded by the plaintiff, are proper parties]; *Iswardas* v. *Hiralal,* 1931 Nag 20 (23): 26 Nag L R 359: 130 Ind Cas 105; *Hare Krishna* v. *Robert Watson & Co,* (1904) 8 Cal W N 365 (368); *Nafar Chandra* v. *Ratnamala Debi,* (1910) 7 Ind Cas 921 (922): 15 Cal W N 66: 13 Cal L Jour 85 [Defendant, mortgagor's legal representative can set up his own title to the property].

(13) *Khub Lal* v. *Jhapsi Kundu,* 1924 Pat 613 (615): 3 Pat 244: 78 Ind Cas 885: 5 Pat L Tim 573. See also In re *Krishnaswami Pathan,* (1910) 8 Ind Cas 885 (886): 9 Mad L Tim 173.

(14) *Duraiswami Iyengar* v. *Varadarajulu Naidu,* 1928 Mad 2 (4, 5): 53 Mad L Jour 647: 39 Mad L Tim 459: 106 Ind Cas 838; *Bhuban Mohan* v. *Co-operative Bank,* 1925 Cal 973 (976): 29 Cal W N 784: 88 Ind Cas 866.

(15) *Debi Baksh Singh* v. *Parshottam Das,* (1918) 36 Ind Cas 64 (65): 3 Oudh L J 322; *Ramasami Pillai* v. *Marimuthu Goundan,* 1928 Mad 764 (769); *Muthiah Servai* v. *Somasundaram Chettiar,* 1928 Mad 199 (200): 107 Ind Cas 814. Similarly *Mati Lal* v. *E M and A Co, Ltd,* 1921 P C 118 (119): 25 Cal W N 265: 28 Mad L Tim 351: 1920 Mad W N 631: 61 Ind Cas 486 P C [Mortgage by Hindu widow—Suit on mortgage—Reversioner joined as party—Reversioner can question binding nature of mortgage against him]. See also *Jaduram* v. *Bhawanisao,* 1930 Nag 89 (90): 121 Ind Cas 666: 13 Nag L J 1 [Suit on mortgage—Subsequent mortgagee joined—He can dispute the binding nature of the mortgage against him on the ground that it was not made with his consent which was requisite under the law, he being malguzar of the land].

(16) *Nilkanta Banerji* v. *Suresh Chandra,* (1886) 12 Cal 414 (421, 422): 12 Ind App 171: 4 Sar 685: 9 Ind Jur 489 P C; *Raghunath* v. *Sheo Lal,* (1917) 39 Ind Cas 849 (850): 13 Nag L R 69.

(17) *Venkatasubbammal* v. *Kandasamy Raja,* 1928 Mad 978 (979): 113 Ind Cas 810.

O. 34, R.1, Notes 5—6.

and some of his legal representatives are brought on the record a person who claims also to be another legal representative cannot be added as a party on that ground only and allowed to raise questions purely between himself and the rival claimants *inter se*.[18] It has also been held similarly that a question of the relative liability of each of several co-mortgagors cannot be gone into in a mortgage suit.[19]

6. **Parties to a suit for foreclosure, sale or redemption.**—As has been seen in Note 5, *ante,* all persons having an interest in the mortgage security or in the right of redemption should be made parties to any suit relating to the mortgage. The interest should be one *subsisting* at the time of the suit.[1] Thus the owner of a *contingent* interest like that of a Hindu reversioner is not a necessary party to the suit.[2] Similarly a transferee pending a suit on the mortgage is not a necessary party to the suit.[3]

The following are necessary parties as being interested in the mortgage security:—

(1) The heirs and assignees of the mortgagee's interest.

(2) Co-mortgagees.[4]

The following are necessary parties as being interested in the equity of redemption:—

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(18) *Govindaswami Udaiyar* v. *Annamalai Udaiyar,* 1927 Mad 1071 (1072): 106 Ind Cas 866. See also *Umesh Chandra* v. *Chowdhury Hemanga Chandra,* (1932) 36 Cal W N 1138 (1143).

(19) *Muhammad Mubarak Ali* v. *Dalip Narayan,* 1927 Pat 117 (120): 98 Ind Cas 968: 8 Pat L Tim 255; *Jai Pragash Singh* v. *Rupmanjari,* 1923 Pat 199 (201): 4 Pat L Tim 91: 71 Ind Cas 940. See also *Marotirao* v. *Mankuwarbai,* 1931 Nag 161 (165): 27 Nag L R 312: 14 Nag L J 109: 134 Ind Cas 274 [Subsequent purchaser—Impleaded—Disclaimer by him of any interest—To be discharged immediately without raising issue between defendants *inter se*].

Note 6.

(1) *Ragho* v. *Daud,* (1888) 13 Bom 51 (53); *T Jivaji Deshamukha* v. *Sakharam Gopal,* (1892) 16 Bom 599 (602) [Cessation of interest due to partition]; *Mulla Vettil Sheelhikutti* v. *Kourthi Koyamutti Naha,* (1915) 28 Ind Cas 386 (386) (Mad) [Auction sa'e of mortgagor's rights—Purchaser joined as party and effectively representing the mortgagor in the suit—Mortgagor not necessary party unless he can show he has been prejudiced]. See also *Damodhar Madhevji* v. *Kahandas Narandas,* (1871) 8 Bom H C O C 1 [Deceased mortgagor having completely transferred to another the mortgaged property—His legal representatives are not necessary parties]; *Marotirao* v. *Mankuwarbai,* 1931 Nag 161 (165): 27 Nag L R 312: 14 Nag L J 109: 134 Ind Cas 274 [Subsequent purchaser—Disclaiming all interest—To be discharged at once].

(2) *Ram Chandar* v. *Kallu,* (1908) 30 All 497 (498): 5 All L J 681: 1908 All W N 225.

(3) *Maroti Rao* v. *Mt Tulsi Bai,* 1927 Nag 299 (299): 103 Ind Cas 306 [Lessee of mortgagor]; *Ishaq Ali Khan* v. *Chunni,* (1899) 21 All 149 (151): 1898 All W N 214; *Dammar Singh* v. *Naziruddin,* 1889 All W N 91 (92); *Mahesh Brehman* v. *Ram Sagar,* 1926 Jour 142 (4): 95 Ind Cas 213; *Barendra* v. *Martin & Co,* 1921 Cal 801 (803): 33 Cal L Jour 7: 62 Ind Cas 167 [Prior mortgagee is in no way bound or affected by *the subsequent encumbrance created* pendente lite].

(4) *Sunitabala* v. *Dhara Sundari,* (1919) 53 Ind Cas 131 (134): 46 Ind App 272: 37 Mad L Jour 483: 17 All L J 997: 1919 Mad W N 821: 22 Bom L R 1: 24 Cal W N 297: 11 Mad L W 227 P C; *Biri Singh* v. *Nawal Singh,* (1902) 24 All 226 (228): 1902 All W N 31; *Parsotam Saran* v. *Mulu,* (1887) 9 All 68 (73): 1886 All W N 298 F B [Sole mortgagee dying—Several heirs left—All must be joined]; *Bhuban Mohan Sikdar* v. *Dharnaraj Oswal,* (1913) 20 Ind Cas 329 (330) Cal; *Ram Chandra Marwari* v. *Dhadhai Singh,* (1914) 25 Ind Cas 440 (441): 19 Cal L Jour 327; *Mushtaq Ali Khan* v. *Behari Lal,* (1914) 25 Ind Cas 508 (508) All; *Bhagela Koer* v. *Abdul Rahman,* (1916) 36 Ind Cas 77 (79) Pat [Suit by one co-heir of a mortgagee—All other coheirs should be joined as parties]; *Abdul Rahaman Mia* v. *Salimannessa Bibi,* 1926 Cal 416 (417): 89 Ind Cas 121 [Heirs of co-mortgagee are necessary parties to the suit]; *Natesa Aiyar* v. *Sahasranama Iyer,* 1927 Mad 773 (775): 103 Ind Cas 814: 53 Mad L Jour 550 [Kurichit deed executed by sake-hoder of chit fund transactions. *Quaere* whether all the subscribers to the fund were necessary parties to the suit]. See also *Haidur Ali Khondkhar* v. *Mahomed Shafuddin Kazi,* 1932 Cal 34 (35, 36): 54 Cal L Jour 118: 134 Ind Cas 1068 [Some heirs of mortgagee suing —Others consenting—Decree for former correct]; *Fakir Khan* v. *Ismail Khan,* (1933) 141 Ind Cas 264 (266) Lah [Suit by mortgagees to set aside order of Collector for redemption on payment of a specified sum—Under S. 12 of Punjab Redemption of Mortgages Act, II of 1913 —Death of one of the plaintiffs and failure to implead his L. Rs.—Each holds a well-defined and divisible share—O. 34, R. 1 not applicable and suit does not abate in entirety].

O. 34, R.1, Note 6.

(1) All persons mentioned in S. 91 of the Transfer of Property Act.[5] Thus, the mortgagor,[5-a] all co-mortgagors,[6] purchasers of the equity of redemption,[7] subsequent mortgagees,[8] and other persons interested in the equity of redemption,[9] and in the proper taking of accounts,[10] are all necessary parties.

(2) Prior to the amendment of the Transfer of Property Act by Act XX of 1929, there was a conflict of decisions as to whether an *attaching creditor* (who was one of the persons mentioned in S. 91 of that Act) was a necessary party to the mortgage suit.[11] The amended S. 91 does not mention an attaching

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(5) *Meghraj* v. *Kesho Gopal*, 1923 Nag 311 (313): 6 Nag L J 181: 73 Ind Cas 8; *Shananda Chandra Pal* v. *Sri Nath Roy Chowdhry*, 17 Ind Cas 432 (432): 17 Cal W N 871; *Tej Singh* v. *Pati Ram*, (1920) 55 Ind Cas 433 (434, 435) Nag; *Ahmad Husain* v. *Muhammad Qasim*, 1926 All 46 (47): 24 All L J 88: 6 L R A Civ 598: 90 Ind Cas 80: 48 All 171; *Ghulam Husain* v. *Dina Nath*, (1901) 23 All 467 (469): 1901 All W N 143.

(5-a) *Chinnan* v. *Ramchandra*, (1892) 15 Mad 54 (56); *Dattaram* v. *Gangaram*, (1898) 23 Bom 287 (291); *Barkoo Singh* v. *Sheo Ram Singh*, 1931 Oudh 410 (410, 411): 8 Oudh W N 1143: 135 Ind Cas 700.

(6) *Bhandin* v. *Ismail*, (1887) 11 Bom 425 (428); *Maung Po* v. *Maung Kye*, (1892-1896) U B R Vol II, 586; *Ram Baksh* v. *Ram Lal*, (1874) 21 Suth W R 428 (428); *Fakir Baksh* v. *Sadat Ali*, (1885) 7 All 876 (878): 1885 All W N 68; *Maung P* v. *Ma Taik*, 3 L B R 15 (17); *Ragho Salvi* v. *Balkrishna*, (1885) 9 Bom 128 (131); *Naro Hari Bhave* v. *Vithalbhat*, (1886) 10 Bom 648 (655, 656); *Mariyil Raman* v. *Narayanan*, (1903) 26 Mad 461 (462); *Krishna Chetty* v. *Maung Hman*, (1913) 18 Ind Cas 181 (182): 5 Bur L Tim 284; *Ahmad Husain* v. *Muhammad Qasim Khan*, 1926 All 46 (47): 24 All L J 88: 6 L R A (Civ) 598: 90 Ind Cas 80: 48 All 171; *Sukhdarshan Prakash* v. *Ram Das*, 1929 All 814 (814): 1929 All L J 908: 119 Ind Cas 97; *Ramlingappa* v. *Dhondi Subrao*, 1923 Bom 451 (453): 24 Bom L R 1304: 76 Ind Cas 145.

(7) *Ram Yad Singh* v. *Lall Saligram Singh*, (1871) 16 Suth W R 98 (99); *Yashavant S Kulkarni* v. *Gopal*, (1864-66) 2 Bom H C (O C) 194; *Nil Khant* v. *Peary Mohun*, (1869) 11 Suth W R 21 (23, 24): 3 Beng L R (O C) 7; *Krishna Gopal Ghose* v. *Hurrynath Dutt*, (1876) 25 Suth W R 60 (61); *Bhogilal* v. *Chutter Singh*, (1874) 6 N W P 323; *Dadoba* v. *Damodar*, (1892) 16 Bom 486 (491) [Auction purchaser in execution of money decree]; *Hargu Lal Singh* v. *Gobind Rai*, (1897) 19 All 541 (542): 1897 All W N 54; *Brojonath* v. *Khelut Chunder*, (1871) 14 Moo Ind App 144 (149): 8 Beng L R 104: 16 Suth W R P C 33: 2 Suth 480: 2 Sar 711 P C; *Tej Singh* v. *Patiram*, (1920) 55 Ind Cas 433 (434, 435) Nag [Transferee of mortgaged property in breach of covenant against alienation is a necessary party]; *Alagammal* v. *Sadasiva Padayachi*, 1930 Mad 1017 (1020): 60 Mad L Jour 72: 1930 Mad W N 1021: 32 Mad L W 843: 129 Ind Cas 47 [Purchaser from Government of mortgaged property attached under Or P C, S. 88, is entitled to be made party to mortgage suit and has the right to redeem].

(8) *Hukam Chand* v. *Karam Chand*, 1908 Pun Re No. 64: 1908 Pun W R 132; *Kishenchand* v. *Ram Sukh Das*, (1916) 33 Ind Cas 815 (816): 81 Pun W R 1916: 86 Pun Re 1916; *Subban* v. *Arunachalam*, (1892) 15 Mad 487 (489); *Jugal Kissore* v. *Kartic Chunder*, (1894) 21 Cal 116 (120); *Dullabhdas Devchand* v. *Lakshmandas*, (1886) 10 Bom 88 (91); *Ballam Das* v. *Amar Raj*, (1890) 12 All 537 (539): 1890 All W N 90; *Radhabai* v. *Shamrav*, (1884) 8 Bom 168 (173).

(9) *Ratan Bai* v. *Narayan Das*, 1927 Bom 474 (477): 29 Bom L R 900: 104 Ind Cas 794: 51 Bom 771 [Heirs of intestate Parsi who intermeddle with his estate are his legal representatives and proper parties to suit on mortgage executed by the deceased Parsi]; *Bia Quiere* v. *Ram Dhone Doss*, Bourke Cas 319 [Suit for foreclosure—Personal representatives of the mortgagor are necessary parties]; *Subban* v. *Arunachalam*, (1892) 15 Mad 487 (489); *Pannalal* v. *Rajaram*, 1926 Nag 496 (497): 96 Ind Cas 973 [Person interested—The test is whether the party will be prejudiced by foreclosure or sale].

(10) *Sukhawat Ali* v. *Kesho Tewari*, (1874) 6 N W P 208; *Hughes* v. *Delhi and London Bank*, (1888) 15 Cal 35 (38).

(11) *Shananda Chandra Pal* v. *Sri Nath Roy Chowdhury*, (1912) 17 Ind Cas 432 (433): 17 Cal W N 871 [He is a necessary party]; *Meghraj* v. *Kesheorao*, 1923 Nag 311 (313): 6 Nag L J 181: 73 Ind Cas 8, (Do); *Linganna Naganna* v. *Ahmed Shah*, 1928 Nag 97 (98): 105 Ind Cas 427: 23 Nag L R 164, (Do); *Titali* v. *Vedvala*, (1912) 15 Ind Cas 334 (335): 37 Mad 468, (Do); *Gulam Hussain* v. *Dina Nath*, (1901) 23 All 467 (471): 1901 All W N 143, (Do); *Subramanian Chettiar* v. *Sinnammal*, 1930 Mad 801 (807): 32 Mad L W 395: 1930 Mad W N 798: 59 Mad L Jour 634: 53 Mad 881: 127 Ind Cas 624 F B [He is not a necessary party]; *Subramanian Chettiar* v. *Sinnammal*, 1925 Mad 266 (269, 270): 20 Mad L W 761: 85 Ind Cas 312, (Do); *C T V E Vyavanchettyar* v. *N S P R M Chettiyar Firm*, 1931 Rang 108 (109): 133 Ind Cas 482, (Do); *Veyindra Muthu* v. *Maya Nadan*, (1920) 58 Ind Cas 501 (503, 504): 1920 Mad W N 299: 43 Mad 696: 39 Mad L Jour 456: 28 Mad L Tim 312, (Do); *Kora Mal* v. *Raghubir Lonia*, 1929 All 861 (861), (Do); *Chamiappa Tharagan* v. *Rama Iyer*, 1921 Mad 30 (34): 44 Mad 232: 40 Mad L Jour 65: 1921 Mad W N 53: 62 Ind Cas 121, (Do); *C L Kiernander* v. *Benimadhab Khettri*, 1931 Cal 763 (766, 770): 58 Cal 598: 134 Ind Cas 561 [Creditor having attached before judgment—No interest—Not necessary party—After execution petition and application for rateable distribution, gets right to redeem and is a necessary party—But after purchase in Court-sale himself ceases to be a necessary party]. See also *Padamchand Pannalal* v. *Bhicumchand Chururia*, 1932 Cal 661 (663): 36 Cal W N 397: 59 Cal 827: 139 Ind Cas 183

O. 34, R.1, Note 6.

creditor as one of the persons entitled to redeem a mortgage and he is therefore no longer a necessary party to a mortgage suit.

The following are not necessary parties to a suit relating to a mortgage:—

(*a*) A prior mortgagee. *See* the explanation.

(*b*) A person merely in possession of the mortgaged property.[12]

(*c*) A person whose name is merely entered in the village papers as having some title to the plots in question; but who is in no way connected with the mortgage.[13]

(*d*) A person who has a right to be maintained out of the income of the mortgaged property when such right is not made a *charge* on the property.[14]

(*e*) A person having merely an inchoate title to the property.[15]

(*f*) A receiver appointed in a partition suit previous to the mortgage suit.[16]

(*g*) Where one of two co-owners of a property mortgages his undivided share and a suit is brought in relation to such mortgage, the other co-owner is not a necessary party thereto.[17]

(*h*) Where a number of persons own the equity of redemption in distinct shares and the mortgagee, in his suit on the mortgage, exempts one or more of such shares, and claims only a decree for a proportionate part of the mortgage debt, the owners of the exempted shares are not necessary parties.[18] The same rule applies where the mortgagee has released from the mortgage any portions of the property.[19]

[Attachment raised on security being furnished—Attaching decree-holder ceases to be a necessary party].

(12) *Balaji Vinayak Buti* v. *Vithoba,* 1924 Nag 191 (193): 79 Ind Cas 614; *Adam Khan* v. *Dattaram,* (1918) 47 Ind Cas 586 (587) Nag [Trespasser not necessary party]; *Adam Khan* v. *Dattaram,* 1921 Nag 67 (68): 17 Nag L R 176 [Trespasser not a necessary party]. See also *Kisan* v. *Yeshwant,* 1932 Nag 144 (147, 148): 28 Nag L R 69 [Redemption—Trespassers in possession—Decree against—Not binding on real heirs of deceased mortgagor].

(13) *Bhagwat Prasad Misra* v. *Baldeo Prasad,* 1925 All 593 (593): 6 L R A (Civ) 818: 87 Ind Cas 679.

(14) *Roshan Singh* v. *Balwant Singh,* (1900) 22 All 191 (199): 27 Ind App 51: 4 Cal W N 353: 7 Sar 642: 2 Bom L R 529 (Obiter).

(15) *Nanjundepa* v. *Hemapa,* (1885) 9 Bom 10 (14, 15).

(16) *Elizabeth May Toomey* v. *Bhupendra Nath Bose,* 1928 Pat 304 (315): 7 Pat 520: 111 Ind Cas 57. See also *Mahomed Mousa* v. *Kazi Fatehullah,* 1925 Sind 167 (169): 79 Ind Cas 466: 19 Sind L R 268 [Mortgagee's property under management of manager under Sind Encumbered Estates Act—Suit for redemption—Manager not a necessary party because the claim for redemption is not a claim for any "debt" against the mortgagee].

(17) *Monmohini* v. *Parviti Nath,* (1905) 32 Cal 746 (748).

(18) *Surajram Marwari* v. *Barhamdeo Persad,* (1905) 2 Cal L Jour 202 (216): 1 Cal L Jour 337; *Ponnuswami Mudaliar* v. *Srinivasa Naicken,* (1908) 31 Mad 338 (336); *Hari Kissen* v. *Velait Husain,* (1903) 30 Cal 755 (757): 7 Cal W N 728. See *Kisan* v. *Abdul Majid Khan,* 1931 Nag 44 (45): 27 Nag L R 4: 130 Ind Cas 809 [If mortgagee claims the whole debt from the rest, the exempted sharer in the equity of redemption would be a necessary party]; *Sheo Tahal* v. *Sheodan Rai,* (1906) 28 All 174 (177): 2 All L J 630: 1905 All W N 244; *Nazir Husain* v. *Nihal Chand,* 1905 All W N 156 (156): 2 All L J 628 [Portions already redeemed by paying proportionate amount—Owners of such portions are not necessary parties]. See also *Ganeshi* v. *Charan,* (1913) 35 All 247: 11 All L J 280: 19 Ind Cas 614 (614); *Venkatavayalu Reddiar* v. *Shaik Farid Sahib,* (1909) 1 Ind Cas 80 (81): 5 Mad L Tim 258.

(19) *Hari Kissen* v. *Veliat Hussein,* (1903) 30 Cal 755 (757): 7 Cal W N 728; *Nazir* v. *Nihal,* 1905 All W N 156 (156): 2 All L J 628 [Where one item has been already redeemed, its owner is not necessary party to suit as to other items]. See also the following cases holding that where a mortgagee has lost his rights against the owner of a portion of the property or has released such portion from his mortgage he cannot throw the whole burden on the rest of the property; *Imam Ali* v. *Baijnath,* (1906) 33 Cal 613 (621): 3 Cal L Jour 576: 10 Cal W N

O. 34, R.1, Notes 6—7.

(*i*) Where a mortgagee has, through negligence, allowed strangers to trespass upon, and acquire, parts of the mortgaged property, such persons are not necessary parties to a suit for redemption.[20] The general rule is that a mortgage is indivisible and hence suits cannot be brought for the redemption or enforcement of a mortgage, part by part.[20-a]

As to the parties to suits, other than suits for redemption, foreclosure or sale, by or against mortgagors or mortgagees, *see* the undermentioned cases.[21]

7. **Trustees, executors or administrators.**—The rule is made "subject to the other provisions of the Code." This would include O. 31, R. 1 under which the trustee, executor or administrator in whom the property is vested can effectively represent the persons beneficially interested. The latter need not therefore be joined as parties to a suit relating to the mortgage.[1]

551; *Surjiram* v. *Barhamdeo*, (1905) 2 Cal L Jour 202 (216): 1 Cal L Jour 337; *Jugal Kishore Sahu* v. *Kedar Nath*, (1909) 10 All L J 211: 34 All 606: 16 Ind Cas 401 (404); *Mir Essuff Ali* v. *Panchanan*, 6 Ind Cas 842 (846-847): 11 Cal L Jour 639: 15 Cal W N 800; *Hari Kissen Bhagat* v. *Valiat Hassein*, (1903) 30 Cal 755 (757): 7 Cal W N 723; *Chandika* v. *Pokhar*, (1878-80) 2 All 906 (907, 908); *Harchandra* v. *Muhammad*, 1921 Cal 554 (555): 25 Cal W N 594: 66 Ind Cas 312; *Budhmal Kevalchand* v. *Rama Yesu Sangle*, (1920) 55 Ind Cas 327 (327): 22 Bom L R 68: 44 Bom 223. But see *Sanwale Singh* v. *Ganeshi Lal*, (1913) 20 Ind Cas 41 (42, 43): 35 All 441: 11 All L J 630; *Jai Gobind* v. *Jasram*, 1898 All W N 120; Compare *Harkhu* v. *Munnalal*, (1913) 19 Ind Cas 423 (423) Cal [Released part being property which mortgagor was not entitled to mortgage—Mortgagee can claim the whole debt from the rest of the property]. Compare also *Debendranath Sen* v. *Abdul Samad*, (1909) 1 Ind Cas 264 (277): 10 Cal L Jour 150; *Roghu Nath Pershad* v. *Harlal-Sadhu*, (1891) 18 Cal 320 (321) [Where whole property is included, mortgagee is not bound to apportion mortgage debt]. See also *Sheo Prasad* v. *Behari Lal*, (1903) 25 All 79 (82): 1902 All W N 203 [Mortgagee's right to personal decree against mortgagor for balance not affected].

(20) *Anandrao Purshottam* v. *Bhikaji Sadashiv*, 1922 Bom 156 (157): 64 Ind Cas 485: 46 Bom 218: 23 Bom L R 979.

(20-a) *Bishendial* v. *Manniram*, (1875-78) 1 All 297 (300); *Doraswamy* v. *Venkata*, (1902) 25 Mad 108 (113): 11 Mad L Jour 373; *Purshottam* v. *Isub Mahomed*, 1927 Bom 513 (513): 29 Bom L R 1052: 104 Ind Cas 648; *Bhora Ray* v. *Alilack Roy*, (1868) 10 Suth W R 476 (476); *Mt Hira Bibi* v. *Ramdhan Lal*, 1922 Pat 70 (73): 1922 Pat H C C 42: 6 Pat L Jour 465: 2 Pat L Tim 752: 62 Ind Cas 540 [Exact interest of each of the mortgagors need not be considered] But see *Azimut Ali* v. *Jawahirsingh*, (1870) 13 Moo Ind App 404 (408): 14 Suth W R 14: 2 Suth 346: 2 Sar 573 P C [Purchaser of portion of equity of redemption in a portion of mortgaged premises entitled to redeem that portion on payment of proportionate amount]. See also *Hurdeo* v. *Guneshee Lall*, (1866) 1 Agra 36; *Puthisseri Manianoor* v. *Thozukkat Pullaniyal*, (1917) 39 Ind Cas 46 (49): 32 Mad L Jour 489: 1917 Mad W N 232: 21 Mad L Tim 299 [Suit by one co-owner for redemption of whole mortgage—Court can in suitable case pass decree for both relief, *viz.*, for partition and redemption of plaintiff's share]

(21) *Doolay Singh* v. *Goolam Hossein*, (1870) 2 N W P 72 [Suit for possession by mortgagee against third party who denies mortgagee's title—Mortgagor is a necessary party]; *Vithaldas Narotamdas* v. *Karsandas Keshavdas*, (1868-69) 5 Bom H C (O C) 76 [Suit by puisne mortgagee against first mortgagee who has been paid the amount due to him, to recover the mortgaged premises—Mortgagor is a necessary party]; *Bal Kishen Mahapattur* v. *Bistoo Churn*, (1874) 22 Suth W R 532 (533) [Suit by mortgagee for possession—Subsequent mortgagees and purchasers who opposed him in obtaining possession are proper parties]; *Mahomed Ismail* v. *Lalla Dhundur Kishore Narain*, (1876) 25 Suth W R 39 (40) [Mortgagee's suit for khas possession of undefined area of the mortgaged land, co-mortgagees are necessary parties]; *Eknath Pandoba Kosti* v. *Dagduram*, (1912) 17 Ind Cas 87 (88): 36 Bom 624: 14 Bom L R 750 [Suit by puisne mortgagee to establish his mortgage and to set aside the order passed against him in claim proceedings in suit brought by prior mortgagee—Mortgagor is necessary party to puisne mortgagee's suit]; *Hughes* v. *Delhi and London Bank*, (1888) 15 Cal 35 (38) [Suit to determine the rights of the puisne and prior mortgagees *inter se* mortgagor is necessary party]; *Rummoy Hazra* v. *Prem Chand Naskar*, (1901) 6 Cal W N 423 (425) [Mortgagee purchasing a portion of the property in execution of his mortgage decree—Suit by him for contribution against purchasers of other portions of the mortgaged property—Mortgagor is not necessary party]; *Naba Kumar Hazra* v. *Radhashyam Mahish*, 1931 P C 229 (231): 35 Cal W N 977: 61 Mad L Jour 294: 1931 All L J 797: 54 Cal L Jour 274: 34 Mad L W 444: 134 Ind Cas 654 P C [Suit for accounts by some mortgagors against assignee decree-holder purchaser—Other co-mortgagors previously held entitled jointly to accounts not impleaded—Suit bad for non-joinder].

Note 7.

(1) *Mohunand* v. *Akhoy Kumar*, (1902) 6 Cal W N 488 (489) [Foreclosure decree against executor binds beneficiaries though not parties to the suit]; *Ahronee Shemail* v. *Sheikh Ahmed Omer*, 1931 Bom 533 (537): 33 Bom L R 1056.

O. 34, R.1, Notes 7—9.

But the Court has a discretion to join the beneficiaries in a proper case,[2] as for example when, in the case of an executor, the estate has been fully administered,[3] or in the case of a trustee or an executor, his interest is adverse to that of the beneficiaries.[4] In the case of joint-trustees, however, all of them should be impleaded in any suit relating to the mortgage.[5]

8. **Benamidar.**—It is now well settled that a benamidar can sue or be sued in his own name and that the rule applies to mortgage suits also.[1] The real owner is not a necessary party to such a suit. The contrary view, held in the undermentioned cases,[2] is not good law. There is, however, no impropriety in adding the real owner as a party in proper cases.[3]

9. **Sub-mortgagee.**—Where a mortgagee creates a mortgage of his rights in favour of another he is said to create a sub-mortgage. The sub-mortgagee is entitled to bring to sale the *interest* of the sub-mortgagor in the mortgage,[1] and the original mortgagor is not a necessary party to such a suit.[2]

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(2) *Oriental Banking Corporation* v. *Gobind Lall*, (1884) 10 Cal 718 (718) [Executor finding it difficult to sue debtor—Legatee may sue]; *Chandri Ayal* v. *Abdul Karim*, 1927 Bom 49 (50): 28 Bom L R 1360: 98 Ind Cas 915: 51 Bom 16.

(3) *Cleg* v. *Rowland*, (1866) L R 3 Eq 368.

(4) *Beresford* v. *Ramasubba*, (1889) 13 Mad 197 (206, 207).

(5) *Kumban* v. *Moorthi*, (1908) 34 Mad 406 (414): 20 Mad L Jour 951: 1910 Mad W N 359: 7 Ind Cas 422: 8 Mad L Tim 208; *Malappurath Parmadhathil* v. *Channazhi Krishnan Mossad*, (1912) 13 Ind Cas 234 (234): 2 Mad W N 537; *Karattale Edamana* v. *Unni Kannan*, (1903) 26 Mad 649 (653): 13 Mad L Jour 322 F B.

Note 8.

(1) *Nand Kishore* v. *Ahmad Ata*, (1896) 18 All 69 (74): 1895 All W N 160; *Yad Ram* v. *Umrao Singh*, (1899) 21 All 380 (382): 1899 All W N 130; *Baccha* v. *Gajadhar*, (1906) 28 All 44 (46): 1905 All W N 173: 2 All L J 702; *Ravji* v. *Mahadev*, (1898) 22 Bom 672 (678); *Sachitananda* v. *Boloram*, (1897) 24 Cal 644 (645); *Shangara* v. *Krishnan*, (1892) 15 Mad 267 (268): 2 Mad L Jour 93 [Presumption is that benamidar instituted suit with the authority of real owner and latter is bound by result of such suit]; *Ramanuja* v. *Sadagopa*, (1905) 28 Mad 205 (207): 15 Mad L Jour 249; *Chowdhry Kirt Bas* v. *Gopal Jee*, (1915) 27 Ind Cas 136 (138): 18 Cal W N 814: 19 Cal L Jour 193; *Sreenath* v. *Chundernath*, (1872) 17 Suth W R 192 (193); *Thakur Rohini* v. *Viswanath*, (1900) 13 C P L R 33 (37); *Gur Narain* v. *Sheo Lal*, (1919): 49 Ind Cas 1 (5): 46 Cal 566: 46 Ind App 1: 17 All L J 66: 36 Mad L Jour 68: 9 Mad L W 335: 23 Cal W N 521: 1 U P L R (P C) 1: 12 Bur L Tim 122: 1918 P C 140 P C; *Hit Lal Mahton* v. *Jiboo Mahton*, 1924 Pat 458 (459): 5 Pat L Tim 142: 3 Pat 81: 75 Ind Cas 378; *Bhola Pershad* v. *Ram Lall*, (1897) 24 Cal 34 (36); *Dagdu* v. *Balvant*, (1898) 22 Bom 820 (823); *Bhuban Mohan Ghose* v. *Co-operative Hindustan Bank, Ltd*, 1925 Cal 973 (978, 979): 29 Cal W N 784: 88 Ind Cas 866; *Kania Fatima* v. *Waliullah*, (1908) 30 All 80 (82): 4 All L J 689: 1907 All W N 272; *Alikjan Bibi* v. *Rambaran Saha*, (1910) 7 Ind Cas 166 (170): 12 Call L Jour 357.

(2) *Hari Govind* v. *Akhoy Kumar*, (1889) 16 Cal 364 (366): *Issur Chandra* v. *Gopal Chandra*, (1898) 25 Cal 98 (99): 3 Cal W N 20; *Mohendra Nath* v. *Kali Pershad*, (1903) 30 Cal 265 (272): 7 Cal W N 229; *Kuthaperumal* v. *Secretary of State*, (1907) 30 Mad 245 (246): 17 Mad L Jour 174.

(3) *Y Pitchayya* v. *Rattammal*, 1929 Mad 268 (269): 29 Mad L W 56: 115 Ind Cas 340: 56 Mad L Jour 856.

Note 9.

(1) *Ram Shankar* v. *Ganesh Prasad*, (1907) 29 All 385 (406): 4 All L J 273: 1907 All W N 97: 2 Mad L Tim 248 F B; *Amratlal* v. *Naranbhai*, (1911) 9 Ind Cas 765 (765): 13 Bom L R 90; *Firm, Moti Ram* v. *Bharat National Bank*, 1921 Lah 253 (254): 3 Lah L Jour 373: 67 Ind Cas 421; *Ahmed Ali Khan* v. *Bilas Rai*, (1908) 5 All L J 402 (403): 1908 All W N 191; *Ram Subhag* v. *Nar Singh*, (1905) 27 All 472 (477, 478): 2 All L J 162: 1905 All W N 58; *Maharajah of Benares* v. *Ram Kumar*, (1904) 26 All 611 (617): 1 All L J 370; *Bansi Lal* v. *Durga Prasad*, (1909) 9 Cal L Jour 429: 2 Ind Cas 645 (646); *M Vijiya Ragunatha* v. *Venkatachallam Chetty*, (1897) 20 Mad 35 (38, 39): 6 Mad L Jour 235; *Chela Ram* v. *Walidad*, 1900 Pun Re No. 81: 219 Pun L R 1900.

The following cases of the Allahabad High Court which held that he could get only a *money decree* against the sub-mortgagor is no longer good law; *Ganga Prasad* v. *Chuni Lal*, (1896) 18 All 113 (114): 1896 All W N 8; *Misri Lal* v. *Abdul Aziz*, (1901) 21 All W N 153 (154); *Ajudhia Prasad* v. *Man Singh*, (1903) 25 All 46 (47): 1902 All W N 176; *Jamnadas* v. *Ram Autar*, (1905) 27 All 364 (370): 1904 All W N 278: 1 All L J 709; *Ram Jatan Rai* v. *Ramhit Singh*, (1905) 27 All 511 (512): 1905 All W N 76: 2 All L J 434.

(2) *Zaki Hasan* v. *Deo Nath Sahai*, (1909) 4 Ind Cas 433 (434): 10 Cal L Jour 470; *Bhoneswar Ram* v. *Ram Khelawan Sahu*, (1910) 5 Ind Cas 654 (655): 12 Cal L Jour 187 [It is, however, *open* to him to implead original mortgagor]; *Amratlal* v. *Naranbhai*, (1911) 9 Ind Cas 765 (765): 13 Bom L Rep 90; *Moti Ram* v. *Bharat National Bank*, 1921 Lah 258 (254): 3 Lah L Jour 373: 67 Ind Cas 421.

Where the mortgagor is also made a party to the suit, the sub-mortgagee may sue for sale or foreclosure of the *mortgaged property itself* in cases and in the circumstances which would have entitled the sub-mortgagor on the date of the sub-mortgage to claim that relief, for the purpose of working out his rights against the sub-mortgagor.[3] The mortgagor is not a necessary party to a suit for redemption by the sub-mortgagor against his sub-mortgagee,[4] though there is no impropriety in making him a party thereto.[5] In a suit for redemption by the mortgagor against his mortgagee, the sub-mortgagee, as being interested in the mortgage security, (is a necessary party).[6] But where the mortgagor, not having notice of the sub-mortgage, fails to implead him in such suit and pays off the mortgage amount to the mortgagee, the sub-mortgagee cannot, after that redemption, bring the right mortgaged to him to sale.[7] The reason is that he has only a terminable interest in the mortgage-right of his sub-mortgagor and when that right has been legally terminated, his security so far is gone.

10. Prior mortgagees—Explanation.—Under S. 85 of the Transfer of Property Act it was held in some cases that a prior mortgagee was a necessary party to a suit to enforce or redeem a puisne mortgage.[1] These cases have been superseded by the explanation to the present rule under which a prior mortgagee or his transferee is not a necessary party to a suit relating to a pusine mortgage.[2] But there is no prohibition against joining a prior

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(3) *Ahmed Ali* v. *Bilas Rai,* (1908) 5 All L J 402 (404); *Bansi Lal* v. *Durga Prasad,* (1909) 9 Cal L Jour 429: 2 Ind Cas 645 (646); *Muthu* v. *V Venkatachallam,* (1897) 20 Mad 35 (38, 39): 6 Mad L Jour 235; *Maharajah of Benares* v. *Ram Kumar Misir,* (1904) 26 All 611 (617): 1 All L J 330; *Kanhai Lall* v. *Mahadeo,* (1913) 18 Ind Cas 389 (390) Oudh; *Ram Subhag* v. *Narasingh,* (1905) 27 All 472 (477, 478): 2 All L J 162: 1905 All W N 58 [Sub-mortgagee can *redeem* (under Transfer of Property Act, S. 91) prior mortgage]. See also *Chela Ram* v. *Wali Dad,* 1900 Pun Re No. 81: 219 Pun L R 1900 [Sub-mortgagee is entitled to retain possession until amount due to him is paid off].

(4) *Ganesh Moreswar* v. *Vasudeo Vithal Paranjpe,* 1922 Bom 424 (426): 24 Bom L R 911: 68 Ind Cas 741.

(5) *Ganesh Moreshwar* v. *Vasudeo,* 1922 Bom 424 (426): 24 Bom L R 911: 68 Ind Cas 741.

(6) *Viswanatha Iyer* v. *Chinnakutti Amma,* 1932 Mad 115 (116): 1931 Mad W N 1141: 34 Mad L W 635: 62 Mad L Jour 272: 135 Ind Cas 535: 55 Mad 320; *Gokul Das* v. *Debi Prasad,* (1906) 28 All 638 (640): 1906 All W N 162: 3 All L J 548; *Narain* v. *Ganoji,* (1891) 15 Bom 692 (693, 694) [Form of decree given]; *Padgaya* v. *Baji,* (1896) 20 Bom 549 (553); *Talukdari Settlement Officer* v. *Akuji Abrahim,* 1922 Bom 350 (351): 24 Bom L R 762: 68 Ind Cas 487: 46 Bom 993; *Venkataraman Iyer* v. *Rengasamy Chetty,* 1927 Mad 703 (704): 1927 Mad W N 418: 101 Ind Cas 728. See *Tha Hn Yin* v. *Maung Mya Su,* (1910) 5 Ind Cas 151 (152, 153): 37 Cal 239: 37 Ind App 19: 14 Cal W N 214: 11 Cal L Jour 166: 3 Bur L Tim 27: 12 Bom L R 234: 20 Mad L Jour 153 P C [Sub-mortgagee by deposit of title-deeds, not impleaded—Not bound by decree or sale].

(7) *Viswanatha* v. *Chinnakutti Amma,* 1932 Mad 115 (117): 1931 Mad W N 1141: 34 Mad L W 635: 62 Mad L Jour 272: 135 Ind Cas 535: 55 Mad 320; *Issakunakath* v. *Themmil,* 1921 Mad 374 (376): 30 Mad L Tim H C 21: 63 Ind Cas 192.

Note 10.

(1) *Ammayi Ammal* v. *Rathna Pathan,* (1904) 14 Mad L Jour 467 (468); *Hari Lal* v. *Kishen Lal,* (1897) 19 All 543 (545): 1897 All W N 153; *Kanti Ram* v. *Kubbuddin,* (1895) 22 Cal 33 (39); *Keshav Ram* v. *Rannchhod,* (1906) 30 Bom 156 (162): 7 Bom L R 811; *Sorabji Cursetji* v. *Ruttonji Dassabhoy,* (1898) 22 Bom 701 (707); *Sri Gopal* v. *Pirthi Singh,* (1898) 20 All 110 (114, 115): 1897 All W N 216; *Mata Din* v. *Kasim Hussain,* (1891) 13 All 432 (465) F B; *Mehrbano* v. *Nadir Ali,* (1900) 22 All 212 (214): 1900 All W N 27; *Tulsa* v. *Khub Chand,* (1891) 13 All 581 (585): 1891 All W N 193 [Property cannot be sold subject to a prior mortgage]; *Salig Ram* v. *Harcharan,* (1890) 12 All 548 (549): 1890 All W N 89 [Suit ignoring prior mortgage is brought on false allegation and should be dismissed]; Compare *Kali Charan* v. *Ahmad Shah,* (1895) 17 All 48 (50, 51): 1894 All W N 199; *Md Niamat Ali Khan* v. *Gaffar Md Khan,* (1899) 21 All 272 (273): 1899 All W N 62 [Failure to acknowledge prior lien of a defendant not fatal to suit]; *Baldeo Sahai* v. *Nanakchand,* 1901 All W N 68 (68) [Suit by subsequent mortgage for sale—Prior mortgage ignored—Offer to redeem if prior mortgage found valid—Suit maintainable]. See, however, *Lalman* v. *Mohar Singh,* (1907) 29 All 205 (206): 3 All L J 848: 1907 All W N 18 [Sale subject to prior charge for maintenance allowed].

(2) *Yado Rao* v. *Amrit Rao,* 1926 Nag 135 (136): 88 Ind Cas 803; *Jagaranath Singh* v.

O. 34, R.1, Note 10.

mortgagee in such a suit,[3] and the equities of a particular case may even demand that he should be so made a party.[4]

Where a decree for sale is passed on foot of a puisne mortgage, without making the prior mortgagee a party to the suit, the rights of the prior mortgagee are in no way affected and the sale under the decree can only be subject to the prior mortgage.[5] Even if the prior mortgagee is made a party to the pusine mortgagee's suit he is not bound to assert his prior right, if *no relief* is claimed against him and *the priority of his right is not in any way impugned* and the decree in the suit cannot affect his rights.[6] But where he is impleaded and his prior right impugned or sought to be postponed in any way, he is bound to assert his right under the prior mortgage. Otherwise his right will be barred by constructive *res judicata*.[7] When a prior mortgagee who has also purchased the equity of redemption and is in possession of the mortgaged property is made a defendant to a suit upon the puisne mortgage the decree may direct the puisne mortgagee to redeem the prior mortgage before bringing the property to sale.[8]

A holds a first and a third mortgage on a property. *B*, the holder of the second, *i.e.*, the intermediate mortgage impleads *A* as a defendant to the suit on the ground that he is a *third* mortgagee. *A* is not bound to set up

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Mohra Kuvar, (1917) 39 Ind Cas 76 (77): 2 Pat L Jour 118: 1 Pat L W 653: 1917 Pat H C C 194; *Katchalai Mudali* v. *Kuppanna Mudali*, (1912) 13 Ind Cas 182 (182): (1912) 1 Mad W N 41; *Gurdeo Singh* v. *Chandrika Singh*, (1909) 36 Cal 193 (210): 5 Cal L Jour 611: 1 Ind Cas 918; *Lachmi Narain Marwari* v. *Chaudhuri Bhagwat Singh*, (1920) 58 Ind Cas 33 (34): 1 Pat L Tim 629; *Rajah Azim Ali Khan* v. *Mir Muhammad Hussain*, (1898) 1 Oudh Cas 105: (111-112); *Panchu Mondal* v. *Mohanan Poddar*, (1909) 1 Ind Cas 139 (139) Cal; *Raj Coomary* v. *Preo Madhub*, (1897) 1 Cal W N 453 (454); *Sankar Venkatesh Karguppi* v. *Sadashir Mahadji Kulkarni*, (1918) 21 Ind Cas 39 (41): 38 Bom 24: 15 Bom L R 817 [Non-joinder of prior mortgagee in suit by puisne mortggagee does not affect latter's right to redeem prior mortgage].

(3) *Narsingh* v. *Nathuji*, 1929 Nag 135 (136): 25 Nag L R 171: 118 Ind Cas 54; *Raj Coomary* v. *Preo Madhub*, (1897) 1 Cal W N 453 (454).

(4) *Narayanaswamy Rao* v. *Ramaswamy Naick*, (1921) 60 Ind Cas 611 (613): 12 Mad L W 674.

(5) *Enturi Guruvayya* v. *Muppulaneni Butchayya*, (1912) 16 Ind Cas 779 Mad; *Phool Kuari* v. *Bhagwan Das*, 1930 All 113 (114): 1930 All L J 321: 124 Ind Cas 476: 52 All 426; *Kanti Ram* v. *Kutubbuddin*, (1895) 22 Cal 33 (46); *Ram Swarup* v. *Bunyad Ali*, 1929 All 126 (127): 112 Ind Cas 702.

(6) *Balaji Vinayak Buti* v. *Vithoba*, 1924 Nag 191 (193): 79 Ind Cas 614; *Phool Kuari* v. *Bhagwan Das*, 1930 All 113 (113): 1930 All L J 321: 124 Ind Cas 476: 52 All 426; *Fazal Rab* v. *Manzoor Ahmad*, 1931 All 76 (79): 1930 All L J 1222: 133 Ind Cas 142; *Collector of Muradabad* v. *Md Hidayat Ali*, 1926 All 449 (449): 94 Ind Cas 506: 48 All 554; *Radha Kishen* v. *Khurshed*, (1920) 55 Ind Cas 959 (962): 1920 P C 81: 47 Cal 662: 47 Ind App 11: 38 Mad L Jour 424: 1920 Mad W N 808: 18 All L J 401: 11 Mad L W 518: 22 Bom L R 557 P C; *Kishen Dyal* v. *Md Amirul Hussain*, (1915) 26 Ind Cas 673 (674, 675): 19 Cal W N 942; *Katchalai* v. *Kuppanna*, (1912) 13 Ind Cas 182 (182): 1912 Mad W N 41; *Lachmi Narain Marwari* v. *Chaudhuri Bhagwat Singh*, (1920) 58 Ind Cas 33 (34): 1 Pat L Tim 629; *Brijmohan Singh* v. *Dukhan Singh*, 1931 Pat 33 (38): 130 Ind Cas 168: 9 Pat 816: 11 Pat L Tim 883; *Surjiram* v. *Barhamdeo*, (1905) 1 Cal L Jour 337 (350).

(7) *Lal Bihari Singh* v. *Gur Prasad Singh*, 1923 Pat 290 (291): 4 Pat L Tim 108: 1923 Pat H C C 118: 1 Pat L R 288: 2 Pat 485; 71 Ind Cas 948; *Gopal Lal* v. *Benarsi Prasad*, (1904) 31 Cal 428 (431, 432); *Brij Mohan Singh* v. *Dukhan Singh*, 1931 Pat 33 (38): 130 Ind Cas 168: 9 Pat 816: 11 Pat L Tim 883; *Surjiram* v. *Barhamdeo*, (1905) 1 Cal L Jour 337 (350); *Sri Gopal* v. *Pirthi Singh*, (1902) 24 All 429 (436): 29 Ind App 118: 4 Bom L R 827: 6 Cal W N 889: 8 Sar 298; *Muhammad Ibrahim* v. *Ambika Persad*, (1912) 14 Ind Cas 496 (502): 15 Cal L Jour 411: 11 Mad L Tim 265: (1912) 1 Mad W N 367: 9 All L J 332: 14 Bom L R 280: 16 Cal W N 505: 22 Mad L Jour 468: 39 Cal 527: 39 Ind App 68 P C.

(8) *Manohar Lal* v. *Ram Babu*, (1912) 14 Ind Cas 674 (677): 9 All L J 328: 34 All 328; *Venkataramana* v. *Gompertz*, (1908) 31 Mad 425 (428): 3 Mad L Tim 397: 18 Mad L Jour 298; *Benarsi Goldsmith* v. *Bhullu*, 1923 All 423 (423): 73 Ind Cas 227. But see *Sarju Kumar* v. *Dwarka Prasad*, 1929 All 296 (298): 1929 All L J 499: 119 Ind Cas 507 [Subsequent mortgagee—Paying prior mortgagee—Suit by intermediate mortgagee—Subsequent mortgagee cannot insist on prior mortgage being paid—Property can be sold subject to prior mortgage].

O. 34, R. 1.
Note 10.

his prior mortgage inasmuch as the prior mortgage is not impugned.[9] But he is not precluded from setting up the prior mortgage and if he so sets it up it should be adjudicated upon by the Court.[9-a] Where *A's* claim to the priority rests not on a prior mortgage in his favour but on the fact of his being *subrogated* to the rights of a prior mortgagee by payment, he must assert the right to such priority on pain of being precluded by *res judicata* from putting it forward in a subsequent suit.[10] The reason is that in such a case he fills only *one role, viz.*, that of puisne mortgagee and must put forward all the defences open to him. Where a person holds two mortgages on the same property, he can, by force of the explanation to the rule, sue on the later mortgage subject to his rights under the earlier mortgage[11] though according to the High Court of Allahabad he must *expressly reserve* his rights under the prior mortgage.[11-a] The High Court of Bombay has, however, held that he cannot sue on the subsequent mortgage alone unless, perhaps, he reserves his rights on the first mortgage.[11-b] But according to the general trend of decisions he cannot sue on his *earlier mortgage* only and afterwards sue to enforce the second mortgage.[12] But a contrary view has also been taken in the undermentioned cases[13] which proceed upon the ground that inasmuch as the two mortgages constitute different causes of action, there is nothing to prevent their being sued on separately without regard to the question whether the mortgage sued on is an earlier or a later one.

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(9) *Collector of Moradabad* v. *Md Hidayat Ali*, 1926 All 449 (449): 48 All 554: 94 Ind Cas 505; *Mahabir Prasad* v. *Parbhu Singh*, (1909) 9 Cal L Jour 78 (81): 3 Ind Cas 686 (688) contra; *Kishen Dyal Gir* v. *Mahomed Amirul Hussain*, (1915) 26 Ind Cas 673 (674): 19 Cal W N 942; *Baranashi Pershad* v. *Johori Lal*, (1903-04) 8 Cal W N 885 [Puisne mortgagee being a necessary party must, when impleaded, set up his prior as well as subsequent mortgages].

(9-a) *Saminathier* v. *Audinarayanasamier*, (1911) 9 Ind Cas 643 (643): 9 Mad L Tim 410.

(10) *Hankar Rai* v. *Kamta Proshad Sahu*, (1915) 29 Ind Cas 875 (876): 19 Cal W N 947; *Muhamad Ibrahim Hossein* v. *Ambika Pershad*, (1912) 14 Ind Cas 496 (504): 39 Cal 627: 39 Ind App 68: 9 All L J 332: 14 Bom L R 280: 16 Cal W N 505: 15 Cal L Jour 411: 22 Mad L Jour 468: 11 Mad L Tim 265: 1912 Mad W N 367 P C; *Mahabir* v. *Prabhu*, (1909) 3 Ind Cas 686 (688): 9 Cal L Jour 78; *Brij Mohan Singh* v. *Dukhan Singh*, 1931 Pat 33 (38): 9 Pat 816: 11 Pat L Tim 883: 130 Ind Cas 168. But compare *Balwant* v. *Manohardas Rangildas*, 1927 Nag 38 (39): 97 Ind Cas 977 [Decision by Court on question of subrogation is unnecessary].

(11) *Nawab Waziri Begam* v. *Shashi Bhusan*, 1924 Pat 77 (80): 2 Pat 874: 74 Ind Cas 820: 4 Bur L Tim 546: 1923 P H C C 293; *Udaichand* v. *Nagina Singh*, (1919) 50 Ind Cas 40 (41) Pat; *Subramania* v. *Balasubramania*, (1915) 30 Ind Cas 317 (319): 38 Mad 927: 29 Mad L Jour 195 F B.

(11-a) *Ram Saran* v. *Abdul Ghaffar*, 1928 All 378 (378): 26 All L J 529: 50 All 742: 114 Ind Cas 38. But see *Dwarka Prasad* v. *Ulfat Rai*, 1931 All 549 (549): 1931 All L J 398: 132 Ind Cas 803: 53 All 631 [He is not bound to declare his prior mortgage].

(11-b) *Dhondo* v. *Bhikoji*, (1915) 27 Ind Cas 1005 (1006): 39 Bom 138: 17 Bom L R 144 [30 Bom 156 referred to].

(12) *Ram Saran* v. *Abdul Ghaffar*, 1928 All 378 (378): 26 All L J 529: 50 All 742: 114 Ind Cas 38; *Gur Prashad* v. *Chhutku Lal*, (1919) 53 Ind Cas 753 (756): 6 Oudh L J 482; *Nattu Krishnama* v. *Annangara Chariar*, (1907) 30 Mad 353 (354): 2 Mad L Tim 330: 17 Mad L Jour 301; *Doraisamy* v. *Venkata*, (1902) 25 Mad 108 (113, 114): 11 Mad L Jour 373; *Bansidhar* v. *Gaya Prasad*, (1901) 24 All 179 (184): 1902 All W N 3.

(13) *Nilu Roy* v. *Asirbad Mandal*, 1921 Cal 321 (322, 326, 327): 33 Cal L Jour 232: 25 Cal W N 129: 60 Ind Cas 809; *Bansidhar* v. *Jagmohandas*, 1925 Oudh 379 (380): 12 Oudh L J 127: 86 Ind 748; *Shiolal* v. *Nanhelal*, (1912) 17 Ind Cas 129 (130): 8 Nag L R 123 [Two mortgages by conditional sale over same property by same person—Separate foreclosure decrees can be passed . . . .]; *Lakshmanan Chetty* v. *Muthaya Chetty*, (1921) 62 Ind Cas 833 (841): 40 Mad L Jour 126: 29 Mad L Tim 189 [Suit on second mortgage without reservation of rights under first mortgage—Decree—Subsequent suit on first mortgage—Maintainable as an independent cause of action so long as properties not sold away and mortgage rights not extinguished]; *Ma Myit* v. *S C Sarma*, (1922) 69 Ind Cas 897 (900): 10 L B R 360 [Suit on later mortgage—Subsequent suit on earlier one—Independent cause of action].

O. 34, R. 1, Notes 10—11.

It was held by the High Court of Patna in the undermentioned case[14] that a mortgagee can *bring the property to sale* subject to a prior mortgage in his own favour, at any rate, when he was not able to sue on the first mortgage. But the consensus of opinion seems to be that though the mortgagee may be allowed to sue separately on the mortgages and obtain decrees, he cannot be allowed to bring the property to *sale twice* or under one of his mortgages subject to the other,[15] the reason being that it would not be equitable to the mortgagor to allow the mortgagee to do so, as a fair price cannot be obtained for the property at such a sale. The conflict has now practically been set at rest, in cases of mortgages coming into existence after the 1st April, 1930 by the enactment of the new S. 67-A of the Transfer of Property Act by which a mortgagee holding two or more mortgages shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages. *See also* Note 40 to S. 11, *ante*.

11. **Mahomedan co-heirs**.—Where a Mahomedan mortgagor or mortgagee dies leaving a number of heirs the ordinary rule is that all the heirs should be made parties to a suit relating to the mortgage.[1] But the failure to join some of the heirs is not fatal to the suit and the decree passed will bind all the heirs.[2] It was so held by their Lordships of the Privy Council in *Khairajmal* v. *Daim*.[3] The reason is, as has been already seen in Note 63-B to S. 11 and Note 5 to S. 52, *ante*, that the representatives actually brought on the record must, in the absence of fraud or collusion, be deemed to be litigating in the common interest of themselves and of all the other heirs within the meaning of Expl. VI of S. 11 of the Code. Where, however, *pending the suit* objection is raised as to the non-joinder of some of the heirs but the plaintiff refuses to make them parties, the decree can bind only the right title and interest, of the persons actually on the record.[4] In view of the Privy Council decision referred to above, the views expressed in the undermentioned cases,[5] that a decree against only some of the legal representatives of a deceased Mahomedan mortgagor is not binding on the other representatives or that there is some difference in principle between Mahomedan co-heirs and the members of a joint Hindu family in this respect cannot be accepted as correct, especially as those cases do not advert to the Privy Council decision.

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(14) *Jagarnath Singh* v. *Mohra Kuvar*, (1917) 39 Ind Cas 76 (77): 2 Pat L Jour 118: 1 Pat L W 653: 1917 Pat H C C 194.

(15) *Nilu Roy* v. *Anirbad Mandal*, 1921 Cal 321 (326): 33 Cal L Jour 232: 25 Cal W N 129: 60 Ind Cas 809; *Nawaba Waziri Begam* v. *Babu Shashi Bhusan Roy*, 1924 Pat 77 (80): 4 Pat L Tim 546: 2 Pat 874: 1923 Pat H C C 293 [Property already sold under prior decree, cannot be allowed to be sold under later decree]; *Sunder Singh* v. *Bholu*, (1898) 20 All 322 (324, 325): 1898 All W N 58; *Dwarka Nath Nandi* v. *Mritunjoy Patra*, (1909) 3 Ind Cas 175 (176) Cal [Property cannot be sold under second decree subject to the first]; *Bhagwandas* v. *Bhawani*, (1904) 26 All 14: 1903 All W N 177.

Note 11.

(1) *Bhaudin* v. *Shekh Ismail*, (1887) 11 Bom 425 (428); *Mt Mujeedoonissa* v. *Syed Dildar*, (1870) 14 Suth W R 216 (216). See also *Haidar Ali* v. *Mahomed Safiuddin*, 1932 Cal 34 (35): 54 Cal L Jour 113: 134 Ind Cas 1068.

(2) *Virchand* v. *Kondu*, (1915) 31 Ind Cas 180 (180): 17 Bom L R 685: 39 Bom 729.

(3) (1904) 32 Cal 296 (313): 32 Ind App 23: 1 Cal L Jour 584: 9 Cal W N 201: 7 Bom L R 1: 2 All L J 71: 8 Sar 734 P C. See also the observations in *Dip Narain Rai* v. *Lachhman Upadhiya*, 1925 All 479 (480): 23 All L J 332: 87 Ind Cas 799: 47 All 466.

(4) *Shahasabeb Sabduralli*, v. *Sadashiv*, (1919) 51 Ind Cas 223 (224): 21 Bom L R 369: 43 Bom 575.

(5) *Lala Miya Shiak* v. *Manu Bibi*, 1928 Bom 411 (412): 25 Bom L R 408: 73 Ind Cas 246: 47 Bom 712; *Shahasaheb Sabduralli* v. *Sadashiv*, (1919) 51 Ind Cas 223 (225, 226): 21 Bom L R 369: 43 Bom 575.

O. 34, R.1, Note 12.

12. Joint Hindu family.—There is a conflict of decisions as to whether, in a suit by or against the manager of a joint Hindu family to enforce or redeem a mortgage, the other members of the family are necessary parties in the sense that their interests will not be bound if they are not individually joined as parties. On the one hand, it has been held by the High Courts of Madras[1] and Patna[2] and in several cases of the other High Courts[3] that in such a case the manager effectively *represents* the other members of the family and that the latter cannot impugn the proceedings as not binding on them merely on the ground of their not having been individually made parties to the suit. But in many other decisions,[4] it has been held that the other co-parceners are necessary parties to the suit and that their interests cannot in any way be affected by the result of the suit. In this connection, the following decisions of the Privy Council should be referred to.[5] In *Kisham*

Note 12.

[1] *Krishnama* v. *Perumal*, (1885) 8 Mad 388 (393); *Ramasamayyan* v. *Virasami*, (1898) 21 Mad 222 (225): 8 Mad L Jour 126; *Palani* v. *Rangayya*, (1899) 22 Mad 207 (208); *Sheikh Ibrahim* v. *Rama Aiyar*, (1912) 10 Ind Cas 874 (878, 879): 20 Mad L Jour 508: (1911) 1 Mad W N 442: 35 Mad 685; *Kunhi kalanda* v. *Kunhipakki*, 1930 Mad 69 (71): 30 Mad L W 862: 57 Mad L Jour 712: 124 Ind Cas 298; *Subramania Ayyar* v. *Sivasubrahmania Ayyar*, (1919) 52 Ind Cas 931 (932, 933): 10 Mad L W 180: 1918 Mad W N 537 [Father—Manager not precluded from suing in his own name merely because he purports to execute the document also as *guardian* of his minor sons].

[2] *Jagdish Narayan Pershad Singh* v. *Manmatha Nath Dey*, (1918) 45 Ind Cas 76 (78): 1918 Pat H C C 71: 4 Pat L W 331; *Ranjit Prasad Tewari* v. *Ram Jatan Pandari*, (1917) 37 Ind Cas 833 (834): 1 Pat L W 197: 1917 Pat H C C 113; *Kali Rai* v. *Tulsi Ram*, 1926 Pat 207 (208): 4 Pat 723: 93 Ind Cas 932: 7 Pat L Tim 499; *Lal Behari Singh* v. *Gur Prasad Singh*, 1923 Pat 290 (292): 4 Pat L Tim 108: 1923 Pat H C C 118: 71 Ind Cas 948: 1 Pat L R 238: 2 Pat 435; *Jag Sah* v. *Ram Chandra Prasad*, 1921 Pat 377 (378): 6 Pat L Jour 640: 1921 Pat H C C 289: 2 Pat L Tim 553: 63 Ind Cas 564; *Shaikh Abdul Rahman* v. *Shib Lal Sahu*, 1922 Pat 252 (253): 1922 Pat H C C 81: 6 Pat L Jour 650: 2 Pat L Tim 572: 63 Ind Cas 570: 4 U P L R (Pat) 13; *Baij Nath Goenka* v. *Daleep Narain Singh*, (1920) 58 Ind Cas 489 (491): 1920 Pat 261: 1 Pat L Tim 582; *Raghunandan Singh* v. *Parameswar Dayal Singh*, (1917) 39 Ind Cas 779 (782): 2 Pat L Jour 306: 1 Pat L W 636: 1917 Pat H C C 137; *Subalal Singh* v. *Rameshwar Singh*, (1917) 40 Ind Cas 525 (526): 1 Pat L W 736; *Tribeni Prasad* v. *Ramasray Prasad*, 1932 Pat 80 (85): 10 Pat 670: 136 Ind Cas 49.

[3] *Pirthipal Singh* v. *Rameshwar*, 1927 Oudh 27 (29): 3 Oudh W N 954: 99 Ind Cas 154: 2 Luck 288; *Ramkrishna Narain* v. *Vinayak Narayan*, (1910) 34 Bom 354 (358): 12 Bom L R 219: 5 Ind Cas 967; *Lala Surja Prasad* v. *Golabchand*, (1900) 27 Cal 724 (743): 4 Cal W N 701; *Balki Mohapatra* v. *Brojobashi Panda*, (1912) 14 Ind Cas 333 (335): 16 Cal W N 1019; *Horilal* v. *Nimman Kunwar*, (1912) 15 Ind Cas 126 (129): 9 All L J 819: 34 All 549; *Madan Lal* v. *Kishen Singh*, (1912) 15 Ind Cas 138 (139): 9 All L J 844: 34 All 572; *Chajju Mal* v. *Nathan*, (1912) 15 Ind Cas 876 (877) All; *Gore* v. *Kashiram*, (1913) 18 Ind Cas 848 (852): 9 Nag L R 1; *Lachmi Shankar* v. *Ram Ayyan Missir*, (1913) 21 Ind Cas 192 (193) All; *Raghoram* v. *Rajani Kanta*, (1915) 29 Ind Cas 752 (753): 21 Cal L Jour 452; *Katwaroo Singh* v. *Dharam Deo*, (1915) 29 Ind Cas 926 (928) All; *Bhagirathi* v. *Onkar Nath*, 1924 Oudh 17 (19): 10 Oudh L J 185: 72 Ind Cas 142; *Sheo Rattan* v. *Raja Jagmohan*, (1898) 1 Oudh Cas 53 (58, 62); *Baij Nath* v. *Ram Bilas*, 1924 All 738 (739): 5 L R A (Civ) 386: 80 Ind Cas 12; *Chetan Singh* v. *Sartaj Singh*, 1924 All 908 (1) (908): 46 All 709: 22 All L J 702: 5 L R A (Civ) 480: 79 Ind Cas 1001; *Nathu* v. *Ram Sarup*, 1925 All 335 (336): 23 All L J 246: 47 All 427: 87 Ind Cas 700; *Madhusudan* v. *Bhagwan*, 1929 Bom 213 (214): 31 Bom L R 395: 53 Bom 444: 118 Ind Cas 788; *Jaddo Kuar* v. *Sheo Shankar*, (1910) 7 Ind Cas 902 (904, 905): 7 All L J 945; *Damodar Namdeo* v. *Kesheo Govind*, (1918) 46 Ind Cas 727 (728) Nag; *Ganga Sahai* v. *Agent, Bombay-Baroda and Central India Railway*, (1919) 50 Ind Cas 243 (247)

[4] *Tatyarao* v. *Putappa*, (1910) 8 Ind Cas 633 (634): 12 Bom L R 940; *Shiam Sundar Lal* v. *Bhuddhu Lal*, (1914) 24 Ind Cas 252 (253): 12 All L J 794; *Sidheshuri Pershad Narain Singh* v. *Dharamjit Narain Singh*, (1914) 22 Ind Cas 570 (571): 19 Cal L Jour 437: 41 Cal 727; *Bissonath* v. *Brindesri Prosad*, (1912) 17 Ind Cas 577 (580): 40 Cal 342: 17 Cal W N 1025; *Nathi Lal* v. *Lala*, (1912) 14 Ind Cas 35 (37): 9 All L J 410; *Lala Suraj Prasad* v. *Golab Chand*, (1901) 28 Cal 517 (531): 5 Cal W N 640; *Lala Surja Prasad* v. *Gulab Chand*, (1900) 27 Cal 724 (756): 4 Cal W N 701; *Kashinath* v. *Chimnaji*, (1906) 30 Bom 477 (486): 8 Bom L R 268; *Ram Prasad* v. *Manmohan*, (1908) 30 All 256 (257): 5 All L J 267: 1908 All W N 106; *Shamrathi* v. *Kishan Prasad*, (1907) 29 All 311 (315, 317): 1907 All W N 58: 4 All L J 194; *Kanhaia Lal* v. *Raj Bahadur*, (1898) 24 All 211 (213): 1902 All W N 24; *Bhawani Prasad* v. *Kallu*, (1895) 17 All 537 (568): 1895 All W N 212; *Badri Prasad* v. *Madan Lal*, (1893) 15 All 75 (83): 1893 All W N 52 F B

[5] *Kishen Prasad* v. *Har Narain Singh*, (1911) 9 Ind Cas 739 (741): 15 Cal W N 321: 8 All L J 256: 9 Mad L Tim 343: 13 Cal L Jour 345: 21 Mad L Jour 378: 13 Bom L R 359: 33 All 272: (1911) 2 Mad W N 395: 38 Ind App 45 P C; *Sheo Shankar Ram* v. *Mt Jaddo Kunwar*, (1914) 24 Ind Cas 504 (506): 18 Cal W N 968: 16 Mad L Tim 175: 1914 Mad W N

O. 34, R.1. Note 12.

Prasad v. *Har Narain*,[6] it was held that the manager of a joint Hindu family business effectively represents the family in all litigation by or against the family in connection with the joint family business. In *Sheo Shankar* v. *Juddoo Kunwar*,[7] the Privy Council observed as follows:—"There seems to be no doubt upon the Indian decisions (from which their Lordships *see* no reason to dissent) that there are occasions including foreclosure suits, when the managers of joint Hindu families so effectively represent all other members of the family that the family as a whole is bound." In *Ganpat Lal* v. *Bindleasin Prasad*,[8] a minor co-parcener sued for a declaration that his right to redeem a mortgage was unaffected by a sale under a decree passed against the manager without impleading him (the minor) as a party. Their Lordships rejected that claim holding that, after the purchase under his decree, the mortgagee was in the position of a purchaser and that unless the sale and the decree were attacked in a properly constituted suit his possession could not be disturbed. In *Lingan Gouda* v. *Basan Gauda*,[9] the Privy Council held that S. 11, Expl. VI was applicable to a joint Hindu family. In view of the foregoing decisions of the Privy Council, the Madras and Patna view must be accepted as correct. *See also* Note 61 to S. 11, *ante*. Even granting that the son is a necessary party to a suit against the father, where he is impleaded as a legal representative of his father he cannot object to the decree in the executing Court, on the ground of the plaintiff's failure to implead him.[9-a] Nor does the plaintiff mortgagee lose his right to sue the son separately by his failure to join him in the suit against the father.[9-b]

On the question whether in a suit by or against the manager of a joint Hindu family the manager should be *expressly* and *specifically* stated as suing or as being sued in his representative capacity as manager, there is a conflict of decisions; some cases holding that such express mention is not necessary,[10] and others holding that it is.[11] The better view, it is submitted, is that the question whether a manager sues or is sued in a representative character is a

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593: 1 Mad L W 645: 20 Cal L Jour 282: 36 All 383: 12 All L J 1173: 16 Bom L R 810: 41 Ind App 216 P C; *Ganpat Lal* v. *Bindbasini Prasad*, (1920) 56 Ind Cas 274 (277): 18 All L J 555: 1920 Mad W N 382: 12 Mad L W 59: 39 Mad L Jour 108: 2 U P L R (P C) 103: 24 Cal W N 954: 28 Mad L Tim 330: 47 Cal 924: 47 Ind App 91: 1920 P C 1 P C; *Lingan Gowda* v. *Basan Gowda*, 1927 P C 56 (56, 57): 52 Mad L Jour 472: 25 Mad L W 789: 25 All L J 319: 31 Cal W N 570: 1927 Mad W N 352: 4 Oudh W N 424: 101 Ind Cas 44: 29 Bom L R 848: 51 Bom 450: 54 Ind App 122: 45 Cal L Jour 504: 8 Pat L Tim 462 P C.

[6] (1911) 9 Ind Cas 739 (741): 15 Cal W N 321: 8 All L J 256: 9 Mad L Tim 343: 13 Cal L Jour 345: 21 Mad L Jour 378: 13 Bom L R 359: 33 All 272: (1911) 2 Mad W N 395: 38 Ind App 45 P C.

[7] (1914) 24 Ind Cas 504 (506): 18 Cal W N 968: 16 Mad L Tim 175: 1914 Mad W N 593: 1 Mad L W 645: 20 Cal L Jour 282: 36 All 383: 12 All L J 1173: 16 Bom L R 810: 41 Ind App 216 P C.

[8] (1920) 56 Ind Cas 274 (277): 18 All L J 555: (1920) Mad W N 382: 12 Mad L W 59: 39 Mad L Jour 108: 28 Mad L Tim 330: 47 Cal 924: 2 U P L R (P C) 103: 24 Cal W N 954: 47 Ind App 91: 1920 P C 1 P C.

[9] 1927 P C 56 (56, 57): 52 Mad L Jour 472: 25 Mad L W 789: 25 All L J 819: 31 Cal W N 570: 1927 Mad W N 352: 4 Oudh W N 424: 101 Ind Cas 44: 29 Bom L R 848: 51 Bom 450: 54 Ind App 122: 45 Cal L Jour 504: 8 Pat L Tim 462 P C.

[9-a] *Hira Lal* v. *Parmeshar Rai*, (1899) 21 All 356 (357, 358): 1899 All W N 100.

[9-b] *Dharam Singh* v. *Angan Lal*, (1899) 21 All 301 (307): 1899 All W N 78.

[10] *Gobind Gorhi* v. *Baldeo Ram*, 1930 Pat 293 (297): 126 Ind Cas 369; *Tulshi* v. *Bishnath Rai*, 1923 All 284 (284): 21 All L J 175: 71 Ind Cas 623: 4 L R A (Civ) 184; *Horilal* v. *Nimman Kunwar*, (1912) 15 Ind Cas 126 (129): 9 All L J 819: 34 All 549; *Jag Sah* v. *Ram Chandra*, 1921 Pat 377 (378): 6 Pat L Jour 640: 1921 Pat H C C 289: 2 Pat L Tim 553: 63 Ind Cas 564.

[11] *Ramchandra* v. *Sripatrao*, (1916) 33 Ind Cas 771 (772): 18 Bom L R 33: 40 Bom 248; *Girwar* v. *Mt Makbulunnissa*, (1916) 36 Ind Cas 542 (543): 1 Pat L Jour 468; *Ramchandra Narain* v. *Shripath Rao Tukoji Rao*, (1916) 33 Ind Cas 771 (772): 18 Bom L R 33: 40 Bom 248.

question of fact in each case and his specific description as manager is not essential.

Although it may not be legally necessary to implead the other co-parceners in a suit by or against a manager, yet, they would be *proper* parties to such a suit.[12] Further, the right of the other co-parceners, to object, not on the ground, of their non-joinder, but on the ground of the debt being not binding on them, or as being tainted with illegality or immorality, is not affected by proceedings to which they have not been parties.[13] But in a suit on a mortgage of joint family property where the *manager* is not made a party, *all* the others are necessary parties.[14] Similarly, where the father is impleaded but he does not, or cannot, act in a representative character, the other members should be joined if their interests are sought to be affected.[15]

To a suit to enforce the mortgage of the share of one co-parcener alone, the other co-parceners are not necessary parties.[16] Similarly, where the mortgage is not a *joint family transaction* but one entered into by a member of the family in his *individual* capacity, the others are not necessary parties.[17]

Where the parties are not governed by Hindu Law, and the son, under the Customary Law, is entitled only to a reversionary interest for the protection of which he has the right to interfere to prevent unnecessary alienations of the property, the son's interest is not sufficient to entitle him to be made a party to a suit on the mortgage.[18]

13. **Assignee of mortgage**.—In a suit for redemption of a mortgage against the assignee thereof, the original mortgagee is not a necessary party.[1] But in a suit to enforce the mortgage brought by the assignee of the mortgage, the original mortgagee is a necessary party where the mortgagor denies receipt of consideration.[2]

14. **Receiver in insolvency**.—Where the mortgagor becomes insolvent after the date of the mortgage, the mortgagee bringing a suit on his

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(12) *Jas Ram* v. *Sher Singh,* (1903) 25 All 162 (164): 1902 All W N 228; *Apparao Babu Rao* v. *Vithal Govind,* 1931 Bom 408 (409): 33 Bom L R 608: 134 Ind Cas 865; *Debi Dat* v. *Jadu Rai,* (1902) 24 All 459 (460): 1902 All W N 123.

(13) *Dabi Singh* v. *Jia Ram,* (1903) 25 All 214 (223): 1903 All W N 21; *Ramkrishna* v. *Vinayak,* (1910) 34 Bom 354 (357): 12 Bom L R 219: 5 Ind Cas 967; *Bidya Prosad Singh* v. *Bhupnarain Singh,* (1915) 29 Ind Cas 629 (632): 21 Cal L Jour 543: 19 Cal W N 849: 42 Cal 1068; *Ramaswami Ayyar* v. *Virasami Ayyar,* (1898) 21 Mad 222 (225): 8 Mad L Jour 126.

(14) *Jugal Kishore* v. *Ganga Singh,* (1913) 21 Ind Cas 712 (713) All.

(15) *Drigpal* v. *Sukhnandan,* (1920) 56 Ind Cas 299 (301): 7 Oudh L J 164: 2 U P L R (O C) 96; *Nago Rao* v. *Nago,* (1914) 24 Ind Cas 831 (832): 10 Nag L R 72; *Prag* v. *Ram Niranjan,* (1912) 17 Ind Cas 734 (735): 11 All L J 36 [Father in jail—Minor son not represented—Son not bound]; *Kandum Venkataswamy* v. *Baligadu,* (1916) 32 Ind Cas 179 (183): 19 Mad L Tim 43: 3 Mad L W 74 [Once the parties have become divided in interest the father cannot sue on behalf of his son].

(16) *Lal Chand* v. *Balkrishna,* (1913) 21 Ind Cas 689 (690): 15 Bom L R 944 Note.

(17) *Sohna Shah* v. *Dipa Shah,* 1902 Pun Re No. 15; *Ram Narain Ram* v. *Palo Patak,* (1904) 1 All L J 367 (368) [Mortgage of property which is not ancestral]; *Adaikulam Chetty* v. *Subban Chetty,* (1915) 26 Ind Cas 35 (36, 38): 1914 Mad W N 634: 16 Mad L Tim 279: 27 Mad L Jour 621 [Mortgage in favour of co-parcener who does not disclose that he is lending joint family funds—He is entitled to sue without joining other co-parceners]. See also *Ragho Vinayak* v. *Sheikh Daud,* (1889) 13 Bom 51 (53) [Divided members of the family not necessary parties].

(18) *Shiv Dev Singh* v. *Jai Ram,* (1919) 53 Ind Cas 411 (411): 125 Pun Re No. 1919: 44 Pun L R 1920.

Note 13.

(1) *Suleman Hussain* v. *Esso,* 1926 Sind 145 (147): 91 Ind Cas 87.

(2) *Dirg Singh* v. *Manbhar,* (1910) 7 Ind Cas 69 (69) All.

O. 34, R. 1, Notes 14—17.

mortgage is bound to implead the Official Receiver or Assignee as a party thereto.[1] The undermentioned cases to the contrary[2] are no longer law in view of the decision of the Privy Council in *Kala Chand* v. *Jagannath*[3] referred to above. *See also* O. 22, R. 10, *ante*.

15. **Lessee.**—A lessee who has been inducted on the land by the mortgagor or by the mortgagee and whose interest will be affected by the result of the suit is a necessary party to a suit relating to the mortgage.[1] But a person having merely a *raiyati* interest in the land is not entitled to redeem a mortgage or to be joined as a party to a suit on the mortgage.[2]

16. **Landlord.**—Although the general rule is that a person claiming a paramount title is not a necessary party to a suit on the mortgage, yet, in some cases it may be convenient to join the landlord of the mortgagor as a party thereto.[1] (*See* Note 5, *supra.*) Where the landlord is in possession of the mortgaged property not by virtue of a supreme title but by virtue of a title improperly and collusively obtained from the tenant under a decree for ejectment, he is a necessary party to the suit on the mortgage.[2]

17. **Kanomdar.**—In an appeal by sub-tenants against a decree for redemption of a *Kanom*, obtained by a *jenmi*, the *Kanomdar* is a necessary party.[1] Where a *melcharathdar* along with the *jenmi* obtains a decree for the redemption of a *Kanom*, and the *Kanomdar* appeals against the decree,

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Note 14.

(1) *Kalachand* v. *Jagannath*, 1927 P C 108 (109): 52 Mad L Jour 734: 29 Bom L R 882: 31 Cal W N 741: 101 Ind Cas 442: 45 Cal L Jour 544: 54 Ind App 190: 25 All L J 621: 1927 Mad W N 485: 54 Cal 595: 39 Mad L Tim 5: 26 Mad L W 268 P C [Reversing 1925 Cal 785 (786)]; *Puninthavelu* v. *Bhashyam*, (1902) 25 Mad 406 (422): 12 Mad L Jour 282.

(2) *Kanduswami Chetti* v. *Jaya Pandiya*, 1927 Mad 609 (610): 101 Ind Cas 78: 26 Mad L W 47 [Decided before the decision in 1927 P C 108]; *Khazanchi* v. *Nizam Din*, 1930 Lah 791 (792): 31 Pun L R 506: 126 Ind Cas 174 [Which simply follows 1925 Cal 785 which was reversed by the Privy Council]. ,

(3) 1927 P C 108 (109): 52 Mad L Jour 734: 29 Bom L R 882: 31 Cal W N 741: 101 Ind Cas 442: 45 Cal L Jour 544: 54 Ind App 190: 25 All L J 621: 1927 Mad W N 485: 54 Cal 595: 39 Mad L Tim 5: 26 Mad L W 268 P C.

Note 15.

(1) *Krishna* v. *Vithal*, 1926 Bom 522 (528): 28 Bom L R 759: 96 Ind Cas 848 [Lessees under mortgagee]; *Asan Pandey* v. *Rajmon Misser*, (1919) 52 Ind Cas 105 (107) Pat [Lease granted by mortgagee]; *Raghunandan* v. *Ambika Singh*, (1907) 29 All 679 (682): 4 All L J 703: 1907 All W N 227 [Lessee under perpetual lease]; *Kasumunnissa* v. *Nilratna Bose*, (1882) 8 Cal 79 (87): 10 Cal L Rep 113: 9 Cal L Rep 173 [Patnidar]; *Radha Pershad* v. *Manohar Das*, (1881) 6 Cal 317 (319): 7 Cal L Rep 293 [Zurpeshgidar]; *Jugul Kissore* v. *Kartic Chunder*, (1894) 21 Cal 116 (120) [Patnidar]; *Narsingdas* v. *Sheik Hussain*, 1926 Nag 495 (496): 96 Ind Cas 961 [Lessee for a term of years]; *Kokil Singh* v. *Dulichand*, (1880) 5 Cal L Rep 243 (250) [Mokararidar]; *Govindarajulu Naidu* v. *Chinna Thambi*, 1928 Mad 1270 (1270): 111 Ind Cas 147; *Sheoram* v. *Jamna Bai*, 1923 Nag 273 (274): 19 Nag L R 18: 65 Ind Cas 503 [Permanent lessee]; *Nand Kuer* v. *Kunj Behari*, 1927 Pat 411 (411, 412): 8 Pat L Tim 229 [Mokararidar]. But see *Sripati* v. *Mohip Narain*, (1883) 9 Cal 643 (644): 13 Cal L Rep 119 [Holder of Mourasi Mokurari patta granted by mortgagor not entitled to redeem and not necessary party].

(2) *Girish Chunder* v. *Juramoni De*, (1901) 5 Cal W N 83 (85).

Note 16.

(1) *Sourendra* v. *Kunjbehari*, 1929 Pat 222 (227): 10 Pat L Tim 129: 8 Pat 439: 116 Ind Cas 518 [Suit by mortgagee of non-transferable holding—Landlord purchaser in rent decree, made defendant—Right must be decided in the very suit]; *Pran Krishna Pan* v. *Atul Krishna*, (1918) 46 Ind Cas 176 (177, 179): 22 Cal W N 662 [To a suit to enforce a mortgage of a non-transferable occupancy holding the landlord is a proper but not a necessary party]; *Jaduram* v. *Bhawanisao*, 1930 Nag 89 (90): 121 Ind Cas 666: 13 Nag L J 1 [Suit on prior mortgage—Puisne mortgagee joined as defendant—Puisne mortgagee (Malguzar) can contend that mortgagor could not validly mortgage without his consent].

(2) *Panchanan Ghosh* v. *Abdul Malik*, (1912) 16 Ind Cas 703 (705): 16 Cal W N 920.

Note 17.

(1) *Vedaparathi* v. *Avara*, (1902) 25 Mad 566 (571).

claiming compensation for improvements, the *jenmi* is a necessary party to the appeal.[2]

18. **Parties to appeal.**—The provisions of this rule apply also to appeals.[1]

19. **Effect of non-joinder.**—Under S. 85 of the Transfer of Property Act, 1882, it was held that the word "must" in that section was imperative in character, and that, consequently, the failure to join a person interested in the mortgaged property as a party to the suit was a defect fatal to the suit.[1] But the Court was, however, held to have power under S. 32 of the old Code (now O. 1, R. 10) to add the necessary parties.[2] As has been seen in Note 4, *ante*, O. 34, R. 1 makes it now clear that its provisions are "subject to the other provisions of the Code" including O. 1, R. 9, and, hence, the non-joinder of any person as a party to the suit is not a fatal defect; a decree can be passed so far as regards the parties *actually* on the record are concerned,[3]

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(2) *Seshan Pattar* v. *Yakkanath*, (1911) 9 Ind Cas 940 (940): (1911) 2 Mad W N 148: 9 Mad L Tim 356.

Note 18.

(1) *Kesavan* v. *Sankaran*, (1897) 7 Mad L Jour 266 (267); *Mankal* v. *Collector of Malabar*, (1899) 9 Mad L Jour 49 (50); *Surjiram* v. *Barhamdeo Prasad*, (1905) 2 Cal L Jour 202 (216): 1 Cal L Jour 337; *Velammal* v. *Lakshmammal*, (1915) 31 Ind Cas 814 (815). But see *Chandi Charan* v. *Siraj Mia*, 1927 Cal 479 (480): 100 Ind Cas 521 [Redemption suit dismissed—One only of the mortgagors appealing—Others are not necessary parties].

Note 19.

(1) *Deokali Kunwar* v. *Alim-un-nissa Bibi*, 1901 All W N 22 (22) [Decree-holder cannot bring property to sale subject to puisne mortgagee's right of redemption]; *Jamuna Pershad* v. *Ganga Pershad*, (1892) 19 Cal 401 (411); *Sorabji* v. *Rattonji*, (1898) 22 Bom 701 (707); *Dalibai* v. *Gopi Bai*, (1902) 26 Bom 433 (436): 4 Bom L R 105; *Muhamad Abdul Rashid* v. *Dilsukh*, (1905) 27 All 517 (525): 2 All L J 210: 1905 All W N 80; *Ghulam Kadir* v. *Mustakin Khan*, (1896) 18 All 109 (112): 1896 All W N 7; *Matadin* v. *Kasim Hussain*, (1891) 13 All 432 (465, 466); *Janki Pershad* v. *Kishen Dat*, (1894) 16 All 478 (483): 1894 All W N 151 F B; *Srinivasa Rao Saheb* v. *Yamunabhai Ammal*, (1906) 29 Mad 84 (86): 16 Mad L Jour 50 [Point was doubted in this case].

(2) *Jamuna* v. *Ganga*, (1892) 19 Cal 401 (411); *Sotish Chunder* v. *Nilcomul*, (1885) 11 Cal 45 (51); *Ahmedbhoy* v. *Vulleebhoy*, (1886) 8 Bom 323 (336); *Vadi Lal* v. *Shah Kausal*, (1903) 27 Bom 157 (161): 4 Bom L R 968; *Kundan Lal* v. *Faquir Chand*, (1904) 27 All 75 (78): 1 All L J 476; *Girish Chunder Day* v. *Jeiramoni De*, (1901) 5 Cal W N 83 (85) [Review granted for the purpose of joining omitted persons]; *Vakatchand Lakmichand* v. *Advocate-General*, (1871) 8 Bom H C R (O C) 96 [Court may add a necessary party even after a preliminary decree]; *Alagappa* v. *Vellian*, (1895) 18 Mad 33 (38): 4 Mad L Jour 283 [Amendment not to be allowed if by so doing defendant is likely to be precluded from pleading limitation]; *Mallikarjuna* v. *Pulayya*, (1893) 16 Mad 319 (320) [Amendment ought not to be allowed if thereby defendant is likely to be precluded from pleading limitation]; *Mangal Prasad* v. *Chandramall*, (1905) 1 Nag L R 117 (121) [Amendment ought not to be allowed if by so doing the defendant is likely to be precluded from pleading limitation]; *Bhagmani* v. *Subh Narain*, 1905 All W N 35 (36) [Prayer for amendment not to be refused even though a previous opportunity had been given and the case was nearing conclusion]; *Amiruddin Hussain* v. *Khairuddin Hussain*, 1900 All W N 20 (21); *Tikam Singh* v. *Thakur Kishore*, (1898) 20 All 188 (189): 1898 All W N 12.

(3) *Waleyatunnissa Begam* v. *Chalakhi*, 1931 Pat 164 (167): 132 Ind Cas 100: 10 Pat 341: 12 Pat L Tim 28; *Parmeshwar Pandey* v. *Rajkishore Narain Singh*, 1925 Pat 59 (61): 3 Pat 829: 5 Pat L Tim 646: 80 Ind Cas 34; *Sital Prasad Ray* v. *Asho Singh*, 1922 Pat 651 (652): 1922 Pat H C C 326: 4 Pat L Tim 698: 69 Ind Cas 677: 2 Pat 175; *Hari Prasad Singha* v. *Babu Surendra Mohan Sinha*, 1922 Pat 450 (473): 66 Ind Cas 945: 1 Pat 506: 3 Pat L Tim 709; *Kherodamoyi Dasi* v. *Habib Shah*, 1925 Cal 152 (153): 29 Cal W N 51: 82 Ind Cas 638; *Har Chandra Roy* v. *Muhamed Hussein*, 1921 Cal 554 (555): 25 Cal W N 594: 66 Ind Cas 312; *Baldeo Prasad* v. *Bhola Nath*, 1929 All 941 (942): 121 Ind Cas 106: 52 All 134; *Karrar Husain* v. *Jai Narain Rai*, 1927 All 290 (290): 100 Ind Cas 198; *Jwala Prasad* v. *Sher Singh*, 1927 All 488 (488): 101 Ind Cas 775; *Sheo Kumar Pandy* v. *Babu Nandan Dube*, 1924 All 928 (928): 5 L R A (Civ) 431: 84 Ind Cas 262; *Parsadi Lal* v. *Laiq Singh*, 1924 All 107 (108): 21 All L J 701: 5 L R A (Civ) 31: 74 Ind Cas 943; *Sabduralli* v. *Sadashiv Supde*, (1919) 51 Ind Cas 223 (224): 43 Bom 575: 21 Bom L R 369; *Alam Singh* v. *Gokal Singh*, (1913) 21 Ind Cas 271 (272): 11 All L J 749; 35 All 484; *Ganeshi Lall* v. *Charan Singh*, (1913) 19 Ind Cas 614 (614): 35 All 247: 11 All L J 280; *Haibat Shah* v. *Bohra Tarachand*, 1931 All 235 (236): 132 Ind Cas 31: 1931 All L J 902 [One of joint-mortgagors dies pending suit—No L R impleaded and abatement—Decree passed for sale of property of other mortgagors for proportionate amount]; *Ramcharan* v. *Rashiduddin*, (1912) 16 Ind Cas 674 (674): 10 All L J 134; *Bala Proshad* v. *Pratab Singh*, (1912) 13 Ind Cas 38 (39) All; *Guruvayya* v. *Dattatraya*, (1904) 28 Bom 11 (17): 5 Bom L R 618; *Hirasa* v. *Onkar*, 1923 Nag 234 (235): 72 Ind Cas 458; *Ram Kinkar* v. *Akkil Chundra*, (1908) 35 Cal 519 (523): 11 Cal W N 350: 5 Cal L Jour 242: 2 Mad L Tim 137 [When in course of mortgage suit, purchaser of portion of mortgaged property is made a party

O. 34, R.1. Note 19.

unless the person omitted is a necessary party in the sense, that, in his absence, no relief could be given at all even as regards the parties actually on the record.[4] If the party on the record effectually represents others not joined, the decree will bind the interests of the latter also.[5] The Court has also ample powers under O. 1, R. 10 to add, in proper cases, any parties it considers necessary for the disposal of the suit.[6] In this connection reference may also be made to S. 99 of the Code which lays down that a misjoinder (which includes non-joinder) is not, in itself, a ground for reversing or varying a decree.[7]

But, although, the non-joinder of persons who ought to have been joined as parties under this rule is not fatal to the suit, the result of this cannot, *in any way, affect* the rights of such persons.[8] Simple, as this proposition is,

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defendant after prescribed period of limitation, suit *as against him* is barred by limitation]; *Kamalpati* v. *Bejoy Lal*, (1909) 3 Ind Cas 291 (293) [Decree is binding on parties thereto]. See aslo *Basuridin Biswas* v. *Debendro Nath Biswas*, (1908) 12 Cal W N 911 (913, 914); *Haidar Ali Khondkar* v. *Mahomed Shajuddin Kazi*, 1932 Cal 34 (35, 36): 54 Cal L Jour 113: 134 Ind Cas 1068 [Some heirs of deceased mortgagee suing—Others consenting—Decree for former correct]; *Umesh Chandra Mondal* v. *Chowdhury Hemanga Chandra Maity*, (1932) 36 Cal W N 1138 (1142, 1143) [One of the purchasers of the equity of redemption impleaded dying pending suit—All L. Rs. except one substituted after notice and without objection—Non-joinder not fatal or material]; *Fakir Khan* v. *Ismail Khan*, (1933) 141 Ind Cas 264 (266) Lah [Suit by mortgagees to set aside order of Collector for redemption under S. 12 of the Punjab Redemption of Mortgages Act (II of 1913)—Death of one and failure to implead his L. Rs.—Each plaintiff has a well-defined and separate share—Suit does not abate in entirety O 34, R. 1 is inapplicable]; contra *Girwar Narain Mahton* v. *Makbulunnissa*, (1916) 36 Ind Cas 542 (543): 1 Pat L Jour 468 [O 1, R 9, is subordinate to O 34, R 1].

[4] *Karrar Hussain* v. *Jai Narain Rai*, 1927 All 290 (290): 100 Ind Cas 198; *Dhuri Patak* v. *Jimal Singh*, (1918) 45 Ind Cas 650 (651): 4 Pat L W 391 [Withdrawal of suit against a *necessary* party—Suit should be dismissed]; *Velammal* v. *Lakshmu Ammal*, (1915) 31 Ind Cas 814 (815) Mad; *Saeed-ud-din Khan* v. *Hira Lal*, (1914) 24 Ind Cas 25 (26): 12 All L J 619 [In redemption suit all the mortgagees or their representatives are necessary parties]. See *Keshavram* v. *Ranchhod*, (1906) 30 Bom 156 (161): 7 Bom L R 811 [Necessary parties defendants are those without whom no decree at all can be rendered].

[5] *Shailesh Chandra Guha* v. *Bechai Gope*, 1925 Cal 94 (95): 40 Cal L Jour 67: 84 Ind Cas 124; *Govindaswamy Udaiyar* v. *Annamalai Udayar*, 1927 Mad 1071 (1072).

[6] *Baldeo Pershad* v. *Bhola Nath*, 1929 All 941 (942): 121 Ind Cas 106; *Shivubai* v. *Shiddheshwar*, 1921 Bom 152 (154): 45 Bom 1009: 23 Bom L R 405: 61 Ind Cas 590; *Ana Pena Nater Sha* v. *Annamalai Chetty*, (1911) 10 Ind Cas 776 (778): 4 Bur L Tim 71 [Defect may be remedied even in appeal].

[7] *Abdul Rahiman Mia* v. *Sali Mannessa Bibi*, 1926 Cal 416 (417): 89 Ind Cas 121 [When the merits of the case have been affected by the non-joinder S. 99 cannot be invoked to cure the defect].

[8] *Het Ram* v. *Shadi Ram*, (1918) 45 Ind Cas 798 (800): 1918 P C 34: 40 All 407: 45 Ind App 130: 16 All L J 607: 20 Bom L R 798: 28 Cal L Jour 188: 22 Cal W N 1088: 35 Mad L Jour 1: 24 Mad L Tim 92: 9 Mad L W 550: 1918 Mad W N 518: 5 Pat L W 88: 12 Bur L Tim 73 P C; *Bojonath* v. *Khelut Chunder*, (1870-72): 14 Moo Ind App 144 (149): 8 Beng L R 104: 16 Suth W R P C 33: 2 Suth 480: 2 Sar 711 P C [Mortgagor's assignee not bound by decree to which he was not party]; *Muhammad Samiuddin* v. *Man Singh*, (1887) 9 All 125 (128): 1886 All W N 318; *Gajadhar* v. *Mulchand*, (1888) 10 All 520 (523): 1888 All W N 210; *Balmakund* v. *Mt Sangari*, (1897) 19 All 379 (381): 1897 All W N 94; *Kudarat-Ullah* v. *Kubra Begum*, (1901) 23 All 25 (31): 1900 All W N 185; *Dina Nath* v. *Lachmi Narain*, (1903) 25 All 446 (453): 1903 All W N 150 F B; *Birj Kishore* v. *Madho Singh*, (1906) 28 All 279 (280): 1905 All W N 279: 3 All L J 27; *Kadir Buksh* v. *Jwala Pershad*, 1906 All W N 285 Note: 1 All L J 288; *Ram Pershad* v. *Gobindi*, (1904) 1 All L J 207 (208); *Umesh Cunder* v. *Zahur Fatima*, (1891) 18 Cal 164 (179): 17 Ind App 201: 5 Sar 507 P C: *Gobind Lal* v. *Ramjanam*, (1894) 21 Cal 70 (79): 20 Ind App 165: 6 Sar 356: 17 Ind Jur 536 P C; *Tha Hnyin* v. *Maung Mya Su*, (1910) 37 Cal 239 (250): 37 Ind App 19: 14 Cal W N 214: 11 Cal L Jour 166: 3 Bur L Tim 27: 12 Bom L R 234: 20 Mad L Jour 153: 5 Ind Cas 151 P C [Right to question priority, etc., not affected]; *Surja Bibi* v. *Monindra Nath*, (1900) 4 Cal W N 507 (508); *Kanhaiya Lal* v. *Bansidhar*, 1884 All W N 136; *Kuppu Naidu* v. *Venkatakrishna*, (1897) 20 Mad 82 (83): 6 Mad L Jour 229; *Puninthavelu* v. *Bhashyam*, (1902) 25 Mad 406 (422): 12 Mad L Jour 282; *Mallikarjanadu Sethi* v. *Lingamurthy Pantulu*, (1903) 26 Mad 332 (333): 12 Mad L Jour 279 [Puisne mortgagee not impleaded in suit on prior mortgage cannot apply to set aside execution sale under O 21, R 90 because his rights are not affected by sale]; *Rengasamy Naicken* v. *Komarammal*, (1903) 26 Mad 484 (485): 13 Mad L Jour 181; *Thenappa Chettiar* v. *Marimuthu Nadan*, (1908) 31 Mad 258 (260): 4 Mad L Tim 293: 18 Mad L Jour 344; *Swami Dayal* v. *Ramdhar*, 1931 Oudh 358 (362): 8 Oudh W N 566: 134 Ind Cas 865 [Foreclosure decree against life-estate-holder—Remainder man not impleaded—Decree does not bind him]; *Ramjhari Koer* v. *Kashi Nath*, 1926 Pat 337 (338): 94 Ind Cas 284: 5 Pat 518: 1926 Pat H C C 310: 7 Pat L Tim 788; *Sadhuprasad Bidyadhar* v. *Hari Krishna Panda*, 1929 Pat 94;

O. 34, R.1, Note 19.

its application to the complicated facts arising in mortgage suits has been the subject of a great diversity of judicial opinion. In order to appreciate the various views properly, it is necessary to remember the following important principles:—

(1) Where an owner *C* mortgages his property to *A* by way of a *simple* mortgage, the mortgagee gets nothing more than a right to obtain from the Court an order that the property be sold for the recovery of the debt. The mortgagor retains, in himself,

  (*a*) a right to redeem the mortgage, and

  (*b*) a right to the physical possession and enjoyment of the mortgaged property.[9]

(2) Where the mortgage is a usufructuary one, *A* will get a right to be in possession of the property until his debt is discharged, and *C* will retain only the right to redeem.

(3) Where *C*, the mortgagor, sells his interest in the property to *D*, then, if the mortgage is a simple one, *D* gets *C's* rights, *viz.*, the right to redeem and the right to possession of the mortgaged property; if the mortgage is a usufructuary one, he will get only the right to redeem the mortgage.[10]

(4) Where *C*, after creating a mortgage in favour of *A*, creates a further mortgage in favour of *B*, then, if the mortgage is a simple one, *B* will get

  (*a*) a right to redeem the prior mortgage, and

  (*b*) a right to obtain from the Court an order that the property be sold subject to the prior mortgage, for the recovery of his debt.

C will retain the right to redeem both the mortgages *plus* the right to possession.

If *B's* mortgage is a usufructuary one, he will be entitled to a right to redeem the prior mortgage and a right to the

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(95): 115 Ind Cas 552: 11 Pat L Tim 41; *Maung Shwe* v. *Karambu Pillai*, 1928 Rang 127 (127): 6 Rang 122: 110 Ind Cas 701; *Aughore Kumar* v. *Mahomed Mussa*, (1909) 2 Ind Cas 662 (667); *Mulla Veetil* v. *Achuthan Nair*, (1911) 9 Ind Cas 513 (515): 21 Mad L Jour 218: (1911) 2 Mad W N 165: 9 Mad L Tim 481; *Magan Lall* v. *Anand Singh*, (1911) 10 Ind Cas 422 (423) All; *Bangser Das* v. *Gena Lal Jha*, (1911) 12 Ind Cas 155 (157, 158): 14 Cal L Jour 530; *Nga Pawe* v. *Nga Sin*, (1912) 13 Ind Cas 874 (875, 876): (1911) 1 U B R 92 [Unimpleaded person is entitled to declaration that his rights are not affected by decree]; *Muhamed Ibrahim Hossein Khan* v. *Ambika Prasad*, (1912) 14 Ind Cas 496 (504): 39 Cal 527: 39 Ind App 68: 9 All L J 332: 14 Bom L R 280: 16 Cal W N 505: 15 Cal L Jour 411: 22 Mad L Jour 468: 11 Mad L Tim 265: 1912 Mad W N 367 P C; *Kailash* v. *Girja*, (1912) 14 Ind Cas 299 (300): 16 Cal W N 658: 39 Cal 925; *Shankar Venkatesh Karguppi* v. *Sadashiv Mahadji Kulkarni*, (1913) 21 Ind Cas 39 (41): 15 Bom L R 817: 38 Bom 24; *Ma Sein* v. *Muthukaruppan Chetty*, (1914) 25 Ind Cas 931 (932): 7 L B R 135; *Suraj Din* v. *Wajid Ali*, (1916) 34 Ind Cas 367 (368): 3 Oudh L J 494; *Muthammal* v. *Raza Pillai*, (1918) 44 Ind Cas 753 (755): 41 Mad 513: 28 Mad L Tim 106: 1918 Mad W N 251: 7 Mad L W 420 [Puisne mortgagee is entitled to accounts of the profits of the property]; *Rebati Mohan Das* v. *Nadiabashi Dev*, (1918) 44 Ind Cas 521 (523): 22 Cal W N 543: 28 Cal L Jour 256. But see *Sita Ram* v. *Amir Begam*, (1886) 8 All 324 (329): 1886 All W N 101 [Obsolete Law].

(9) *Paman Das* v. *Hiranand*, (1918) 47 Ind Cas 792 (793): 12 Sind L R 1.

(10) *Pamandas* v. *Hiranand*, (1918) 47 Ind Cas 792 (793): 12 Sind L R 1.

O. 34 R.1, Note 19.

possession of the property; and *C* will be entitled only to a right to redeem both the mortgages.

(5) Where *C* makes several mortgages successively in favour of different persons, the later mortgagee is entitled to redeem the earlier one, but the earlier ones cannot redeem the later ones, according to the *maxim* "Redeem up and foreclose down."[11]

We now proceed to consider the various classes of cases illustrating the application of the above principles:—

(*i*) *C* executes a simple mortgage in favour of *A* and then sells his interests in the mortgaged property to *D*. *A* files a suit on his mortgage, against *C* without impleading *D*, and, in execution of the decree obtained therein, purchases the property himself. Being obstructed by *D* in the possession proceedings, *A* sues *D* for possession. Is the suit maintainable? No.[12] The reason is that *D*, not having been made a party in *A's* suit on the mortgage, is not affected in any way by the decree and execution proceedings in such suit, and his right to possession cannot be disturbed. On the same principle, if *D* is dispossessed by *A* in execution, he can, in a suit by him against *A*, recover back possession unconditionally.[13] There is no difference in principle, in this respect, even if *D* is a purchaser of *C's* interest in execution of a money decree against him, instead of in a private transfer.[14] The remedy of *A* in such cases would be to file a fresh suit on his mortgage against *D*.[15]

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(11) See S. 94 of the Amended Transfer of Property Act.

(12) *Hargulal Singh* v. *Govind Rai*, (1897) 19 All 541 (542): 1897 All W N 154 F B; *Kristopada Roy* v. *Chaitanya Charan Mandal*, 1923 Cal 274 (277): 49 Cal 1048: 28 Cal W N 92: 69 Ind Cas 530; *Digambar* v. *Suajan*, 1929 Cal 233 (236): 33 Cal W N 100: 120 Ind Cas 97 [Suit was also barred by limitation in this case]; *Chandramma* v. *Gunna Seethan*, 1931 Mad 542 (547): 33 Mad L W 648: 61 Mad L Jour 316: 133 Ind Cas 497; *Mt Nand Kuer* v. *Kunj Behari Lal*, 1927 Pat 411 (411, 412): 8 Pat L Tim 229; *Maung Pe* v. *Parmaysam Pillay*, (1916) 33 Ind Cas 760 (760) L B; *S P S Chetty Firm* v. *Maung Pyan Gyi*, 1921 L B 61 (68): 11 L B R 119: 66 Ind Cas 562; *Ma Ken Kyaw* v. *R C Dey*, 1926 Rang 183 (184): 4 Rang 96: 97 Ind Cas 243; *Narasinghdas Luxminarayin* v. *Sheikh Hussain*, 1926 Nag 495 (495): 96 Ind Cas 961 [Lessee not made party]; *Ramnath* v. *Hazarilal*, 1929 Nag 246 (250): 25 Nag L R 19; *Sheoram* v. *Jamnabai*, 1923 Nag 278 (274): 19 Nag L R 18: 65 Ind Cas 503 [Transfer by way of lease]; *Sind Bank, Ltd* v. *Amersi Dyal*, 1925 Sind 193 (2) (195): 17 Sind L R 281: 78 Ind Cas 279 [Vendee of equity of redemption not bound by mortgage decree to which he was not party].

(13) *Gopal Ram Marwari* v. *Narasingh Pershad*, (1916) 36 Ind Cas 744 (746) Pat; *Ram Lingam Pillai* v. *Ma Loke Gale*, 1930 Rang 175 (176): 127 Ind Cas 371; *Syed Tasadduq Hussain* v. *Ashgar Hussain*, (1918) 45 Ind Cas 606 (607, 608): 21 Oudh Cas 70. See also *Venkatachella* v. *Panjanadien*, (1882) 4 Mad 213 (216) [Puisne mortgagee in possession—Prior mortgagee who had obtained money decree, purchasing the property in execution, *depriving* puisne mortgagee of his possession—Latter can sue prior mortgagee for possession].

(14) *Banwari Lal* v. *Nand Ram*, 1927 All 611 (612): 25 All L J 732: 102 Ind Cas 645: 49 All 923; *Dattatraya* v. *Vankatesh*, 1922 Bom 334 (335): 24 Bom L R 741: 69 Ind Cas 165; *Bhabhuti Rai* v. *Harbans Rai*, (1914) 25 Ind Cas 1 (3) All; *Krishtopada* v. *Chaitanya*, 1923 Cal 274 (275): 49 Cal 1048: 69 Ind Cas 530: 28 Cal W N 92; *Mahammad Mehar* v. *Rash Behari*, 1932 Cal 561 (562): 55 Cal L Jour 299: 138 Ind Cas 752.

(15) *Chardamme* v. *Seethan Naidu*, (1931) 61 Mad L Jour 316 (321, 327): 1931 Mad 542: 33 Mad L W 648: 133 Ind Cas 497; *E Kizhakkikandy Kanaran* v. *Koylil Unnooli*, (1907) 30 Mad 500 (502): 17 Mad L Jour 481; *Nand Kuer* v. *Kunj Behari Lal*, 1927 Pat 411 (411, 412): 8 Pat L Tim 229; *Sheoram* v. *Jamnabhai*, 1923 Nag 273 (274): 19 Nag L R 18: 65 Ind Cas 503 [Transferee a lessee]; *Ma Kin Kyaw* v. *R C Dey*, 1926 Rang 183 (184): 4 Rang 96: 97 Ind Cas 243; *Ramnath* v. *Hazari Lal*, 1929 Nag 246 (250): 25 Nag L R 19; *Sheoram* v. *Jamnabai*, 1923 Nag 273 (274): 19 Nag L R 18: 65 Ind Cas 503; *Jote Kumar* v. *Indra Narain*, (1911) 10 Ind Cas 137 (138) Cal; *Badam Kumari Dasi* v. *Hari Dasi*, (1911) 11 Ind Cas 74 (75): 16 Cal L Jour 38; *Venkat* v. *Kuniappa*, 1924 Mad 650 (655): 47 Mad 551: 46 Mad L Jour 391: 20 Mad L W 137: 34 Mad L Tim 226: 1924 Mad W N 365: 83 Ind Cas 1022; *Rampla* v. *Hazari Lal*, 1923

He cannot, however, bring a fresh suit where his claim on the original mortgage is barred by limitation.[16]

It was, however, held in the undermentioned cases[17] that the result of not impleading *D* or other person entitled to be in possession would be to make the decree so obtained *ineffectual only against the* right of redemption vested in such persons, so that, *A* would be entitled to possession against them subject to their right of redemption. It is submitted that this view is not correct. *D* has not only got a right of redemption but a *right to the possession* of the property as well. A decree to which he was not a party cannot affect him even in respect of the latter right.

(*ii*) The principles above stated in Class I will equally apply to cases, where *D*, instead of being a purchaser of *C's* interest, is a usufructuary mortgagee in possession.[18]

(*iii*) *C* executes simple mortgages first in favour of *A* and then in favour of *B*. *B* sues on his mortgage without impleading *A* and, in execution of the decree obtained therein, purchases the property in Court auction and enters into possession. *Thereafter, A* sues on his mortgage without impleading *B* and purchases the same property in execution of his decree. It will be seen that, at the time of the suit by *A* the right to redeem and the right to possession of the property being already vested in *B*, cannot be affected by *A's* suit to which he was not a party. It follows that *A* cannot maintain a suit for *possession* against *B*[19] or a suit for *possession subject to a redemp-*

All 232 (232): 65 Ind Cas 654; *Remmoy Hazra* v *Prem Chand*, (1901) 5 Cal W N 423 (425, 426); *Badar-ud-din Qureshi* v. *Karim Bakhsh*, 1931 Lah 488 (488): 32 Pun L R 384: 135 Ind Cas 200.

[16] *Dattatraya* v. *Venkatesh*, 1922 Bom 384 (385): 24 Bom L R 741: 69 Ind Cas 165; *Shurnomoyee Dasi* v. *Srinath Das*, (1885) 12 Cal 614 (620): 10 Ind Jur 458; *Chandramma* v. *Gunna Seethan*, (1931) 61 Mad L Jour 816 (828): 1931 Mad 542: 33 Mad L W 648: 133 Ind Cas 497; *T C Bose* v. *Obeden Rahiman Chowdhry*, 1928 Rang 189 (190): 6 Rang 297: 111 Ind Cas 132.

[17] *Ram Prasad* v. *Bhikari Das*, (1904) 26 All 464 (467): 1904 All W N 108; *Dadoba* v. *Damodar*, (1892) 16 Bom 486 (491); *Bhoban Shahu* v. *Ganasham Shahu*, (1913) 18 Ind Cas 457 (459) Cal; *Bhagaban Chandra Kundu* v. *Tarak Chandra Basak*, 1927 Cal 259 (260): 45 Cal L Jour 4: 100 Ind Cas 420 [Where it was held that dispossessed purchaser can only redeem and cannot sue for possession]; *Mohesh Chundera Mookerjee* v. *Umesh Chandra Ghosal*, (1915) 29 Ind Cas 742 (742) Cal, (Do); *Sheikh Kalu Shariaf* v. *Abhoy Charan Karmokar*, 1921 Cal 157 (158): 25 Cal W N 253: 62 Ind Cas 445, (Do); *Birinchi Singh* v. *Sarado Prasad Mukherji*, 1924 Pat 452 (453): 3 Pat 114: 5 Pat L Tim 95: 75 Ind Cas 942. See *Sivathi* v. *Ramasubbayyar*, (1898) 21 Mad 64 (66): 8 Mad L Jour 21 [Where defendant was *willing* to redeem]; *Jugdeo Singh* v. *Habibulla*, (1908) 6 Cal L Jour 612 (616): 12 Cal W N 107; *Krishnan* v. *Chadayan*, (1892) 17 Mad 17 [Puisne mortgagee in possession]; *Namdar Chaudhri* v. *Karam Raji*, (1891) 13 All 315 (319): 1891 All W N 90 [Subsequent usufructuary mortgagee in possession]; *Mohan Manor* v. *Togu Uka*, (1886) 10 Bom 224 (226), (Do); *Bunwari Jha* v. *Ramjee Thakur*, (1902) 7 Cal W N 11 (19, 20) [Case of puisne mortgagee who had purchased in execution of his decree]; *Baldeo Singh* v. *Jaggu Ram*, (1901) 23 All 1 (3): 1900 All W N 176.

[18] *Mulla Vittil* v. *Achutan Nair*, (1911) 9 Ind Cas 513 (515): 21 Mad L Jour 213: (1911) 1 Mad W N 165: 9 Mad L Tim 431 [Overruling 26 Mad 537]; *Mithu Lal* v. *Ramchandar*, (1887) All W N 125 [*A* cannot sue to recover possession from puisne usufructuary mortgage]; *Jugal Kishore* v. *Kartick Chunder*, (1894) 21 Cal 116 (120); *Sheo Indar Bahadur Singh* v. *Ghazi-ud-din*, (1916) 33 Ind Cas 243 (244): 18 Oudh Cas 347; *Mr. San Biwin* v. *Nagamutu*, (1915) 30 Ind Cas 710 (712): 8 L B R 266: 8 Bur L Tim 261 [Puisne mortgagee entitled to sue for confirmation of possession].

[19] *Madan Lal* v. *Bhagwan Das*, (1899) 21 All 235 (237, 238): 1899 All W N 41 F B; *Bamandas* v. *Hirachand*, (1918) 47 Ind Cas 792 (794): 12 Sind L R 1; *Rengaswamy* v. *Komarammal*, (1903) 26 Mad 484 (485): 13 Mad L Jour 131 [Not entitled to possession without paying off subsequent mortgagee]; *Raghu Nath* v. *Sheo Lal*, (1917) 39 Ind Cas 849 (851): 13 Nag L R 69.

O. 34, R.1, Note 19.

tion by *B*.[20] He can, however, bring a fresh suit for sale on his mortgage against *B* provided, of course, that, on the date of such suit, the claim on the mortgage is not barred by limitation.[21]

(*iv*) *C* executed simple mortgages first in favour of *A* and then in favour of *B*. *A* obtains a decree upon his mortgage without impleading *B* and in execution thereof purchases the property himself and obtains possession. *B thereafter* files a suit on his mortgage, purchases the same property in execution of his decree and then sues *A* for *possession*. Does the suit lie? No.[22] The reason is that at the time of *B's* suit on the mortgage the right to redeem and the right to possession having both already vested in *A*, the latter cannot be affected by anything done in *B's* suit. *B* has, however, two remedies open to him, *viz.*, (*a*) to redeem *A*[23] and (*b*) to sue *A* for sale on the subsequent mortgage subject to the prior mortgage.[24] If *B* adopts the former remedy and redeem *A*, the latter, in his turn, as owner of the equity of redemption, can redeem *B*.[25] Both these rights can, however, be adjusted on equitable grounds in the same suit.[26] If *B* adopts the latter remedy, *A* can, in equity, claim that *B* should redeem the prior mortgage rights

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(20) *Madan Lal* v. *Bhagwan Das*, (1899) 21 All 235 (237, 238): 1899 All W N 41; *Ram Narain* v. *Mt Somi*, 1923 All 449 (449): 45 All 189: 74 Ind Cas 277. See also *Md Mehar* v. *Rash Behari*, 1932 Cal 561 (562): 55 Cal L Jour 299: 138 Ind Cas 752. But see *Hajrabibi* v. *Shiam Narain*, (1913) 20 Ind Cas 184 (185): 11 All L J 362 [Decree must be for possession, subject to redemption by *B*—Submitted wrong on principle].

(21) *Shamdei* v. *Baljit Singh*, (1910) 5 Ind Cas 451 (452): 7 All L J 29: 32 All 119; *Muhamad Ibrahim Hossein Khan* v. *Ambika Pershad*, (1912) 14 Ind Cas 496 (504): 39 Cal 527: 39 Ind App 68: 9 All L J 332: 14 Bom L R 280: 16 Cal W N 505: 15 Cal L Jour 411: 22 Mad L Jour 468: 11 Mad L Tim 265: 1912 Mad W N 367 P C; *Lachmi Narain* v. *Hirdey Narain*, 1926 All 480 (483, 489): 24 All L J 661: 97 Ind Cas 4 [Remedy on original mortgage barred. Therefore not entitled to any remedy]. But see *Lakshmanan Chetty* v. *Muthaya Chetty*, (1921) 62 Ind Cas 833 (836, 837): 40 Mad L Jour 126: 29 Mad L Tim 189 [Subsequent mortgagee not impleaded—Fresh suit on mortgage against him not maintainable—Security having merged in decree—*Obiter*].

(22) *Laxmichand* v. *Narayan*, 1923 Nag 225 (226): 6 Nag L J 237: 82 Ind Cas 77.

(23) *Laxmichand* v. *Narayan*, 1923 Nag 225 (226): 82 Ind Cas 77: 6 Nag L J 237; *Govinda Rao* v. *Rukhmanund*, 1924 Nag 198 (199): 75 Ind Cas 899 [*B* has the first right to redeem and not *A* to redeem him]; *Hukum Singh* v. *Lallanji*, 1921 All 339 (341): 61 Ind Cas 942: 18 All L J 1105: 43 All 204; *Sivaraman Chetty* v. *Kuppumuthu Chetty*, (1903) 13 Mad L Jour 72 (74). But see *Sarvothama Rao* v. *Raja Rao Sahib*, 1921 Mad 648 (649): 1921 Mad W N 608: 14 Mad L W 355; *Hassanbai* v. *Umaji*, (1904) 28 Bom 158 (162): 5 Bom L R 892 [*A* was held entitled to redeem *B* first].

(24) *Debendra Narain* v. *Ramtaran*, (1903) 30 Cal 599 (604, 605): 7 Cal W N 766 F B; *Mahadeo Rai* v. *Adya Prasad*, (1917) 38 Ind Cas 179 (182): 1 Pat L W 269 [But purchaser cannot dispossess *A* without redeeming him]; *Narayanasamy Rao* v. *Ramasamy Naicker*, (1921) 60 Ind Cas 611 (613): 12 Mad L W 674; *Mt Dhanwanti* v. *Hargobind*, 1924 Pat 484 (486): 3 Pat 435: 5 Pat L Tim 103: 78 Ind Cas 614; *Gangadas* v. *Bhikaji*, (1920) 58 Ind Cas 295 (296, 297): 16 Nag L R 215; *Muhamad Ibrahim Hossein Khan* v. *Ambika Pershad Singh*, (1912) 14 Ind Cas 496 (504): 39 Cal 527: 39 Ind App 68: 11 Mad L Tim 265: (1912) 1 Mad W N 367: 9 All L J 332: 14 Bom L R 280: 16 Cal W N 505: 15 Cal L Jour 411: 22 Mad L Jour 468 P C.

(25) *Parasram Singh* v. *Pandohi*, 1922 All 135 (137): 20 All L J 401: 67 Ind Cas 533: 44 All 462 [Prior mortgagee who has foreclosed his mortgage without impleading puisne mortgagee can deposit under Transfer of Property Act, S. 83 and sue for redemption]. See, however, *Mt Sheoratan Koer* v. *Kamta Prasad*, 1932 Pat 270 (272): 11 Pat 415: 13 Pat L Tim 582.

(26) *Parasram* v. *Pandohi*, 1922 All 135 (137): 44 All 462: 20 All L J 401: 67 Ind Cas 583 [Prior mortgagee was allowed to redeem having regard to equities]; *Jogeswar* v. *Moti*, 1922 Nag 89 (91, 92): 5 Nag L J 157: 66 Ind Cas 631 F B [*A* was given a decree for possession subject to *B's* right of redemption]. See also *Amir Chand* v. *Moti Pande*, 1931 Pat 434 (435, 436): 12 Pat L Tim 769: 134 Ind Cas 959 [Prior mortgagee suing without impleading subsequent mortgagee of portion and becoming purchaser in Court auction—Second suit against subsequent mortgagee for possession—Second mortgagee allowed to redeem that portion alone].

O. 34. R.1, Note 19.

vested in him before disturbing his possession.[27] In other words, A can set up his prior mortgage as a *shield* against the claim of *B*.[28] This right of *A* is a weapon of *defence* and not of *attack*[29] and can be set up notwithstanding the claim on the mortgage itself is barred by limitation.[30]

(*v*) *C* makes a mortgage in favour of *A*. Thereafter, in execution of a money decree against *C* the mortgaged property is attached and sold and is purchased by *D*. Pending the attachment *A* purchases by private sale the property from *C* in satisfaction of the mortgage and enters into possession. In a suit by *D* against *A* for recovery of possession, can *A* set up his mortgage as a "shield" as a defence to the suit? No.[31] The reason is that the private purchase of *A* pending attachment is void against all claims of *D* arising under the attachment and does not convey the equity of redemption to *A*. The prior mortgage can be used as a shield only for the purpose of protecting a possession *to which the person setting it up has become lawfully entitled,* and since in the case above referred to, *A* had no valid title to such possession as against *D,* he cannot use his prior mortgage as a shield in *D's* suit to recover possession.

(*vi*) *C* executes simple mortgages first in favour of *A* and then in favour of *B*. *A* sues *C* on his mortgage without impleading *B*. *B* also institutes a parallel suit on his own mortgage without impleading *A*. *A* purchases *pending B's* suit the mortgaged property in execution of his decree, and thereafter *B* purchases the same property in execution of his decree. If the doctrine of *lis pendens* applies to the case then *A's* purchase cannot take effect as against *B's* and therefore, *B* will be entitled to possession as against *A; A's* remedy will then

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(27) *Ram Senahi Lal* v. *Janki Prasad,* 1931 All 466 (481): 1931 All L J 729: 134 Ind Cas 1.

(28) *Mussammat Sukhi* v. *Munshi Ghulam Safdar Khan,* 1922 P C 11 (18): 26 Cal W N 279: 42 Mad L Jour 15: 65 Ind Cas 151: 24 Bom L R 590: 30 Mad L Tim 175: 48 Ind App 465: 43 All 469: 14 Mad L W 162: 1922 Mad W N 445 P C; *Damodhar Devchand* v. *Naro Mahadev,* (1881-82) 6 Bom 11 (13); *Budhi Lal* v. *Administrator-General, Madras,* 1922 All 104 (105): 20 All L J 216: 44 All 418: 65 Ind Cas 841; *Raghubhans Kuar* v. *Ramsahai,* 1883 All W N 193 (193); *Ram Narain* v. *Bandi Pershad,* (1904) 31 Cal 737 (743); *Jugal Kishore* v. *Shafi-ud-din,* (1912) 14 Ind Cas 587 (539): 208 Pun W R 1912; *P Venkataramana* v. *K Rangiah,* 1922 Mad 249 (259): 1922 Mad W N 15: 70 Ind Cas 212: 41 Mad L Jour 899; *S K A R S T Chettyar Firm* v. *A L A R Chettiar Firm,* 1931 Rang 105 (106, 107): 9 Rang 1: 132 Ind Cas 281: *N N Chetty Firm* v. *K A P L Chetty Firm,* 1923 Rang 107 (108): 1 Bur L Jour 217: 74 Ind Cas 151; But see *Chinnu Pillai* v. *Venkatasamy,* (1916) 34 Ind Cas 507 (508, 509): 40 Mad 77: 30 Mad L Jour 347: 19 Mad L Tim 217: (1916) 1 Mad W N 245 [Dissented from in 62 Mad L Jour N R C 25 and also contrary to 1922 P C 11]; *Mt Sheoratan Koer* v. *Kamta Prasad,* 1932 Pat 270 (271): 11 Pat 415: 13 Pat L Tim 582.

(29) *Ram Sanehi Lal* v. *Janki Prashad,* 1931 All 466 (481): 1931 All L J 729: 134 Ind Cas 1 F B.

(30) *Mt Sukhi* v. *Ghulam Safdar,* 1922 P C 11 (13): 26 Cal W N 279: 42 Mad L Jour 15: 65 Ind Cas 151: 24 Bom L R 590: 30 Mad L Tim 175: 48 Ind App 465: 43 All 469: 14 Mad L W 162: 1922 Mad W N 445 P C [The limitation period had run out in this case. See the discussions of this decision in 1931 All 466 (477) F B].

(31) *Bijai Saran* v. *Rudra Bhageshwari,* 1929 P C 288 (289): 30 Mad L W 604: 1929 Mad W N 827: 51 Cal L Jour 70: 120 Ind Cas 650: 32 Bom L R 144 P C. But see *Premsukhdas* v. *Peerkhan,* 1926 Nag 21 (23, 24): 8 Nag L J 157: 95 Ind Cas 979 [Transferee *lis pendens* held entitled to set up prior mortgage as shield].

O. 34, R.1, Note 19

be to file a fresh suit for sale against *B*.[32] Further on the analogy of the principle stated in Class *v* above, *A* not being *entitled* to possession cannot hold up his prior mortgage as a shield against *B's* suit for possession. The undermentioned cases, however, while holding that the doctrine of *lis pendens* applies to such cases, have nevertheless come to the conclusion that *A* can get a decree for possession *subject to redemption by B*.[33] The High Court of Allahabad has, in a recent Full Bench case,[34] held that the doctrine of *lis pendens* applies to such cases but has in a somewhat contrary manner come to conclusions which can only follow on the basis that the doctrine does *not* apply. Thus it has formulated the following conclusions:—

If *A* sues *B* as plaintiff for possession, then

(1) if he was the earlier purchaser, (*i.e.*, purchaser pending *B's* suit) in point of time he can redeem *B* and recover possession even though his (*A's*) mortgage is barred by time,

(2) if he is the later purchaser (*i.e.*, if *B's* purchase is pending *A's* suit) then his suit even for redemption cannot be decreed.

If *B* sues *A* as plaintiff for possession, then,

(1) If *B* is the earlier purchaser in point of time he must redeem *A* and *A* cannot compel *B* to submit to redemption by him.

(2) If *B* is the later purchaser in point of time he must first redeem *A* but *A* will have the right to redeem *B* next and retain possession.

The High Courts of Madras[35] and Calcutta[36] have held that the doctrine of *lis pendens* does not apply to legal proceedings to enforce mortgages and that therefore a sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit, is not affected by the doctrine of *lis pendens*. According to this view the *first* purchaser will be entitled to possession as against the later purchaser, a result, which is practically the same as that of the Full Bench case of the Allahabad High Court referred to above.

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(32) *Pandurung* v. *Sakharchand*, (1907) 31 Bom 112 (118): 8 Bom L R 861; *Venkatasubrayadu* v. *Nagamma*, (1930) 59 Mad L Jour 39 (42): 1930 Mad 570: 31 Mad L W 520: 127 Ind Cas 228 [*See also* foot-note 36, *infra*].

(33) *Tilakdhari Singh* v. *Gour Narain*, 1921 Pat 150 (151, 152): 1921 Pat H C C 122: 2 Pat L Tim 95: 59 Ind Cas 290; *Jogeshwar* v. *Moti*, 1922 Nag 89 (91, 92): 5 Nag L J 157: 66 Ind Cas 631; *Chandal Bai* v. *Bassarmal*, (1915) 28 Ind Cas 67 (68): 8 Sind L R 264. But see *Lachmi Narain* v. *Hirdey Narain*, 1926 All 480 (486): 24 All L J 661: 97 Ind Cas 4 [*Lis pendens* does not apply. Prior mortgagee cannot compel unimpleaded puisne mortgagee to redeem him].

(34) *Ram Sanehi Lal* v. *Janki Parshad*, 1931 All 466 (481, 482): 1931 All L J 729: 134 Ind Cas 1 F B.

(35) *Venkatanarasammah* v. *Ramiah*, (1880) 2 Mad 108 (112): 3 Ind Jur 360; *Rengasamy Naicken* v. *Komarammal*, (1903) 26 Mad 484 (485): 13 Mad L Jour 131; *Kutti Chettiar* v. *Subramaniya*, (1909) 4 Ind Cas 1077 (1079): 32 Mad 485: 19 Mad L Jour 728.

(36) *Har Pershad Lal* v. *Dal Nardan Singh*, (1905) 32 Cal 891 (904): 9 Cal W N 728: 1

O. 34, R.1,
Note 19.

In the principles discussed in the several classes of cases discussed above there is no distinction between the case of a mortgagee-purchaser and a stranger-purchaser, as can be seen from an examination of the cases above referred to.[37] When the puisne mortgagee, who has not been impleaded in a suit on the prior mortgage, seeks to redeem a prior mortgage, it was held before the Transfer of Property Act was passed that he should pay the amount due under the prior *mortgage* without any reference to the *decree* that was passed in the prior mortgage.[38] But S. 89 of the said Act provided that when once a final decree was passed on a mortgage, the mortgage security and the right to redeem were both *extinguished,* with the result, that, thereafter, the rights of the parties fell to be determined on the basis of the *decree*.[39] Even subsequent to the Transfer of Property Act the earlier view is adopted in many cases.[40] In O. 34, R. 5 which has taken the place of S. 89 of that Act the words as to the mortgage security being extinguished have been omitted. The result now is the same as was held by the decisions prior to the Transfer of Property Act, namely, that the puisne mortgagee, seeking to redeem the prior mortgagee should pay the amount due under the prior *mortgage* and not merely the amount due under the *decree* thereon.[41] He is not, however, bound to pay for any *improvements* made by the purchaser.[42] Where a puisne mortgagee *is impleaded* in a suit to enforce a prior mortgage, and a decree for sale or foreclosure is passed on the mortgage, the effect is to extinguish his security if he does not exercise his right of redemption or his security

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Cal L Jour 871; *Nanakchand* v. *Teluckdye Koer*, (1880) 5 Cal 265 (268): 4 Ind Jur 81: 4 Cal L Rep 858.

(37) *Bose* v. *Obedur Rahman*, 1928 Rang 189 (190): 6 Rang 297: 111 Ind Cas 132; *Dattatraya* v. *Vankatesh*, 1922 Bom 334 (335): 24 Bom L R 741: 69 Ind Cas 165 [Assignee from decree-holder purchaser].

(38) *Umesh Chunder* v. *Zahur Fatima*, (1891) 18 Cal 164 (180): 17 Ind App 201: 5 Sar 507. P C.

(39) *Matru Mal* v. *Durga Kunwar*, 1920 P C 79: (1920) 55 Ind Cas 969 (972): 42 All 364: 47 Ind App 71: 25 Cal W N 397: 38 Mad L Jour 419: 11 Mad L W 529: 22 Bom L R 553: 1920 Mad W N 838: 18 All L J 896: 2 U P L R (P C) 75: 32 Cal L Jour 121 P C; *Lachhman Das* v. *Dallu*, (1900) 22 All 394 (397, 398): 1900 All W N 125. See also *Het Ram* v. *Shadi Ram*, (1918) 45 Ind Cas 798 (800): 1918 P C 34: 40 All 407: 45 Ind App 130: 16 All L J 607: 20 Bom L R 798: 28 Cal L Jour 188: 22 Cal W N 1033: 35 Mad L Jour 1: 24 Mad L Tim 92: 9 Mad L W 550: 1918 Mad W N 518: 5 Pat L W 88: 12 Bur L Tim 73 P C.

(40) *Dip Narain* v. *Hira Singh*, (1897) 19 All 527 (534): 1897 All W N 147; *Wahi-un-nissa* v. *Govardhan Das*, (1903) 25 All 388 (394, 395): 1903 All W N 86; *Delhi and London Bank, Ltd* v. *Bhikari Das*, (1902) 24 All 185 (187): 1902 All W N 7; *Dadoba Arjunji* v. *Damodhar Raghunath*, (1892) 16 Bom 486 (491); *Girish Chunder* v. *Kedar Nath*, (1906) 33 Cal 590 (595): 10 Cal W N 592; *Sivathi* v. *Ramasubbayyar*, (1898) 21 Mad 64 (67, 68): 8 Mad L Jour 21; *Rengasamy Naicken* v. *Komarammal*, (1903) 26 Mad 484 (485): 13 Mad L Jour 131; *Gangayam Venkataramana Iyer* v. *Henry James Colley Gompertz*, (1908) 31 Mad 425 (428): 3 Mad L Tim 397: 18 Mad L Jour 298; *Thenappa* v. *Marimuthu*, (1908) 31 Mad 258 (259, 260): 18 Mad L Jour 344: 4 Mad L Tim 298; *Ganga Das* v. *Jogendra Nath*, (1907) 5 Cal L Jour 315 (319, 320): 11 Cal W N 403; *Ram Pershad* v. *Gobindi*, (1904) 1 All L J 207.

(41) *Jnanendra* v. *Shorashi*, 1922 Cal 28 (25, 27): 49 Cal 626: 69 Ind Cas 759; *Devi Das* v. *Trimbak*, 1926 Nag 214 (214, 215): 21 Nag L R 165: 91 Ind Cas 1010; *Nannumal* v. *Ram Charan*, 1930 All 485 (486, 487): 1930 All L J 573: 52 All 331: 126 Ind Cas 824: *Sukhi* v. *Ghulam Safdar Khan*, 1922 P C 11 (13): 48 Ind App 465: 43 All 469: 26 Cal W N 279: 42 Mad L Jour 15: 24 Bom L R 590: 30 Mad L Tim 175: 14 Mad L W 162: 1922 Mad W N 445: 65 Ind Cas 151 P C; *Ponnambala Chetty* v. *Muthusamy Pillai*, (1912) 17 Ind Cas 291 (292): 1912 Mad W N 1119: 23 Mad L Jour 284; *Kishan Chand* v. *Ram Sukh Das*, (1916) 33 Ind Cas 815 (816): 81 Pun W R 1916: 86 Pun Re 1916; *Phul Chand* v. *Roshan Lal*, (1916) 36 Ind Cas 703 (705): 14 All L J 337; *Shankar Vankatesh* v. *Sadashiv Mahadji*, (1913) 21 Ind Cas 39 (41): 38 Bom 24: 15 Bom L R 817; *Raghunath Kunwar* v. *Shankar Singh*, (1914) 22 Ind Cas 387 (388): 36 All 123: 12 All L J 41; *Phulmani Chaudhurin* v. *Nageshar Prasad*, (1911) 9 Ind Cas 670 (671): 33 All 370: 8 All L J 155 [Not entitled to redeem by simply paying the price for which the property was sold must pay the full amount due on the prior mortgage]; *Mt Sheoratan Koer* v. *Kamta Prasad*, 1932 Pat 270 (272): 11 Pat 415: 13 Pat L Tim 582, (Do).

(42) *Budhi Lal* v. *A.-G.*, 1922 All 104 (105): 20 All L J 216: 44 All 418: 65 Ind Cas 841; *Venkatarama Iyer* v. *Henry James Colley Gompertz*, (1908) 31 Mad 425 (430): 3 Mad L Tim 397: 18 Mad L Jour 298; *Rangayya* v. *Parthasarathi*, (1897) 20 Mad 120 (123).

O. 34, R.1, Notes 19—21.

is not expressly saved.[43] It was held in the undermentioned cases[44] that the puisne mortgagee is not entitled, in such a case, to insist that the mortgagor should redeem *his mortgage* also, his cause of action being altogether different from that of the prior mortgagee. Similarly it was held if the puisne mortgagee pays off the prior mortgage, he cannot apply for an order absolute for the amounts of *both* the mortgages.[45] But the said cases are of doubtful authority now, since express provision is made in Rr. 2 and 4 for the adjudication of the rights of subsequent mortgagees who are joined as parties to a suit on the prior mortgage. *See also* forms Nos. 9, 10 and 11 of App. D. These legislative changes only give effect to an old practice as can be seen from the below mentioned case.[46] *See also* the undermentioned cases.[47]

20. **A person cannot be both a plaintiff and a defendant.**—Suppose *A* and *B* are the first mortgagees and *A* and *C* are the puisne mortgagees of a property. In a suit by *A* and *B* for foreclosure of their mortgage, *C* alone can be joined as defendant as a puisne mortgagee, because *A* cannot be both plaintiff and defendant in the same suit.[1] The same person cannot be both plaintiff and defendant in a suit even in *different capacities.*[2]

21. **Joinder of parties.**—A misjoinder of plaintiffs in a mortgage suit, some of whom are not entitled to any relief, is a mere defect of form and is not fatal to the suit.[1] This rule does not *prohibit* the joinder of any person[2] whom it is proper to add under the provisions of O. 1, Rr. 1 and 3.

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(43) *Fayaz Hossein Khan* v. *M Prag Narain,* (1904) 7 Oudh Cas 243 (246): *Ram Lal* v. *Lakhpat Rai,* (1906) 3 All L J 240: 1906 All W N 112; *Ragunathaswamy* v. *Gopauj Rao,* 1922 Mad 807 (808): 41 Mad L Jour 547: 1921 Mad W N 732: 15 Mad L W 123: 68 Ind Cas 667; *Ramji Das* v. *Harjas,* 1928 Lah 505 (507): 112 Ind Cas 699; *Muhammad Rafi* v. *Muhammad Askani,* (1917) 37 Ind Cas 433 (434): 1 Pat L Jour 261: 3 Pat L W 390; *Kazmi Jan* v. *Shib Charan,* (1916) 29 Ind Cas 757 (758) All [Puisne mortgagee's rights are not affected when only a money decree is obtained on the prior mortgage]; *Kalipada Mukerji* v. *Basanta Kumar,* 1932 Cal 126 (129): 35 Cal W N 877: 59 Cal 117: 138 Ind Cas 177 [Rights of puisne mortgagee indicated—Redemption or remedy against surplus sale proceeds—Remedy for sale in case of satisfaction of prior mortgage before sale or for sale of properties not included in prior mortgage, only by separate suit of his own].

(44) *Mackintosh* v. *N S Watkins,* (1904) 1 Cal L Jour 31 (36).

(45) *Jamna Das* v. *Misri Lal,* (1904) 26 All 504 (506).

(46) *Kissory Mohun* v. *Kally Churn,* (1897) 24 Cal 190 (192): 1 Cal W N 156.

(47) *Ghulam Nabi* v. *Kanhai Singh,* (1921) 59 Ind Cas 511 (512): 16 Nag L R 180 [Lessee not joined in suit on mortgage—Mortgagor foreclosed—Lessee redeeming mortgage—Mortgagor's rights not revived and he cannot redeem lessee]; *Ragunathaswamy* v. *Gopauj Rao,* 1922 Mad 307 (309, and 310): 15 Mad L W 123: 68 Ind Cas 667: 41 Mad L Jour 547: 1921 Mad W N 732 [Legal representative of deceased party not brought on record, proceedings do not bind him]; *Kanakasabapathy Chetty* v. *Venkatarama Iyer,* (1910) 5 Ind Cas 339 (340): 7 Mad L Tim 270 [Legal representatives of deceased defendant not brought on record of application for sale—Sale set aside]; *Sri Kanta* v. *Jag Sah,* 1925 Pat 57 (58): 3 Pat 818: 84 Ind Cas 293: 6 Pat L Tim 287 [Defendant opposing the impleadment of any person is estopped from objecting to the proceedings on the ground of failure to make him a party]; *Ismail Hussain* v. *Haji Moosa & Co,* 1930 Mad 538 (539): 58 Mad L Jour 855: 1930 Mad W N 160: 128 Ind Cas 194: 31 Mad L W 266: 53 Mad 581 [Charge decree—Non-party cannot intervene in the execution of the decree and resist execution—His remedy is by separate suit]; *Babu Lal* v. *Jalaia,* (1917) 37 Ind Cas 343 (346): 14 All L J 1146 [Suit by prior and puisne mortgagees without impleading others—Subsequent suit to establish priority—Court should decide according to equity having regard to the real position of the parties]; *Golam Ahad* v. *Judhister,* (1903) 30 Cal 142 (151 and 152): 7 Cal W N 305 [Party to suit omitted in execution proceedings—Sale is not nullity but may be set aside by appropriate proceedings]; *Kalipada Mukerji* v. *Basanta Kumar,* 1932 Cal 126 (129): 35 Cal W N 877: 59 Cal 117: 136 Ind Cas 177 [Rights of puisne mortgagee indicated—Redemption or remedy against surplus sale proceeds—Remedy for sale in case of satisfaction of prior mortgage before sale or for sale of properties not included in prior mortgage, only by separate suit of his own].

Note 20.

(1) *Bansidhar* v. *Gayaprasad,* (1902) 24 All 179 (183, 184): 1902 All W N 3.

(2) *Rustomji* v. *Sheth Purushothamdas,* (1901) 25 Bom 606 (612): 3 Bom L R 227.

Note 21.

(1) *Udaram* v. *Gondu,* 1925 Nag 366 (368): 87 Ind Cas 35.

(2) *Tejsingh* v. *Patiram,* (1920) 55 Ind Cas 433 (434) Nag.

O. 34, R.1, Notes 21—22.

Where, after the commencement of the trial of a suit, an application is made to the Court for adding persons alleged to be interested in the subject matter of the suit, the matter is in the discretion of the Court; it may, in a proper case, decline under O. 1, R. 10 to add the parties sought to be impleaded.[3] As to the effect of joining new parties after the period of limitation, *see* Limitation Act S. 22 and the undermentioned cases.[4]

22. **Revision.**—It has been held by the High Court of Patna that S. 115 does not apply to the case of a mere refusal to add a person as a plaintiff in a mortgage suit but that, if the result amounts to a denial of a fair trial, the High Court can interfere under S. 107 of the Government of India Act.[1] An order discharging necessary parties from the suit is open to revision.[2]

O. 34, R.2.

Preliminary decree in foreclosure suit.

R. 2. [*New.* Act IV of 1882, S. 86.] (1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree[5]—

(a) Ordering that an account be taken[6] of what was due to the plaintiff at the date of such decree for—

(*i*) principal[7] and interest[8] on the mortgage,

(*ii*) the costs of suit[11], if any, awarded to him, and

(*iii*) other costs, charges and expenses[12] properly incurred by him up to that date in respect of his mortgage security, together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) directing—

(*i*) that, if the defendant pays into Court[16] the amount so found or declared due on or before such date as the Court may fix within six months[17] from the date on which the Court confirms and countersigns the account taken under clause (*a*), or from the date on which such amount is declared in Court under clause (*b*), as the case may be, and thereafter pays such amount as may be adjudged due in respect of

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[3] *Beni Madho* v. *Yusuf Hussain Khan*, 1924 Oudh 83 (83, 84): 26 Oudh Cas 317: 72 Ind Cas 1031: 10 Oudh L J 232: 9 O & A L R 826 [Party sought to be impleaded after preliminary decree—Application for joinder—Refused]; *Bhagmani Kunwar* v. *Subh Narain Rai*, 1905 All W N 35 (36) [In this case it was held that the Court ought to have granted the application for the addition of parties].

[4] *Narain* v. *Mahadeo*, (1915) 26 Ind Cas 720 (721, 722): 10 Nag L R 173.

Note 22.

[1] *Kali Rai* v. *Tulsi Rai*, 1926 Pat 207 (208): 4 Pat 723: 93 Ind Cas 932: 7 Pat L Tim 499.

[2] *Barkat Singh* v. *Sheo Ram Singh*, 1931 Oudh 410 (410, 411): 8 Oudh W N 1118: 135 Ind Cas 700.

O. 34, R.2.

subsequent costs, charges and expenses as provided in Rule 10, together with subsequent interest[9] on such sums respectively as provided in Rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and

(*ii*) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree[19] debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time[18] fixed for the payment of the amount found or declared due under sub-Rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees[15] or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

[*See* Rr. 3, 10 and 11 below.]

LOCAL AMENDMENT.

Bombay.

Substitute for Cl. (*d*), the following:—

"(*d*) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall be entitled to apply for a final decree for foreclosure under R. 3."

Synopsis.

1. Legislative changes.
2. Analogous law—T. P. Act, S. 86.
3. Scope and object of the rule.
4. Persons entitled to the right to foreclosure.
5. Form of preliminary decree.
6. "Ordering that an account be taken."
    7. Principal.
    8. Interest.
    9. Interest subsequent to the date fixed for payment.
    10. Rule of Damdupat—See Notes 16 to S. 34.
    11. Costs of the suit.
    12. Other costs, charges and expenses.
    13. Account against mortgagee in possession.
    14. Accounts in suits by or against sub-mortgagee.
    15. Subsequent mortgagees.
16. "Pays into Court."
17. "On a day within six months."
18. Extension of time.
19. Plaintiff to apply for final decree.
20. Mortgage of chattels and intangible property.
21. Res judicata.
22. Equitable mortgage of personal property. See Note 4, ante.
23. Appeal.

Instalment decrees in mortgage suits. See Note 5, Pts. (1) and (2).
Irregular decrees. See Note 5, Pt. (3).
Personal decree. See Note to R. 6 below; also Note 5, Pt. (3) to R. 4 below.
Right of redemption. See Note 3, Pt. (1) and Note 18, Pts. (7) to (9).
Rights of mortgagee after preliminary decree. See Note 4, Pt. (3).
Subsequent mortgagee's subrogation and effect. See Note 15, Pt. (3).
Validity of part of mortgage. See Note 7, Pts. (6) and (7).

1. Legislative changes :—

The rule has been extensively amended by the Transfer of Property Amended Act, (XXI of 1929). The old rule ran as follows:—

"2. In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree—

(*a*) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for the costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(*b*) declaring the amount so due at the date of such decree, and directing—

(*c*) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but,

(*d*) that if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property."

O. 34, R.2, Notes 1—3.

The following important changes may be noted:—

(1) The present rule makes it clear that the decree under it is a *preliminary* decree.[1]

(2) Under the old rule it was not clear, when accounts were directed to be taken, whether they were to be taken up to the date of declaring in Court the amount due, or up to the date fixed for payment. It is now provided that the accounts are to be taken up to the date of the preliminary decree.

(3) The provision as to other costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage security, is new.

(4) The new rule makes it clear as to when the period fixed for payment commences to run.

(5) The provision in (*c*) (*i*) relating to subsequent costs and subsequent interest is new.

(6) The same sub-rule makes it clear that the retransfer is to be at the mortgagor's cost.

(7) Under the same sub-rule the mortgagee has to apply for a final decree on default by the mortgagor.

(8) The provision as to the Court's power to extend time which was contained in the proviso to sub-R. (2) in the old R. 3 has been enacted as sub-R. (2) of this rule.

(9) Sub-R. (3) makes express provision for the form of decree in cases where subsequent mortgagees are made parties.

2. **Analogous law.—T. P. Act, S. 86.**—This rule corresponds to S. 86 of the Transfer of Property Act, with the following differences:—

(1) Under R. 2 payment has to be made in all cases *into the Court* while under S. 86 payment could be made to the *plaintiff* or into the Court.

(2) The words "if so required" have been added into sub-R. (1) (*c*) (*i*) as it was found that, in the moffusil Courts it was not the practice for the mortgagee to execute a re-conveyance of the property to the mortgagor.

3. **Scope and object of the rule.**—The scheme and object of this order is "that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal interest and costs due on a fixed day and that after the expiration of that day, if the property be not redeemed, the matter shall pass from the domain of contract to that of judgment and the rights of the mortgagee should thenceforth depend not on the contents of the bond but on the directions in the decree".[1]

The object of the rule is to prevent mortgagees from realising their securities otherwise than in the mode prescribed by the rule.[2]

Order 34, Rule 2—Note 1.

(1) *Harjivan Devraj* v. *Gajanan Kashinath*, 1923 Bom 420 (421): 25 Bom L R 459: 73 Ind Cas 187 [Where the opinion was expressed under the old rule that the point should be made clear by amendment].

Note 3.

(1) *Sunder Koer* v. *Rai Sham Krishnan*, (1907) 34 Cal 150 (161): 34 Ind App 9: 4 All L J 109: 5 Cal L Jour 106: 9 Bom L R 304: 11 Cal W N 249: 17 Mad L Jour 43: 2 Mad L Tim 75 P C [Observations were with reference to the old Transfer of Property Act sections but apply equally to the present order]; *Benudhar* v. *Kangoi Krishna*, (1919) 51 Ind Cas 738 (740): 4 Pat L Jour 306; *Maung Yan Gin* v. *Katharason Chetty*, 1921 U B 5 (7): 4 U B R 1: 63 Ind Cas 799 (801); *Muhammad Zakaraiya* v. *Muhammad Hafiz*, (1917) 41 Ind Cas 233 (236): 15 All L J 557: 39 All 506.

(2) *Chundra Nath* v. *Burroda Shoondury*, (1895) 22 Cal 813 (816).

4. **Persons entitled to the right to foreclosure.**—Under S. 67 of the Transfer of Property Act, as it existed before it was amended by Act XX of 1929, the remedy by way of foreclosure was available only in the case of

(1) a mortgagee by conditional sale,
(2) an English mortgage, and
(3) an equitable mortgage by deposit of title-deeds in Bombay.[1]

The newly amended S. 67 now provides that no mortgagee "other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose," can institute a suit for foreclosure.[2] It follows that neither a mortgagee under an English mortgage, nor an equitable mortgagee by deposit of title-deeds in Bombay can sue for foreclosure. Their remedy is only to sue for sale. By S. 15 of the Amending Act XX of 1929, however, the remedy of the equitable mortgagee in Bombay to proceed by way of foreclosure was kept open till 1st April, 1932.

The characteristic of a foreclosure decree is that it completely extinguishes the mortgagor's right to redeem and thereafter makes the mortgagee owner of the property. A mortgagee who has obtained a preliminary decree for foreclosure is entitled to apply for setting aside an execution sale under O. 21, R. 90 on the ground of material irregularity.[3]

5. **Form of preliminary decree.**—*See* appendix D, forms 3, 3-A, 9 and 10.

In a preliminary decree for foreclosure, the Court cannot, except with the consent of parties, direct payment of the mortgage money by instalments.[1] But where a preliminary decree allowing payment by instalments is passed by *consent* of parties, it does not necessarily fall outside the scope of R. 2; the provisions of Rr. 2 and 3 may still apply to such a decree.[2] A preliminary decree for foreclosure which does not conform to the form prescribed by this rule is irregular, but after it is made absolute, the defendant cannot object to delivery of possession under the decree, to the decree-holder.[3]

6. "**Ordering that an account be taken**".—The amount (whether accounts are directed to be taken or not) is to be calculated *up to the date of the preliminary decree*. The object of the rule is that a general account should be taken of *all* amounts due between the parties once for all and that the aggregate amount should be declared as due to the plaintiff on payment of which the property is to be redeemed.[1] The accounts have to be taken *before*

Note 4.

[1] *Manekji Framji* v. *Rustomji Naserwanji Mistry*, (1890) 14 Bom 269 (278).

[2] *Papamma* v. *Srivira Pratapa*, (1896) 19 Mad 249 (252 and 253): 23 Ind App 32: 6 Mad L Jour 53: 7 Sar 10 P C [Simple mortgagee not entitled to foreclose]; *Jai Kishori* v. *Md Ali Muhammad Khan*, (1921) 60 Ind Cas 560 (563): 7 Oudh L J 620 [Foreclosure decree can only be passed in the case of a mortgage by conditional sale].

[3] *Rakhal Chunder Bose* v. *Dwarka Nath Misser*, (1886) 13 Cal 346 (348).

Note 5.

[1] *Hurdeo Das* v. *Hukam Singh*, (1878-80) 2 All 320 (321, 322): 4 Ind Jur 415; *Mahadaji* v. *Hari*, (1883) 7 Bom 332 (335); *Shankarappa* v. *Danappa*, (1882) 5 Bom 604 (607).

[2] *Mt Manjlabai* v. *Surajmal*, 1928 Nag 333 (335): 111 Ind Cas 294.

[3] *Jogendra Chandra* v. *Rama Nath*, (1906) 4 Cal L Jour 533 (535).

Note 6.

[1] *Sahu Banarsi Prasad* v. *Manmohan Lal*, 1926 All 119 (120): 6 L R A (Civ) 479: 89 Ind

O. 34, R.2, Notes 6—7.

the final decree; they cannot be directed to be taken *in execution* of the final decree.[2] In the taking of such accounts, not only sums due by the mortgagor but also those due by the mortgagee should be taken into consideration.[3] If the decree is silent as to the person selected to take the accounts, the parties may themselves select a person to do so and his award will be binding on them.[4] The accounting is, however, to be restricted to the *mortgage transaction* in question in the suit and should not be extended to other transactions between the parties.[5] For other cases on this part of the subject, *see* the undermentioned cases.[6]

7. **Principal.**—The *onus* of proving the amount due to him is initially on the mortgagee. Hence if the mortgage deed is not properly stamped and the mortgagee refuses to pay the stamp duty and penalty with the result the mortgage deed is inadmissible in evidence, the mortgagee cannot recover anything beyond what the mortgagor *admits* to be due.[1]

The statement in the mortgage deed is *prima facie* proof of the amount due.[2] But the mortgagor can plead a total or partial discharge of the debt or that the recital as to consideration in the bond is wholly or partially untrue.[3] But in such a case, the burden will be upon him to substantiate his allegations. It is not for the mortgagee to prove that the consideration stated in the bond was actually paid by him.[4] But recitals in deeds are not evidence against *third parties*.[5]

Where only part of the alleged consideration is proved to have been paid, the mortgage is valid to the extent of the part so paid.[6] Similarly, in

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Cas 288. See *Sripat Singh* v. *Naresh Chandra Bose*, 1932 Pat 882 (384): 18 Pat L Tim 645: 140 Ind Cas 104 [The rule contemplates declaration, (*a*) at time of judgment, or (*b*) after taking account, of amount due on date of decree].

(2) *Varidsahayam Fernandez* v. *Ranchordin Kheki*, (1912) 15 Ind Cas 862 (868): 1912 Mad W N 400.

(3) *Brij Kumar* v. *Majlis Sahai*, (1916) 34 Ind Cas 899 (900) Cal; *Doole Chand* v. *Omda Khanum*, (1881) 6 Cal 377 (378): 7 Cal L Rep 375 [Mortgagee not entitled to withdraw from the taking of accounts when they appeared to be *going against him*]; *Mahabir* v. *Macnaughton*, (1889) 16 Cal 682 (691): 16 Ind App 107: 5 Sar 345: 13 Ind Jur 133 P C [If the mortgagor fails to set up any equity in his favour, he cannot subsequently sue on it].

(4) *Sir Jehangir Cowasji* v. *The Hope Mills, Ltd*, (1909) 33 Bom 216 (218, 219): 10 Bom L R 488: 2 Ind Cas 294.

(5) *Ali Nabi* v. *Habib-un-Nissa*, 1927 Oudh 170 (173): 4 Oudh W N 323: 100 Ind Cas 802; *Parameshwar* v. *Raj Kishore Prasad Narayan Singh*, 1925 Pat 59 (63): 3 Pat 829: 5 Pat L Tim 646: 80 Ind Cas 34.

(6) *Pathumsa Ammal* v. *Rajagopala Mudaliar*, 1927 P C 17 (17): 1927 Mad W N 147: 25 Mad L W 346: 100 Ind Cas 91: 52 Mad L Jour 407: 45 Cal L Jour 300: 29 Bom L R 777: 31 Cal W N 304 P C [Failure to direct accounts to be taken not serious error when the result of taking accounts would be to give the same sum as that for which decree was passed]; *Administrator-General* v. *Laladas*, (1914) 24 Ind Cas 669 (670): 68 Pun W R 1914: 166 Pun L R 1914 [Mortgagee understanding his real claim—Further deductions not to be allowed].

Note 7.

(1) *Ganga Mulik* v. *Bayaji*, (1882) 6 Bom 669 (670).

(2) *Babbu* v. *Sita Ram*, (1914) 25 Ind Cas 426 (427): 12 All L J 806: 36 All 478.

(3) *Naoroji* v. *Sidick Mirza*, (1896) 20 Bom 636 (645): Chitty's S C C R 486; *Sayrat Saha* v. *Sader Saha*, (1921) 61 Ind Cas 241 (241) Cal [Plea of partial adjustment].

(4) *Kishen Chand* v. *Sohan Lal*, (1915) 26 Ind Cas 913 (914): 20 Pun L R 1915: 245 Pun W R 1915; *Ali Khan Bahadur* v. *Indar Parshad*, (1896) 23 Cal 950 (955): 23 Ind App 92: 7 Sar 63 P C; *Mahabir Pershad* v. *Bishen Dayal*, (1905) 27 All 71 (72): 1 All L J 423: 1904 All W N 163; *Lal Singh* v. *Chaitram*, (1902) 15 C P L R 24 (25) [Onus of promisor not shifted by promissee's admission that actual consideration was different from that stated in bond]. See *Brajeshware* v. *Budhanuddi*, (1881) 6 Cal 268 (277, 278): 7 Cal L Rep 6 [Transaction not honest and *bona fide*—The recital as to payment of consideration entitled to little weight—*Onus* of proving *bona fide* of transaction is on plaintiff]; *Kundan Mal Kashibai*, (1902) 26 Bom 368 (371): 4 Bom L R 42.

(5) *Manohar Singh* v. *Sumitra*, (1895) 17 All 428 (430): 1895 All W N 93; *Ghurphekni* v. *Purmeshar*, (1905) 5 Cal L Jour 658 (658).

(6) *Bajrangi* v. *Udit Narain*, (1906) 10 Cal W N 932 (938).

O. 34, R. 2, Notes 7—11.

the case of a mortgage of property belonging to a Hindu joint family, where it is proved that only a part of the consideration was supported by legal necessity, the mortgage is valid and binding to that extent.[7]

8. **Interest.**—By Act XXI of 1929 a new rule (R. 11) has been enacted which deals specially with the power of the Court to order payment of interest in mortgage suits. The reader is referred to the notes under that rule for full information on the subject. According to S. 58 (*a*) of the Transfer of Property Act, "mortgage money" includes interest on the principal secured by the mortgage. This principle is recognised by the present rule which *inter alia* makes the payment of the interest provided in the mortgage deed a condition of redemption. In the absence of anything to the contrary in the mortgage deed,[1] interest as well as the principal constitute a charge on the property.[2]

9. **Interest subsequent to the date fixed for payment.**—Before the amendment of the rule by Act XXI of 1929 there was no provision either in R. 2 or R. 3 for the payment of interest subsequent to the date fixed for payment. Hence, there was a lack of uniformity in the decision on the question.[1] Express provision has now been made for the inclusion, in the preliminary decree for foreclosure, of a direction for the payment of "subsequent interest" up to the date of actual payment. For fuller information on the subject, *see* Notes under R. 11 below.

10. **Rule of damdupat.**—*See* Note 16 to S. 34.

11. **Costs of the suit.**—The general rule in all suits relating to mortgages is that the mortgagee is entitled to his costs. But it is within the power of the Court, in view of the mortgagee's conduct and the peculiar circumstances of any case, to refuse to award him any costs.[1] Ordinarily costs awarded against a mortgagor are part of the mortgage money, and are recoverable from

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(7) *Chotey Lal* v. *Laiq Singh*, 1929 All 15 (15 and 16): 111 Ind Cas 221: 26 All L J 1374.

Note 8.

(1) *Ramji Lal* v. *Munshi Lal*, 1925 Lah 182 (182): 79 Ind Cas 24 [Mortgage deed providing for redemption on payment of principal sum only interest stipulated is not a charge]; *Manikchand Maganchand* v. *Rangappa Kondappa*, 1921 Bom 28 (29): 45 Bom 528: 59 Ind Cas 765 [Mortgage not for interest, but mortgagee to take possession of property—Mortgagee making no attempt to obtain possession, cannot claim interest].

(2) *Ganga Ram* v. *Natha Singh*, 1924 P C 183 (183, 184): 22 All L J 686: 47 Mad L Jour 64: 20 Mad L W 101: 26 Bom L R 750: 1924 Mad W N 599: 35 Mad L Tim 141: 2 Pat L R (Civ) 257: 5 Lah 425: 51 Ind App 377: 5 L R P C 133: 6 Lah L Jour 551: 11 Oudh L J 534: 6 Pat L Tim 97: 80 Ind Cas 820: 29 Cal W N 558 P C.

Note 9.

(1) *Puchalapalli Adiseshadri Reddi* v. *Mungamur Shivaramayya*, (1915) 31 Ind Cas 320 (321) Mad [Court has power to provide for future interest in its preliminary decree]; *Brij Raj Kishun* v. *Maharaja Sir Rameswar Singh Bahadur*, (1917) 42 Ind Cas 625 (627, 628): 2 Pat L W 208 [Provision for payment of interest may be made at the time of enlarging the period fixed for payment]; *Bhawani Prasad* v. *Brij Lal*, (1894) 16 All 269 (270): 1894 All W N 79 [Future interest not charge on property]. See also *Maung Yan Gin* v. *Katharasan Chetty*, (1921) 63 Ind Cas 799 (801, 802): 1921 U B 5: 4 U B R 1 [Appellate Court confirming Lower Court's decree —No provision for subsequent interest therein nor in the final decree—Review or appeal only remedy —Allowing subsequent interest on aggregate amount by way of amendment to meet ends of justice is invalid].

Note 11.

(1) *Carvalho* v. *Nurbibi*, (1878-79) 3 Bom 202 (203): 4 Ind Jur 32 [Costs refused on ground of usurious nature of transaction]; *Dhondo* v. *Balkrishna*, (1884) 8 Bom 190 (193): 1886 Bom Print Judgt 62 [Defendant in *redemption* suit is ordinarily entitled to costs unless he has refused a tender of the amount due to him or has so misconducted himself in the course of the suit as to induce the Court to subject him to a penalty]; *Ram Kumar* v. *Kali Kumar*, (1887) 14 Cal 99 (108): 13 Ind App 116: 11 Ind Jur 33: 4 Sar 737 P C [Both parties maintaining pleas far in excess of their legal rights—Ordered to bear their own costs].

O. 34, R.2, Notes 11—13.

out of the mortgaged property.[2] But the Court can, in the exercise of its discretion, under S. 35, make such costs recoverable from the mortgagor *personally*.[3]

A puisne mortgagee who is made a party to a suit on the mortgage is also entitled to his costs against the mortgagor.[4] Similarly a co-mortgagee is also entitled to his costs even though he refused to join the plaintiff in a suit on a mortgage and was therefore joined as a defendant in the suit.[5] It has been held that costs are to be awarded to the mortgagee on the scale of costs as between attorney and client.[6] The mortgagee is also entitled to his costs incurred subsequent to the preliminary decree up to the date of payment. (*See* R. 10 below.)

12. **Other costs, charges and expenses.**—The rule as amended by Act XXI of 1929 makes express provision for payment to the mortgagee of all expenses properly incurred by him in respect of the mortgage security, together with interest thereon. Even prior to Act XXI of 1929 the mortgagee was entitled in a suit on the mortgage, to claim as part of the mortgage money expenses properly incurred by him for the preservation of the mortgaged property, the protection of his title to the property, etc.[1] (*See* Transfer of Property Act, Ss. 72 and 63-A.) R. 10 below also provides for the payment of such expenses incurred subsequent to the preliminary decree up to date of payment.

13. **Account against mortgagee in possession.**—Under S. 77 of the Transfer of Property Act, a mortgagee in possession of the mortgaged property is not liable to account for the rents and profits of the property where,

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(2) *Maharaj Bahadur Singh Dugar* v. *Basiruddin*, 1925 Cal 1135 (1135, 1136): 41 Cal L Jour 607: 93 Ind Cas 364; *Lal Ram Prakash* v. *Janki Prasad*, 1925 Oudh 351 (351): 12 Oudh L J 91: 2 Oudh W N 203: 88 Ind Cas 208: 29 Oudh Cas 34; *Jugal Kishore* v. *Jagmohan Dass*, 1930 Oudh 167 (168): 7 Oudh W N 138: 125 Ind Cas 170: 5 Luck 595; *Vrajlal* v. *Venkataswamy*, 1928 Bom 123 (129 and 130): 30 Bom L R 402: 108 Ind Cas 794: 52 Bom 459; *Sadiq Husain* v. *Ummatul Fatima*, (1918) 48 Ind Cas 329 (329) Oudh; *Dambar Singh* v. *Kalyan Singh*, (1918) 43 Ind Cas 557 (559): 15 All L J 914: 40 All 109; *Khushal Singh* v. *Srinivasa Rao*, (1889) 2 C P L R 94 (98). But see *Shaffer Khan* v. *Satyananda Das*, (1909) 4 Ind Cas 545: 13 Cal W N 742; *Damodhar Das* v. *Budh Kuar*, (1888) 10 All 179 (181): 1888 All W N 68; *Pran Kuar* v. *Durga Prasad*, (1888) 10 All 127 (129): 1888 All W N 21 [Judgment-debtor in a foreclosure decree is personally liable for the costs of the suit]

(3) *Rutnessur* v. *Jusoda*, (1887) 14 Cal 185 (187); *Dhondu Pandit* v. *Mahant Daulatpuri*, (1907) 3 Nag L R 97 (100); *Amina* v. *Rama Shankar*, (1919) 50 Ind Cas 730 (731): 17 All L J 582: 41 All 478; *Ajkumar* v. *Ram Saran*, (1909) 3 Ind Cas 38 (38) All; *Shri Ram* v. *Raghu Ram*, (1918) 47 Ind Cas 542 (542) Nag; *Damodhar Das* v. *Budh Kuar*, (1888) 10 All 179 (181): 1888 All W N 68. See *Maqbul Fatima* v. *Lalta Prasad*, (1898) 20 All 523 (527): 1898 All W N 157 [Mere separate order of costs under the rules of the Code is not necessarily an order for realisation of the costs personally from the mortgagor]; *Kamalamma* v. *Narasimha*, (1907) 30 Mad 464 (465): 17 Mad L Jour 317: 2 Mad L Tim 359 [Personal decree for costs should not be made unless the sale proceeds prove insufficient to satisfy the mortgagee's claim].

(4) *Sarat Chandra Roy* v. *Nahapiet*, (1910) 37 Cal 907 (913): 8 Ind Cas 1142.

(5) *Pulin Krishna Roy* v. *Nanda Lal Roy*, 1929 Cal 544 (544): 33 Cal W N 657.

(6) *Chander* v. *Essen*, 1 Ind Jur (N S) 22; *Obhoy Churn Sen* v. *Debendranath*, (1881) 8 Cal L Rep 437 (438).

Note 12.

(1) *Damodar* v. *Vamanrao*, (1885) 9 Bom 435 (437); *Pokree Saheb* v. *Pokree Beary*, (1898) 21 Mad 32 (34): 7 Mad L Jour 228; *Kamaya Naick* v. *Devapa*, (1898) 22 Bom 440 (446); *Sri Ganesh* v. *Keshavrav*, (1891) 15 Bom 625 (639) [Costs of proceedings against tenants of mortgaged property —Mortgagor not *personally* liable]; *Lakshman Bhisaji* v. *Hari Dinkar Desai*, (1880) 4 Bom 584 (589) [Mortgagee in possession entitled to reasonable costs of repairs]; *Imdad Hasan* v. *Badra Prasad*, (1898) 20 All 401 (408); 1898 All W N 90 [Mortgagee in possession paying Government revenue payable by mortgagor. He has a right to tack on amount so paid to his mortgage debt]; *Anandrav* v. *Ravji*, (1864-66) 2 Bom H C R 214 [Costs of improvements]; *Sheo Saran Singh* v. *Mahabir Pershad*, (1905) 32 Cal 576 (580): 2 Cal L Jour 78; *Dattaram* v. *Vinayak*, (1904) 28 Bom 181 (188): 5 Bom L R 916 [Mortgagee in possession can add sums spent for making good his title against mortgagor].

under the terms of the mortgage, the mortgagee is to take the rents and profits in lieu of interest or in lieu of interest and defined portions of the principal. In other cases, a mortgagee in possession is liable to account for the rents and profits of the property. Under S. 76 (*g*) of the Transfer of Property Act, he must keep, clear, full and accurate accounts of all sums received and spent by him as mortgagee,[1] and is bound to deduct the rents and profits realised by him from the amount claimed by him against the mortgagor.[2] Further he is liable to pay a reasonable occupation rent if he is personally in possession of the land.[3] He must also, in the absence of a contract to the contrary, pay the Government revenue and all charges of a public nature and all rents accruing due in respect of the property, and, if owing to his default, the mortgagor has to pay any of these items of expenditure, he is entitled to a set-off in respect thereof.[4] [*See* Transfer of Property Act, S. 76 (*c*).]

14. **Accounts in suits by or against sub-mortgagee.**—A sub-mortgagee is entitled to sue for sale or foreclosure to the same extent as the original mortgagee himself.[1] Where a sub-mortgagee is a party to a suit on the mortgage, the proper course is to direct accounts to be taken, both of the amounts due to the original mortgagee and of the amounts due to the sub-mortgagee and to order that, out of the sum due to the original mortgagee, the sub-mortgagee should be paid the amount due to him on his mortgage, that the balance should be paid to the original mortgagee and that, thereafter, both the mortgagees should re-convey to the mortgagor the mortgaged property.[2] (*See also* Appendix D, form 11 and Notes under R. 1.)

15. **Subsequent mortgagees.**—The form of the preliminary decree given in the present rule should be adopted to the circumstances of each case. Where puisne mortgagees are impleaded as parties in a suit on a prior mortgage a form similar to the one in use in the Chancery Division in the High Court in England may be found useful.[1] (*See also* Appendix D, forms 9 to 11.) The chief point to be noted in such cases is to give effect to the principle "redeem up, and foreclose down". The first right of redemption belongs to the next puisne mortgagee. If he makes default, he is foreclosed and the right to redeem devolves on the next puisne mortgagee and in the event of his default, the right belongs to the next mortgagee and the process goes on until the mortgagor is reached. If the mortgagor also fails to redeem he will be foreclosed.[2]

Note 13.

(1) *Goluck Chunder* v. *Mohun Lal*, (1866) 5 Suth W R 271 (276); *Ram Lochun* v. *Kunya Lall*, (1866) 6 Suth W R 84 (85); *Ramphul* v. *Waked Ali Khan*, (1870) 14 Suth W R 66 (67); *Kundanmal* v. *Kashibai*, (1902) 26 Bom 363 (371).

(2) *Radhabenode* v. *Kripa Moyi*, (1878) 14 Moo Ind App 443 (451): 10 Beng L R 386: 17 Suth W R 261; *Jaree Begam* v. *Gangaram*, (1868) 3 Agra 91; *Banarasi Prasad* v. *Ramnarain*, (1903) 7 Cal W N 514 (517): 25 All 287: 30 Ind App 66: 8 Sar 447 P C; *Lakshman* v. *Hari*, 1879-80) 4 Bom 584 (589); *Madari* v. *Baldeo Prasad*, (1905) 27 All 351 (355): 1904 All W N 270 F B; *Hunooman Pershad* v. *Munraj Koonwari*, (1872) 6 Moo Ind App 393 (422): 18 Suth W R 81 [Foot-notes]: 2 Suth 29: 1 Sar 552 P C.

(3) *Daudbhai* v. *Daudbhai*, (1890) 14 Bom 113 (115); *Ram Nath* v. *Brahmamoyi*, (1905) 1 Cal L Jour 581 (587).

(4) *Jaijit Rai* v. *Gobind*, (1884) 4 All W N 92 (95): 6 All 303.

Note 14.

(1) *Muthu Vijaya* v. *Venkatachalam*, (1897) 20 Mad 35 (40): 6 Mad L Jour 235.

(2) *Narayan* v. *Ganoji*, (1891) 15 Bom 692 (693 and 694).

Note 15.

(1) *Gopi Narayan Khauna* v. *Babu Bansidhar*, (1905) 27 All 325 (330): 32 Ind App 123: 2 All L J 336: 2 Cal L J 173: 7 Bom L R 427: 9 Cal W N 577: 15 Mad L Jour 191: 8 Sar 779 P C.

(2) *Narayan Venkoba* v. *Pandurang*, (1888) 7 Bom 526 (529); *Ram Pratap* v. *Bachhan Misra*, (1911) 10 Ind Cas 174 (175) Oudh; *Gopi Narain*

O. 34, R.2, Notes 15—18.

A subsequent mortgagee who has been added as a party to a suit for foreclosure by a prior mortgagee and who pays off the decree amount can on his being transposed as plaintiff apply for a final decree.[3]

16. **"Pays into Court".**—Under S. 86 of the Transfer of Property Act the defendant could pay the mortgage money under the preliminary decree to the *mortgagee* plaintiff direct or into the *Court*.[1] But the present rule requires the payment to be made only *into the Court* in all cases.[2] As to when and how far a payment made *out of Court* can be recognised by the Court dealing with an application to pass a final decree, *see* Note 14 to R. 5, *infra*.

17. **"On a day within six months".**—The rule only fixes the outer limit for the period to be fixed for the payment of the mortgage money under the preliminary decree. The Court has a discretion to fix any smaller period it thinks fit.[1] Where accounts are directed to be taken, the six months period should be calculated not from the date of the preliminary decree but from the date on which the Court confirms and countersigns the accounts taken under its decree.[2] [*See* sub-R. (1), Cl. (*c*) and sub-Cl. (*i*)]. As to the question whether, when the preliminary decree is appealed against, the period fixed for payment runs from the date of the first Court's decree or from the date of the appellate decree. (*See also* Note 5 to R. 3 and Note 9 to S. 148.)

18. **Extension of time.**—Sub-R. (2) of this rule which corresponds to the proviso to the old sub-R. (2) of R. 3, empowers the Court on good cause being shown, to extend the time fixed for payment of the mortgage money under the preliminary decree.[1] But the mortgagor is not entitled to an extension of time *as of right*.[2] The rule itself provides that extension of time may be granted "on good cause shown".[3] It is not a good ground for extend-

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v. *Bansidhar*, (1905) 27 All 325 (330): 32 Ind App 123: 2 All L J 336: 2 Cal L Jour 178: 7 Bom L R 427: 9 Cal W N 577: 15 Mad L Jour 191: 3 Sar 779 P C.

(3) *Balaji* v. *Ballabadas*, 1928 Nag 145 (146): 11 Nag L J 89: 24 Nag L R 119: 109 Ind Cas 251. But see *Gopi Narain* v. *Babu Bansidhar*, (1905) 9 Cal W N 577 (583): 32 Ind App 123: 2 All L J 336: 2 Cal L Jour 178: 7 Bom L R 427: 15 Mad L Jour 191: 3 Sar 779: 27 All 325 P C [Case under Transfer of Property Act].

Note 16.

(1) *Hatam Ali* v. *Abdul Gafur*, (1904) 8 Cal W N 102 (104); *Sitaram Amrit* v. *Dharmu*, (1908) 16 C P L R 111.

(2) *Puran Bibi* v. *Jatindra Mohan*, (1917) 40 Ind Cas 845 (845): 25 Cal L Jour 559: 21 Cal W N 920; *Singa Raja* v. *Pethu Raja*, (1918) 48 Ind Cas 196 (197): 1918 Mad W N 809: 35 Mad L Jour 579: 8 Mad L W 497: 24 Mad L Tim 501: 42 Mad 61; *Banarsi Das* v. *Nathu Mal*, (1912) 16 Ind Cas 987 (987): 281 Pun W R 1912: 12 Pun Re 1913: 276 Pun L R 1914 Supl; *Rasan Chettiar* v. *Rangayyan Chettiar*, 1930 Mad 105 (107, 108): 30 Mad L W 551: 1929 Mad W N 867: 120 Ind Cas 72.

Note 17.

(1) *Pathumsa Ammal* v. *Rajagopala Mudaliar*, 1927 P C 17 (17): 1927 Mad W N 147: 25 Mad L W 346: 100 Ind Cas 91: 52 Mad L Jour 407: 45 Cal L Jour 300: 29 Bom L R 777: 31 Cal W N 304 P C [But held that in the circumstances the fullest possible term should be given].

(2) *Kartick Chandra* v. *Haragobind*, (1915) 27 Ind Cas 813 (814): 21 Cal L Jour 75.

Note 18.

(1) *Hari Ram* v. *Chatur Bhuj*, (1892) 5 C P L R 54 (55); *Gangram* v. *Nandu Sunar*, (1892) 5 C P L R 104; *Sajjadi Begam* v. *Dilawar Hussain*, (1918) 47 Ind Cas 4 (5): 16 All L J 625: 40 All 579; *Gokaran Singh* v. *Mangli*, 1921 Oudh 138 (138): 8 Oudh L J 407: 66 Ind Cas 678 [Decree was construed as extending time for payment].

(2) *Ratnakar* v. *Chamra*, (1919) 51 Ind Cas 881 (883): 4 Pat L Jour 347; *Murugesa* v. *Ramasami*, (1916) 31 Ind Cas 200 (201): 18 Mad L Tim 495: 1916 Mad W N 126: 39 Mad 882.

(3) *Ram Lal* v. *Tulsa Kuar*, (1897) 19 All 180 (185): 1897 All W N 11; *Nand Lal* v. *Ram Ratam*, (1906) 2 Nag L R 137 (148); *Bhagwandas* v. *Shridhar*, (1903) 3 Nag L R 55 (66) [Onus of proving "good cause" is on judgment-debtor]; *Lakshimi Bai* v. *Ramachandra*, (1907) 3 Nag L R 146 (156); *Govinda* v. *Gangaram*, (1889) 2 C P L R 29 (30); *Annaji* v. *Fakira*, 1922 Nag 175 (178): 67 Ind Cas 282: 6 Nag L J 27; *Narayan Dhondopant* v. *Sangidas Biharilal*, 1928 Nag 301 (302): 109 Ind Cas 770; *Waman Rao* v. *Bhagwan Prasad*, 1930 Nag 12 (13): 119

ing the time that the mortgagor was under a misconception that payment within the period fixed was unnecessary.[4] As to what constitutes "good cause" *see* the undermentioned cases.[4-a] Time may be extended even after the expiry of the period originally fixed[5] provided a *final decree* has not been passed.[6] As the right to redeem continues until the final decree is actually passed,[7] the mortgagor may pay in the money at any time before the final decree is passed though there may not be an *express* order extending the period.[8] This is made clear now by the substitution of the words "before a final decree has been passed" at the beginning of R. 3 in place of the words "on or before the day fixed" which occurred in the old rule. Even where a preliminary decree is passed by consent of parties, the Court can exercise its power of extending the period fixed for payment, if there is nothing in the decree excluding such power.[9]

Ind Cas 677 [Good cause must be alleged and judicially proved]; *Jiwa Umar Kachi* v. *Gulabchand*, 1930 Nag 55: 119 Ind Cas 684; *Bhanu Pratap Singh* v. *Pratap Singh*, 1930 Nag 178 (179): 122 Ind Cas 443 [No sufficient cause for extension of time shown—Final decree *must* be passed]; *Maung Pye* v. *Ma Thav*, (1910) 8 Ind Cas 592 (593): 3 Bur L Tim 2 [Question of good cause to be decided in view of all the circumstances of the case]; *Kalian* v. *Sadholal*, (1918) 18 Ind Cas 14 (16): 11 All L J 62: 35 All 116; *Balakishan* v. *Atma Ram*, (1915) 26 Ind Cas 701 (703, 704, 705): 10 Nag L R 150; *Kanhai Singh* v. *Karu*, (1920) 54 Ind Cas 860 (861) Nag [Sufficiency of cause is a question of fact in each case].

(4) *Motilal* v. *Thaku Vijar Singh*, 1928 P C 137 (139): 26 All L J 600: 47 Cal L Jour 607: 109 Ind Cas 467: 32 Cal W N 796: 55 Ind App 207: 55 Mad L Jour 81: 28 Mad L W 9: 55 Cal 821: 24 Nag L R 182: 30 Bom L R 856 P C.

(4-a) *Bankateshwar Rawan Bahadurpal Singh* v. *Firm, Dina Nath Balgobind*, 1926 Oudh 180 (180): 90 Ind Cas 986 [Discretion to be exercised liberally—Time to be extended to enable money being raised]; *Jokhan Singh* v. *Debi Singh*, (1919) 50 Ind Cas 201 (201): 6 Oudh L J 94 [Fact that mortgagee looses nothing by extension of time may be good cause]; *Waman Rao* v. *Baghwan Prasad*, 1930 Nag 12 (13): 119 Ind Cas 680 [No evidence of *bona fide* efforts to secure loan——Good cause entitling applicant to extension held not shown]; *Ram Narayan Marvadi* v. *Vuhanda*, 1929 Nag 263 (264): 116 Ind Cas 511 [Semble: difficulty in raising money is good cause]; *Narayan Dhondopant* v. *Sangidas Biharilal*, 1928 Nag 301 (303): 109 Ind Cas 770 [Failure of crop—Consequent inability to pay —Time extended]; *Aman Singh* v. *Kunj Behari*, 1925 Nag 258 (258): 8 Nag L J 6: 86 Ind Cas 397 [*Bona fide* attempt to raise money—Time may be extended]; *Mt Rukhmabai* v. *Ganpatrao*, 1932 Nag 177 (179): 28 Nag L R 221 [Time extended—One-third amount deposited—Time again asked for—Refused and final decree passed in ignorance of deposit—On review time extended—Held justified as balance also deposited in meantime].

(5) *Kanhai Singh* v. *Karu*, (1920) 54 Ind Cas 860 (861) Nag; *Rango* v. *Bhomshetti*, (1902) 26 Bom 121 (126): 3 Bom L R 554; *Mallikarjunudhu* v. *Lingamurti*, (1902) 25 Mad 244 (289): 12 Mad L Jour 279 F B; *Nandram* v. *Babaji*, (1898) 22 Bom 771 (773); *Narayana* v. *Pappayya*, (1899) 22 Mad 133 (136): 8 Mad L Jour 205 Nag. See, however, *Ram Lal* v. *Har Narain*, (1891) 13 All 400 (403): 1891 All W N 150.

(6) *Ali Muhammad* v. *Miarish*, (1917) 37 Ind Cas 779 (780) Cal [Court cannot accept payment after final decree has been passed].

(7) *Isof Ali* v. *Kasim Ali*, 1921 Jour 22 (1): 26 Cal W N 532: 70 Ind Cas 152; *Poreshanath* v. *Ramjodu*, (1889) 16 Cal 246 (249); *Vadapurattai* v. *Vallabha*, (1902) 25 Mad 300 (307) 12 Mad L Jour 128 F B; *Mohan Lal* v. *Ram Charan*, 1931 All 223 (223): 130 Ind Cas 196: 1931 All L J 265; *Sant Bakhsh* v. *Bhagwandin Singh*, 1931 Oudh 121 (122): 8 Oudh W N 142: 131 Ind Cas 435; *Salig Ram* v. *Muradan*, (1903) 25 All 231 (233): 1903 All W N 20; *Mussammat Buta* v. *Usman*, (1898) 1 Oudh Cas 91 (93); *Pardas Singh* v. *Dwarka Singh*, (1910) 7 Ind Cas 50: 7 All L J 953; *Vidyasagar* v. *Ratipal*, (1914) 25 Ind Cas 752 (755): 17 Oudh Cas 347: 1 Oudh L J 433; *Ramchandra* v. *Hanumantha*, (1920) 58 Ind Cas 45 (46): 44 Bom 939: 22 Bom L R 939; *Rama Tulsa* v. *Bhagchand Motiram*, (1915) 27 Ind Cas 249 (250): 39 Bom 41: 16 Bom L R 687.

(8) *Bepin Behraya* v. *Mokunda Lal*, (1909) 1 Ind Cas 780 (782): 36 Cal 122: 8 Cal L Jour 547; contra *Wali Muhammad* v. *Husain Baksh*, 1884 All W N 178 (178) [Case superseded by amendments introduced by Act, XXI of 1929]; *Jai Kishn* v. *Bhola Nath*, (1892) 14 All 529 (530, 531): 1892 All W N 106 [Observations as to right of redemption not being available after expiry of time fixed]; compare *Makhan* v. *Bhagirath Pershad*, (1905) 8 Oudh Cas 33 (35) [Mortgagee obtaining possession of the mortgaged property before the expiry of the period fixed in preliminary decree for payment of mortgage money—Mortgagee's possession is as absolute owner and mortgagor's suit after 12 years is barred].

(9) *Nalayan* v. *Daulat*, (1922) 67 Ind Cas 273 (274): 1922 Nag 182; *Akkach Mondal* v. *Aminuddi Millik*, (1919) 50 Ind Cas 937 (938): 23 Cal W N 439; contra *Dawlat* v. *Kashi Rao*, (1926) Nag 280 (281): 92 Ind Cas 822; compare also *Karorimal* v. *Ramji Lal*, 1921 Lah 9 (10): 2 Lah 53: 3 Lah L Jour 68: 46 Pun L R 1921: 59 Ind Cas 812: 60 Pun L R 1921 [Parties compromising—Mortgagee given possession—One year allowed for redemption—After one year mortgagee automatically becomes full owner].

An express application for extension of time is not necessary.[10] Nor need the application, where one is made, be in *writing*.[11] But the Court cannot postpone the passing of a final decree, on the application of a *third party*.[12]

19. **Plaintiff to apply, for final decree.**—The rule [sub- R. (1) (*c*) sub-Cl. (*ii*)] makes it clear that *plaintiff* has to apply for a final decree for foreclosure if the defendant fails to pay the mortgage money within the time fixed by the Court. In one case it was contended that a final decree passed on the application of the *transferee* from the mortgagee was not binding on the mortgagor. It was held that as the decree was passed in the presence of the mortgagor he could not subsequently object to it.[1]

20. **Mortgage of chattels and intangible property.**—It has been held by the High Court of Calcutta that a mortgagee of chattels is entitled to sue for foreclosure.[1] The High Court of Bombay,[2] the Judicial Commissioner's Court of Nagpur,[3] and Oudh,[4] on the other hand, have held that he is not so entitled. A mortgagee of a turn of worship is entitled according to the Calcutta High Court to sue for foreclosure of that right,[5] the turn of worship being regarded as intangible property.

21. **Res judicata.**—*See* Notes to S. 11, Note 40, *supra. See also* Notes under Rr. 7 and 9, *infra.*

22. **Equitable mortgage of personal property.**—*See* Note 4, *ante.*

23. **Appeal.**—An appeal lies from a preliminary decree.[1] Under O. 43, R. 1(*o*) an appeal lies from an order *refusing* to extend time under this rule but not from an order *granting* an extension of time.[2] An application for revision may, however, lie from such orders.[3] No appeal lies against an order refusing to extend time, *after a final decree has been passed.*[4] *See also* S. 97, *ante.*

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[10] *Ishwar* v. *Gopal,* (1904) 28 Bom 102 (105): 5 Bom L R 719.

[11] *Rango* v. *Bhomshetti,* (1902) 26 Bom 121 (126): 3 Bom L R 554.

[12] *Akshya Kumar Barori* v. *Surja Kumar Chatterjee,* (1902) 6 Cal W N 654 (655).

Note 19.

[1] *Ratnakar* v. *Chamra,* (1919): 51 Ind Cas 881 (884): 4 Pat L Jour 347.

Note 20.

[1] *Mahamaya Debi* v. *Hari Das Haldar,* (1915) 27 Ind Cas 400 (406): 19 Cal W N 208: 20 Cal L Jour 183: 42 Cal 455 [Following the decision of the House of Lords in *Harrison* v. *Hart,* (1726) 1 Comb 393; *Tancred* v. *Potts,* 2 Fonblanque on Equity, 5th Edn., 261n, and *Kemp* v. *Westbrook,* 1 Ves (Sen 278)].

[2] *Tehilram* v. *Longin D'Mello,* (1917) 37 Ind Cas 231 (236): 18 Bom L R 587.

[3] *Nanhuji* v. *Chimna,* (1911) 10 Ind Cas 869 (873): 7 Nag L R 72.

[4] *Sardar Karan Singh,* minor under the guardianship of *Mt Narain Debi* v. *Dwarka Singh,* (1901) 4 Oudh Cas 301 (302) [It was held that the provisions of Ss. 86 to 89 of the Transfer of Property Act corresponding to O. 34, Rr. 2 to 5 did not apply to the mortgage of moveable property].

[5] *Mahamayya* v. *Haridas,* (1915) 27 Ind Cas 400 (406): 19 Cal W N 208: 20 Cal L Jour 183: 42 Cal 455.

Note 23.

[1] *Shri Ram* v. *Raghu Ram,* (1918) 47 Ind Cas 542 (542) Nag; *Dulhin Golab Koer* v. *Radha Dulari,* (1892) 19 Cal 463 (467).

[2] *Singai Raghubar Prasad* v. *Chhogmal,* 1931 Nag 1 (3): 130 Ind Cas 98 [Case cited in 9 All 500 at page 502. Note]; *Rahima* v. *Nepal Rai,* (1892) 14 All 520 (520): 1892 All W N 99; *Rango* v. *Bhomshetti,* (1902) 26 Bom 121 (125): 3 Bom L R 554 [Under the Transfer of Property Act, such an order was held to come within S. 244 of the Code (now S. 47) and hence appealable]; *Dharmaraja* v. *Srinivasa,* (1915) 31 Ind Cas 240 (240): 39 Mad 876: 2 Mad L W 1074: 29 Mad L Jour 708: 18 Mad L Tim 486; *Balakrishen* v. *Atma Ram,* (1915) 26 Ind Cas 701 (702): 10 Nag L R 150.

[3] *Singai Raghubar* v. *Chhogmal,* 1931 Nag 1 (3): 130 Ind Cas 98.

[4] *Tikaram* v. *Onkar,* 1930 Nag 240 (240): 13 Nag L J 100: 124 Ind Cas 241.

Final decree in foreclosure suit.

R. **3.** [*New* Act IV of 1882, S. 87.] (1) *Where*, before a final decree debarring the defendant from all right to redeem[3] the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

(*a*) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,—

(*b*) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree,

and, also, if necessary,—

(*c*) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made,[6] the Court shall, on application made by the plaintiff in this behalf, pass a final decree[7] declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(3) On the passing of a final decree under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.[9]

Synopsis.

1. Transfer of Property Act, S. 87.
2. Transfer of Property (Amendment) Supplementary Act, XXI of 1929.
3. "Where, before a final decree has been passed debarring defendant from all right to redeem."
4. Power to enlarge time. See Note 18 to R. 2 and S. 148, Note 9.
5. Effect of appeal on time fixed for payment.
6. Where payment in accordance with sub-R. (1) has not been made.
7. Final decree for foreclosure.
8. Partial foreclosure.
9. Discharge of debt, etc., on foreclosure.
10. Delivery of title-deeds.
11. Limitation for application for final decree. See Note 12 to R. 5.
12. Application for execution of final decree.
13. Appeal.
14. Court-fee.

Application by plaintiff. See Note 7, Pts. (2) and (4).

Costs. See Note 12, Pts. (5), R. 2; Note 11, above.

Court to which application is to be made. See Note 7, Pt. (3).

Form of decree. See Appendix D. Form No. 4.
Nature of proceedings, suit and not execution. See Note 7, Pt. (5).
Notice. See Note 7, Pts. (7) to (10).
Payment after date fixed but before final decree. See Note 3, Pts. (1) and (2).
Payment before time fixed. See R. 2, Note 17, Pt. (1).
Payment under R. 2, sub-R. (2). See R. 2, Note 16, above.
Right to interest. See Note 6, Pt. (3) and R. 11, Notes.

1. **Transfer of Property Act, S. 87.**—This rule corresponds to S. 87 of the Transfer of Property Act with the following differences:—

(1) The present rule provides for the *passing of a decree* when the defendant pays up the mortgage money within the time allowed. But, S. 87 merely provided that, in such a case, the defendant should, if necessary, be put in possession of the mortgaged property.

(2) Under the present rule, if the defendant does not pay the mortgage money within the time allowed, a *final decree* is passed. But under S. 87 the procedure was to pass an *order* absolute for foreclosure.

2. **Transfer of Property (Amendment) Supplementary Act, XXI of 1929.**—The present rule has been amended by Act, XXI of 1929. The chief points of distinction between the old rule and the new rule are:—

(1) The words "before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed" have been substituted for the words "on or before the day fixed".

(2) Under the amended rule, the defendant mortgagor has to *apply* to the Court for a decree in his favour if he pays the mortgage money within the time allowed. The old rule did not require this.

(3) The new rule makes it clear that the decree to be passed under it is a *final* decree.

(4) The proviso to sub-R. (2) of the old rule, regarding the Court's power to extend the time fixed for payment of the mortgage money has been transferred to R. (2) above.

(5) Sub-R. (3) makes it clear that the passing of a final decree for foreclosure, discharges not only the mortgage debt but all liability of the defendant in respect of the mortgage or on account of the suit thereon.

3. **"Where, before a final decree has been passed debarring defendant from all right to redeem".**—The substitution of the words "before a final decree has been passed, etc.," for the words "on or before the day fixed" now makes it clear that though a mortgagor has not paid the mortgage money under the preliminary decree for foreclosure within the time allowed by the Court, he does not lose his right to redeem but can exercise the right till a final decree for foreclosure is actually passed.[1] In view of this the under-

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Order 34, Rule 3—Note 3.

[1] *Sant Bakhsh* v. *Bhagwandin Singh*, 1931 Oudh 121 (122): 8 Oudh W N 142: 131 Ind Cas 435.

O. 34, R.3, Notes 3—5.

mentioned decisions[2] prior to the Transfer of Property (Amendment) Supplementary Act, XXI of 1929 which disclose a conflict of Judicial opinion are only of academic interest now. Where a mortgagee, after the date fixed for payment but before a final decree for foreclosure is passed, enters into possession of the mortgaged property, he does so in his capacity as mortgagee and not as owner.[3] But if he remains in possession and the mortgagor keeps quiet for a long time the mortgagor will be held to have acquiesced in the mortgagee holding the property as his own and may thus be deprived of his right on the ground of estoppel.[4]

4. **Power to enlarge time.**—*See* Note 18 to R. 2 above and S. 148, Note 9.

5. **Effect of appeal on time fixed for payment.**—O. 41, R. 5 expressly provides that an appeal shall not operate as a stay of proceedings under a decree or order appealed from, except so far as the appellate Court may order to that effect. Hence the mere *pendency* of an appeal from the preliminary decree does not extend the time fixed, and is no bar to the passing of a final decree[1] unless the appellate Court expressly or by necessary implication extends the period for payment.[2] Nor is it a ground for enlarging the time fixed by the preliminary decree for payment.[3]

As to the effect of a *decree* passed in, or *dismissal* of the appeal on the time fixed by the preliminary decree, *see* S. 148, Note 9 and the undermentioned cases.[4]

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(2) In the following cases the mortgagor was held entitled to redeem till order absolute or final decree for foreclosure was actually passed:—*Sham Narain* v. *Roghoobur Dyal,* (1878-1879) 8 Cal 508 (509, 510): 1 Cal L Rep 343; *Narayana Reddi* v. *Pappiah,* (1899) 22 Mad 133 (136): 8 Mad L Jour 205; *Nandram* v. *Babaji,* (1897) 22 Bom 771 (773); *Poresh Nath* v. *Ramjadu,* (1889) 16 Cal 246 (249); *Tara Prasad* v. *Bhododeb,* (1895) 22 Cal 931 (934); *Somesh* v. *Ram Krishna Chowdhry,* (1900) 27 Cal 705 (708): 4 Cal W N 699; *Malkarjunadu* v. *Lingamurti,* (1902) 25 Mad 244 (289); *Kanara* v. *Govinda,* (1893) 16 Mad 214 (219): 3 Mad L Jour 89; *Vedapurathi* v. *Vallabha,* (1902) 25 Mad 800 (806, 807): 12 Mad L Jour 128; *Bepin Behary* v. *Mokunda Lal,* (1909) 1 Ind Cas 780 (1909): 36 Cal 122: 8 Cal L Jour 547; *Saudagar Mal* v. *Jan Ali,* (1904) 1 All L J 300; *Pardas Singh* v. *Dwarka,* (1910) 7 All L J 953: 7 Ind Cas 50; *Nihali* v. *Mittar Sen,* (1898) 20 All 446 (447): 1898 All W N 112; *Raham Ilahi* v. *Ghasita,* (1898) 20 All 375 (377): 1898 All W N 78; *Debi Prosad* v. *Jaikaran Singh,* (1902) 24 All 479 (480): 1902 All W N 125; *Salig Ram* v. *Muradan,* (1903) 25 All 281 (283): 1903 All W N 20; *Sham Sunder* v. *Muhammad Ihtisan,* (1905) 27 All 501 (504): 2 All L J 180: 1905 All W N 70; *Shashtidas Dutt* v. *Ujir Ali Khan,* (1913) 18 Ind Cas 357 (358) Cal; *Vidya Sagar* v. *Ratipal,* (1914) 25 Ind Cas 752 (754, 755): 1 Oudh L J 433: 17 Oudh Cas 347; *Ghulam* v. *Himayatullah,* (1913) 18 Ind Cas 326 (326) All; *Isof Ali* v. *Kasim Ali,* 1921 Jour 22 (1): 26 Cal W N 532: 70 Ind Cas 152; *Alimea Chowdhary* v. *Roshun Ali,* (1906) 3 Cal L Jour 533 (536); *Maung Aung* v. *Ma Nan,* (1910) 8 Ind Cas 961 (962): 3 Bur L Tim 134: 5 L B R 219. See also *Keshav Rao Kawale* v. *Baset,* (1896) 9 C P L R 75 (77) [The Court has a discretion to extend the time]; *Lakshmi Bai* v. *Ramachandra Malhar,* 3 Nag L R 146 (155) [The Court can in its discretion refuse to extend the time].

In the following cases it was held that if the mortgagor did not pay within the time originally fixed or subsequently extended by the Court he could not redeem the property afterwards; *Jiwa Umar Kachhi* v. *Gulabchand,* 1930 Nag 55: 119 Ind Cas 684; *Bhanu Prasad Singh* v. *Pratap Singh,* 1930 Nag 178 (179): 122 Ind Cas 443.

(3) *Makhan* v. *Bhagirath,* (1905) 8 Oudh Cas 33 (35).

(4) *Vasant Rao Govinda Rao* v. *Nana Bhai Sanadand,* 1926 Bom 273 (277): 28 Bom L R 347: 94 Ind Cas 96.

Note 5.

(1) *Rajbans Sahay* v. *Askaran Baid,* 1930 Pat 227 (229): 125 Ind Cas 113; *Madan Mohan Mitter* v. *Ram Huri Sahu,* (1897) 1 Cal W N 197.

(2) *Chiranji Lal* v. *Dharam Singh,* (1896) 18 All 455 (457): 1896 All W N 130; *Ali Mahomed* v. *Miarish,* (1917) 37 Ind Cas 779 (780) Cal; *Babu Prasad* v. *Khiali Ram,* 1906 All W N 203 (203): 3 All L J 829; *Rafikunnessa Bibi* v. *Tarini Churn,* (1893) 20 Cal 279 (284).

(3) *Ram Golam* v. *Barsati Singh,* (1906) 10 Cal W N 910 (912); *Ishwargar* v. *Chunda Sama,* (1889) 13 Bom 106 (109); *Aminabi* v. *Sidu,* (1893) 17 Bom 547 (553, 554); *Chudasama* v. *Ishwar,* (1892) 16 Bom 243 (248); *Kanara Kurup* v. *Govinda Kurup,* (1891) 1 Mad L Jour 745 (746); *Tarachand Marwari* v. *Brojo Gopal Mukerji,* (1913) 18 Ind Cas 747 (749): 17 Cal W N 457: 17 Cal L Jour 120.

(4) *Bunnaua* v. *Kallakuri,* (1917) 41 Ind Cas 268 (269): 32 Mad L Jour 455 [Appellate

O. 34, R.3, Notes 6—7.

6. **Where payment in accordance with sub-R. (1) has not been made.**—A mortgagee is not bound to accept a smaller sum than that due as part satisfaction of his decree but is entitled to insist on a final decree for foreclosure being passed in his favour where the *whole* of the amount found due to him is not paid into the Court.[1] But this principle only applies where there is no dispute as to the sum due.[2] Thus, where the mortgagor deposits in Court the sum found due by the lower Court but the sum is increased by the appellate Court, the payment by the mortgagor reduces the debt *pro tanto* and interest is payable afterwards only on the balance.[3] The mortgagee is not bound to accept payment after the passing of the final decree for foreclosure.[4]

7. **Final decree for foreclosure.**—The rule makes it clear that the decree to be passed under this rule is a *final* decree. The procedure under the Transfer of Property Act was to obtain an *order* absolute for foreclosure or sale.[1]

An application for a final decree for foreclosure should be made by the *plaintiff*,[2] and he should make it to the Court of *first instance* even though the preliminary decree was modified in appeal.[3] But a defendant who is present and allows a final decree to be passed on the application of a *transferee* from the plaintiff will be estopped from questioning the validity of the decree afterwards.[4]

The legal representatives of a party who dies after a preliminary decree can and should be brought on record under the provisions of O. 22 in the proceedings to obtain the final decree in as much as the suit must be deemed to be pending till a final decree is passed.[5] But a person, who was not a party

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Court confirming decree of lower Court—Time not extended]; *Thathara Nannabha Chetty* v. *Kuppal Krishnammal*, (1912) 16 Ind Cas 799 (799, 800): 14 Mad L Tim 194, (Do.): *Maung Yan Gin* v. *Katharasan Chetty*, (1921) 63 Ind Cas 799 (801) (Rang): 1921 U B 5 (7): 4 U B R 1, (Do.); *Thakur Narwarsingh* v. *Tulsi Ram*, (1896) 11 C P L R 115 (120, 121) [No extension of time unless expressly granted in appellate decree]; *Chowdhry Kirtibash* v. *Gopaljee Thakur*, (1915) 27 Ind Cas 136 (138): 18 Cal W N 814: 19 Cal Jour 193 [High Court in second appeal while restoring decree of first Court which had been reversed by lower appellate Court, fixed fresh date for redemption]. But see *Nam* v. *Raghunath*, (1895) 22 Cal 467 (472).

Note 6.

(1) *Digambar Dass* v. *Harendra Narain*, (1910) 5 Ind Cas 165 (169): 11 Cal L Jour 226: 14 Cal W N 617; *Syyed Fida Husain* v. *Lala Chhanga Mal*, (1907) 10 Oudh Cas 354 (356) [Mortgagor not entitled to refund of the portion paid by him].

(2) *Digambar Dass* v. *Harendra Narain*, (1910) 5 Ind Cas 165 (169): 11 Cal L Jour 226: 14 Cal W N 617.

(3) *Digambar Das* v. *Harendra Narain*, (1910) 5 Ind Cas 165 (169): 11 Cal L Jour 226; 14 Cal W N 617; *Hari Kishen Bhaghat* v. *Kamaleshur Prashad Singh*, (1912) 16 Ind Cas 374 (375) Cal.

(4) *Ali Mamud* v. *Miarish*, (1917) 37 Ind Cas 779 (780) Cal.

Note 7.

(1) *Ganapathia Pillai* v. *Gopala Iyer*, (1920) 56 Ind Cas 563 (565) [Right to order absolute already accrued at the time of coming into force of Code of 1908 not affected by the Code]. See *Abdul Majid* v. *Jawahir Lal*, (1914) 23 Ind Cas 649 (650): 1914 P C 66: 36 All 350: 12 All L J 624: 16 Bom L R 395: 19 Cal L Jour 626: 18 Cal W N 963: 27 Mad L Jour 17: 16 Mad L Tim 44: 1 Mad L W 488: 1914 Mad W N 485 P C [Execution of order absolute barred before Code of 1908—Not revived by passing of new Code].

(2) *Ratnakar Gountia* v. *Chamra Satpasty*, (1919) 51 Ind Cas 881 (884): 4 Pat L Jour 347.

(3) *Sheonarain* v. *Chunt*, (1901) 23 All 88 (89): 1900 All W N 209; *Venkata* v. *Thiagaraya*, (1900) 23 Mad 521 (523): 10 Mad L Jour 145; *Shamuidhun Dutt* v. *Lakshmani Debia*, (1910) 6 Ind Cas 323 (325): 13 Cal L Jour 459. See *Latchman* v. *Muddan*, (1881) 6 Cal 513 (515): 7 Cal L Rep 521: 5 Ind Jur 414 [Court passing preliminary decree—Jurisdiction transferred to another Court—Application for final decree may be made to either Court].

(4) *Ratnakar Gountia* v. *Chamrasatpasty*, (1919) 51 Ind Cas 881 (884): 4 Pat L Jour 347.

(5) *Bhutnath* v. *Tara Chand*, 1921 Cal 551 (552): 33 Cal L Jour 115: 25 Cal W N 595: 59 Ind Cas 177; *Natesa Pillai* v. *Kannammal Anni*, 1924 Mad 786 (786): 46 Mad L Jour 181: 19 Mad L W 173: 1924 Mad W N 216: 78 Ind Cas 64.

O. 34, R.3, Note 7.

to the preliminary decree, cannot be added as a party to the proceedings to obtain a final decree.[6]

No notice is necessary to be given under this rule to the defendant before a final decree is passed,[7] though, in practice, it is generally given on grounds of justice and equity.[8] Notice is, however, necessary where the defendant happens to be a *minor*.[9] But the failure to give notice is, if anything, only an *irregularity* and, unless the merits of the case are affected, will not invalidate the proceedings.[10]

An *ex parte* final decree can be set aside under O. 9, R. 13 if "sufficient cause" within the meaning of that rule is established.[11] The dismissal for default of an application for a final decree does not preclude a fresh application for the same purpose.[12]

The procedure for obtaining a final decree applies to preliminary decrees passed on compromise between the parties[13] unless, the decree, by its terms, provides for execution on default without any fresh decree being passed.[14] A *conditional* decree for foreclosure is not contemplated by the rule.[15]

Where a party is entitled to pre-emption on foreclosure the right arises, not on the expiry of the period fixed for payment, but on the passing of the

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(6) *Raghunath* v. *Sheo Lal*, (1917) 39 Ind Cas 849 (850): 13 Nag L R 69.

(7) *Krishna* v. *Muthusami*, (1902) 25 Mad 506 (507): 12 Mad L Jour 62; *Tara Pado Ghose* v. *Kamini Dasee*, (1901) 29 Cal 644 (646); *Punjab Rao* v. *Baliram*, 1923 Nag 13 (15): 69 Ind Cas 549; *Mohomed Taki* v. *W A Thomas*, (1906) 4 Cal L Jour 317 (318); *Chaitram* v. *Daolat Gond*, (1896) 9 C P L R 5 (8).

In some cases under the Transfer of Property Act notice was held to be necessary if the application for order absolute was made more than one year after the decree, the view being that such an application was an application for execution: see the following cases:—*Pandu Prabhu* v. *Juje Lobo*, (1903) 27 Mad 40 (42). But see *Dalpat Rao* v. *Tarachand*, (1893) 6 C P L R 1 (3) [Application for order absolute against legal representatives of deceased mortgagor—Notice necessary].

(8) *Babooji* v. *Ram Gopal*, 1923 Nag 320 (320): 19 Nag L R 124: 73 Ind Cas 32; *Rasan Chettiar* v. *Rangaya Chettiar*, 1930 Mad 105 (107, 108): 30 Mad L W 551: 1929 Mad W N 867: 120 Ind Cas 72; *Bishambhar Nath* v. *Umed Ali*, (1917) 42 Ind Cas 750 (750): 20 Oudh Cas 268; *Pochanna* v. *Pochanna*, 1930 Nag 136 (136): 120 Ind Cas 382; *Sri Maruthiswamiar* v. *A Subramania Ayyar*, 1929 Mad 393 (394): 29 Mad L W 393: 118 Ind Cas 831: *Abhoy Churn Gain* v. *Naba Kumar Dutt*, (1910) 6 Ind Cas 806 Cal [Notice necessary before application for final decree for sale can be converted into application for final decree for foreclosure]; *Bechu Singh* v. *Bicharam Sahu*, (1909) 1 Ind Cas 677 (681, 682): 10 Cal L Jour 91; *Narayana Reddi* v. *Pappiah*, (1899) 22 Mad 133 (136): 8 Mad L Jour 205; *Seth Bhagavan Dass* v. *Shridhar*, (1907) 3 Nag L R 55 (68).

(9) *Chandradip Tewari* v. *Jadunandan Singh*, 1924 All 578 (578): 5 L R A (Civ) 366: 79 Ind Cas 1041; *Mahadeo Pandey* v. *Soba Nath Pandey*, 1926 All 757 (758, 759): 24 All L J 914: 97 Ind Cas 277: 48 All 828.

(10) *Mahadeo Pandey* v. *Soba Nath Panday*, 1926 All 757 (758, 759): 24 Mad L Jour 914: 97 Ind Cas 277: 48 All 828 [Want of notice to minor]; *Ram Jas* v. *Sheoprasad*, (1906) 28 All 193 (195): 2 All L J 640: 1905 All W N 241; *Malkarjun* v. *Narhari*, (1901) 25 Bom 337 (347, 348): 27 Ind App 216: 2 Bom L R 927: 10 Mad L Jour 368: 7 Sar 739: 5 Cal W N 10 P C. See also *Badri Nath* v. *Raja Ram*, 1932 All 698 (699, 700).

(11) *Mt Fahiman* v. *Awadh Behari Lal*, 1929 All 279 (280): 1929 All L J 376: 51 All 634: 119 Ind Cas 246; *Bibee Tulsiman* v. *Mahato*, (1905) 32 Cal 253 (256): 9 Cal W N 81 F B; *Seth Bhagavan Dass* v. *Shridhar*, (1907) 3 Nag L R 55 (65). See *Mt Jafri Begum* v. *Lakshmi Dhar*, (1901) 4 Oudh Cas 238 (240) [Want of notice is no ground for setting aside a final decree under O 9, R 13]. See also *Kaloo Singh* v. *Mt Lachmi Bai*, (1899) 12 C P L R 82 (84) [Suit lies to set aside order absolute on ground of fraud].

(12) *Lakshmi Narain Singh* v. *Maharaj Din*, 1927 Oudh 49 (50): 3 Oudh W N 921: 98 Ind Cas 1029.

(13) *Narayan* v. *Daulat*, 1922 Nag 182 (184): 67 Ind Cas 273.

(14) *Biswanath* v. *Bhagwandin*, (1911) 10 Ind Cas 536 (538): 14 Cal L Jour 648; *Sarat Chandra* v. *Joy Sankar*, 1931 Cal 546 (548): 35 Cal W N 332: 134 Ind Cas 80; *Vishun Moreshwar* v. *Sadashiw*, 1925 Bom 509 (509, 510): 27 Bom L R 943: 89 Ind Cas 889.

(15) *Gokaran Singh* v. *Mangli*, 1921 Oudh 138 (139): 8 Oudh L J 407: 66 Ind Cas 673. But see *Baldeo* v. *Abhiman*, (1899) 12 C P L R 103 (105, 106) [Possession obtained under conditional decree for foreclosure cannot be disputed on ground of final decree not having been passed].

O. 34, R.3, Notes 7—10.

final decree for foreclosure,[16] as, until then, the ownership of the mortgaged property vests in the mortgagor.[17]

An omission to draw up a final decree is only an irregularity so that where a Court erroneously passed an order absolute instead of a final decree it was held that the order could be enforced by execution.[18] *See also* the undermentioned cases.[19]

8. **Partial foreclosure.**—The nature of the proceedings for foreclosure is such that a mortgage must be foreclosed as a whole or not at all. Thus where a suit for foreclosure is decreed only with respect to some of the properties but dismissed with regard to others and an appeal is filed from that portion of the decree which dismisses the suit, the mortgagee cannot first obtain a final decree in respect of the portion of the decree favourable to him and then, on succeeding in the appeal as to the rest, another final decree in respect thereof.[1]

9. **Discharge of debt, etc. on foreclosure.**—The present rule makes it clear that on the passing of a final decree for foreclosure, not only the mortgage *debt* but all the defendant's liabilities in respect of the mortgage as well as for the costs of the suit become discharged.[1] The mortgagor's right to redeem revives if, notwithstanding the foreclosure, the mortgagee pursues his personal remedy against the mortgagor.[2] Where a person holding several mortgages on the same property forecloses under the first mortgage, it will be inequitable to allow him to sue the mortgagor personally for the debt secured by the second mortgage.[3]

See the undermentioned case.[4]

10. **Delivery of title-deeds.**—A mortgagor can institute a separate suit to recover compensation for loss of title-deeds; the Court may also grant, in the mortgage decree itself, an alternative relief for damages for such loss.

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(16) *Batul Begum* v. *Mansur Ali Khan,* (1898) 20 All 315 (319): 1898 All W N 61; *Anwar Ul Haq* v. *Jwala Prasad,* (1898) 20 All 358 (361): 1898 All W N 67; *Raham Ilahi Khan* v. *Ghasita,* (1898) 20 All 375 (377): 1898 All W N 78 [See also S 4, cl (2), S 6 and S 16, Agra Pre-emption Act (11 of 1922)].

(17) *Singat Gopal Sao* v. *Mehtab Bi,* (1896) 9 C P L R 130 (131).

(18) *Chhagan Lal* v. *Jayaram,* 1927 Bom 131 (133): 29 Bom L R 107: 51 Bom 125: 100 Ind Cas 956.

(19) *Hazarilal* v. *Hazarimal,* 1923 Nag 130 (132): 68 Ind Cas 476 [Interpretation of final decree for foreclosure]; *Gobind Rao* v. *Kamta Prasad,* (1914) 25 Ind Cas 400 (401): 12 All L J 503: 36 All 376 [Foreclosure—Preliminary decree—Plea of agricultural tribe—Finding negativing plea, by Collector—Case referred to Civil Court—Decree absolute for foreclosure must inevitably be passed]; *Manly* v. *Patterson,* (1881) 7 Cal 394 (400) [Suit in nature of foreclosure suit—Defendant not to be ordered to pay deficiency in principal, interest, etc., which the moneys to arise from the sale may be insufficient to meet].

Note 8.

(1) *Sham Sundar* v. *Muhammad,* (1905) 27 All 501 (504): 2 All L J 180: 1905 All W N 70.

Note 9.

(1) *Shaffar Khan* v. *Satyanunda,* (1909) 4 Ind Cas 545: 13 Cal W N 742 [Case under Transfer of Property Act—On order absolute for foreclosure, mortgage *debt* is discharged but liability for costs of suit continues]. See also *Chaturbhuj* v. *Chandermool,* (1910) 5 Ind Cas 705 (706): 6 Nag L R 27.

(2) *Hope Mills, Ltd* v. *Sir Kovasji Jehangir,* (1911) 10 Ind Cas 748 (751): 13 Bom L R 162.

(3) *Bapuravji* v. *Ramji,* (1887) 11 Bom 112 (113, 114); *Kali Prosunno* v. *Kamini,* (1879) 4 Cal 475 (481): 3 Cal L Rep 184: 3 Ind Jur 463.

(4) *Ram Partab* v. *Bachhan,* (1911) 10 Ind Cas 174 (176) Oudh [Subsequent mortgagee made party to decree under R 2 but not made party to decree under R 3 and redeeming prior mortgage—Mortgagee ceases to have any interest in the property and cannot redeem the subsequent mortgage].

O. 34, R.3, Notes 10—14.

But if no such alternative relief for damages is provided for in the preliminary and final decrees the Court cannot grant it in execution.[1]

11. **Limitation for application for final decree.**—*See* Note 12 to R. 5, *infra.*

12. **Application for execution of final decree.**—An application for the execution of a final decree is governed by Art. 182 of the Limitation Act.[1]

A final decree in a mortgage suit may be adjusted out of Court like any other decree and O. 21, R. 2 applies thereto.[2] Where a mortgage decree is time-barred it cannot be enforced, the mortgage itself having merged in the decree.[3] S. 48 of the Code applies to a final decree under O. 34, though the preliminary decree, on which it was based, had been passed under the Transfer of Property Act.[4] Where in a foreclosure decree against the defendants, costs are awarded to the defendants, O. 21, R. 19 is no bar to their executing the decree for costs.[5] Where a foreclosure decree contains no direction for delivery of possession, the mortgagee cannot obtain possession by *applying in execution.* The proper course is to apply for an order for *possession.*[6]

13. **Appeal.**—It is clear under O. 34 that a final *decree* is a decree and appealable as such. Even under the Transfer of Property Act, an order absolute was held to be appealable as a decree.[1]

14. **Court-fee.**—*Ad valorem* Court-fee is payable on an appeal against a final decree in a mortgage suit.[1]

O. 34, R.4.

Preliminary decree in suit for sale.

R. 4. [New. Act IV of 1882, S. 88.] (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree[3] to the effect mentioned in clauses (*a*), (*b*) and (*c*) (*i*) of sub-rule (1) of rule (2), and further directing[5] that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid

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Note 10.

(1) *Marath Sivaraman* v. *Seshu Pattar,* 1922 Mad 299 (300): 42 Mad L Jour 356: 16 Mad L W 589: 70 Ind Cas 529.

Note 12.

(1) *Somar Singh* v. *Deonandan Prasad,* 1927 Pat 215 (217): 8 Pat L Tim 379: 102 Ind Cas 611: 6 Pat 780. See also *Abdul Majid* v. *Jawahir Lal,* (1914) 28 Ind Cas 649 (650): 1914 P C 66: 36 All 350: 12 All L J 624: 16 Bom L R 395: 19 Cal L Jour 626: 18 Oudh W N 963: 27 Mad L Jour 17: 16 Mad L Tim 44: 1 Mad L W 483: 1914 Mad W N 485 P C.

(2) *Lachmun Singh* v. *Mardan Singh,* 1923 Nag 20 (21): 68 Ind Cas 443.

(3) *Parsotam Das* v. *Patesri Pratap Narain Singh,* (1913) 18 Ind Cas 923 (925): 11 All L J 241: 35 All 250.

(4) *Bohra Tara Chand* v. *Murtaza Husain,* 1924 All 696: 5 L R A (Civ) 52: 78 Ind Cas 1030: 10 O & A L R 244.

(5) *Chhogmal* v. *Govind Prasad,* (1903) 16 C P L R 73 (75, 76).

(6) *Ramachandra Bania* v. *Balakrishna Ganapat,* (1904) 17 C P L R 62 (64).

Note 13.

(1) *Lakshmi Bai* v. *Ramachandra Malhari,* (1907) 3 Nag L R 146 (152, 153); *Kedar Nath* v. *Lalji Sahai,* (1890) 12 All 61 (62): 1889 All W N 198. See also *Nathu Mal* v. *Ude Ram,* 1932 Lah 214 (215): 33 Pun L R 56: 137 Ind Cas 273 [Order dismissing application for final decree amounting to dismissing suit—Appealable as decree].

Note 14.

(1) *Balaji* v. *Ballabh Dass,* 1928 Nag 146 (147): 107 Ind Cas 671; *Ram Dhani* v. *Chaudhri Maqbul Ahmad Khan,* (1915) 30 Ind Cas 492 (492): 18 Oudh Cas 114.

O. 34, R.4 into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs[12], charges, expenses and interest,[11] and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time[8] fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

Power to decree sale in foreclosure suit.

(3) In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage-security or the right of redemption, pass a like decree[9] (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(4) *Where*, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication[6] of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

Synopsis.

1. Transfer of Property Act, S. 88.
2. Amendments subsequent to 1908.
3. Who may obtain a decree for sale.
4. Decree for money in suit for sale.
   5. Form of decree.
   6. Contents of decree in suit for sale by first mortgagee.
   7. Court's power to adjust equities.
8. Power to extend time in suit for sale. Sub-R. (2).
9. Decree for sale in foreclosure suit. Sub-R. (3).
10. Order in which properties should be sold.
11. Interest. See Notes under O. 34, R. 11.
12. Costs.

13. **Succession certificate.**
14. **Award.**
15. **Consent decrees.**
16. **Appeal.**

Anomalous mortgagees. See Note 3, Pt. (1), also Note 9 and S. 58, Cl. (g) of T. P. Act.

Amount fixed—Lump sum once for all. See Note 6, Pt. (1) to R. (2) above.

Charges. See Note 4, Pts. (2) and (3).

Construction of mortgage-decrees. See Note 5, Pts. (5) to (8).

English mortgagee. See Note 3, Pt. (1), also S. 58, Cl. (e) of T. P. Act.

Equitable mortgagee or mortgagee by deposit of title-deeds. See Note 3, Pt. (1), also S. 58, Cl. (f) of T. P. Act.

Failure to pass final decree—Effect. —See R. 5, Note 4, Pts. (6) and (7); R. 3, Note 7, Pts. (4), (18) and (19).

Final decree—Direction to take accounts in execution—Against law. See Note 5, Pt. (4).

Person having two or more mortgages. See Note 10, Pts. (9) to (15) to R. 1 above.

Personal decree not to be included. See Note 5, Pt. (3).

Rights of subsequent mortgagees. See Note 6 and Note 8, Pt. (6).

Sub-mortgagees. See R. 1, Note 9.

1. **Transfer of Property Act, S. 88.**—The provision as to the payment of subsequent costs and interest, to the mortgagee out of the sale proceeds of the mortgaged property, is new. The present rule is not retrospective in effect so as to affect decrees already passed under the Transfer of Property Act at the time of coming into force of the new Code.[1]

2. **Amendments subsequent to 1908.**—The present rule has been amended extensively by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929. The material changes introduced by the amendment are as follows:—

(1) The new rule makes it clear that the decree under it is a *preliminary* decree.

(2) If the mortgagor makes default in payment, the mortgagee has to *apply* for a final decree for sale.

(3) The rule makes it clear that the mortgagee should be paid out of the sale proceeds not only subsequent costs and interest but also *subsequent charges and expenses properly incurred* in respect of the mortgage security.

(4) Sub-R. (2) enables the Court to *extend the time* fixed for payment. There was no such provision in the old rule.

(5) Sub-R. (3) corresponding to sub-R. (2) of the old rule is now expressly limited to anomalous mortgages, while sub-R. (2) of the old rule applied to *all* mortgages other than mortgages by conditional sale.

(6) Sub-R. (4) makes express provision for the adjudication of the rights of *subsequent mortgagees* who are joined as parties to a suit by a prior mortgagee.

3. **Who may obtain a decree for sale.**—The right to sue for sale or foreclosure is conferred by S. 67 of the Transfer of Property Act. A decree for sale cannot be obtained by a *usufructuary mortgagee* as such or a

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Order 34, Rule 4—Note 1.

[1] *N. Viswanatha Sastri v. Seethalakshmi*, 1921 Mad 126 (128): 13 Mad L W 37: 1921 Mad W N 181: 61 Ind Cas 979.

mortgagee by *conditional sale as such*. Such a decree can be obtained only by a simple mortgagee, an *English* mortgagee, an *equitable* mortgagee and an *anomalous* mortgagee. *See* Note 4 to R. 2 and the undermentioned cases.[1] As to the rights of sub-mortgagees, *see* Note 9 to R. 1.

4. **Decree for money in suit for sale.**—In a suit on a mortgage, it is open to a mortgagee to relinquish his security and to content himself with a simple money decree.[1] A mere decree for money which creates a charge on immoveable property for the decretal amount[2] or which authorises the decree-holder to enforce the decree by selling certain property[3] is not a "preliminary decree" on a mortgage under this rule.

5. **Form of decree.**—The forms in Appendix D for decrees in suits relating to mortgages have been greatly changed by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929. For the form of preliminary decree in suit for sale, *see* Appendix D, Forms Nos. 5 and 5-A.

In framing decrees in mortgage suits the provisions contained in O. 34 should not be overlooked.[1] A preliminary decree in a mortgage suit must fix a period within which the mortgagor should pay the mortgage money and the decree should direct a sale of the property *only* if the mortgagor fails to pay the money within the period fixed.[2]

It will be noted that the form of a preliminary decree for sale under this rule does not contain any provision regarding the mortgagor's personal liability. Any decree which contains such a provision is in contravention of the rules which contemplate the determination of the question only when the sale proceeds of the mortgaged property are *not sufficient* to pay off the mortgage debt.[3] Accounts between the mortgagor and the mortgagee should be

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Note 3.

[1] *Umda* v. *Umrao Begum*, (1889) 11 All 367 (370): 1889 All W N 140 [Usufructuary mortgagee not entitled to sue for sale]; *Mohadji* v. *Joti*, (1893) 17 Bom 425 (428), (Do.); *Venkataswamy* v. *Subramaniya*, (1888) 11 Mad 88 (90), (Do.); *Chathu* v. *Kunjan*, (1889) 12 Mad 109 (110, 111), (Do.); *Ramayya* v. *Guruva*, (1891) 14 Mad 232 (234), (Do.); *Luchmeshar* v. *Dookh Mochan*, (1897) 24 Cal 677 (680), (Do.); *Sadashiv* v. *Vyankatarao*, (1896) 20 Bom 296 (298), (Do.); *Sivakami* v. *Gopala*, (1894) 17 Mad 131 (133): 4 Mad L Jour 50 [Personal covenant in usufructuary mortgage—Mortgagee entitled to sue for sale]; *Madho Prosad* v. *Debi Dayall*, (1891) 11 All W N 168 (169), (Do.); In *Kangaya Gurukul* v. *Kalimuthu*, (1904) 27 Mad 526 (528): 14 Mad L Jour 61 [Combination of a simple and usufructuary mortgage, the mortgagee has a right to a decree for the mortgage money and for sale]; *Umrao Begum* v. *Vuliullah*, (1888) 8 All W N 171 (172), (Do.); *Jugal Kishore* v. *Ram Sahai*, (1886) 6 All W N 212 (213), (Do.); *Sreenath Roy* v. *Gadahar Das*, (1897) 24 Cal 348 (350): 1 Cal W N 225 [Equitable mortgage, appropriate remedy is a decree for sale]; *Phulkuar* v. *Murlidhar*, (1878-80) 2 All 527 (530) [Simple mortgagee can sue for sale]; *Azimdad Khan* v. *Ghansan Dass*, (1904) 1 All L J 20 (25).

Note 4.

[1] *Sukhdeo Prasad* v. *Lachman Singh*, (1902) 24 All 456 (457): 1902 All W N 114.

[2] *Ramsamy Naidu* v. *Subbaraya Tevar*, 1925 Mad 1101 (1103): 49 Mad L Jour 490: 1925 Mad W N 525: 88 Ind Cas 648.

[3] *Chandukutti Nayar* v. *K Narayana Nayar*, 1925 Mad 1083 (1084): 87 Ind Cas 557.

Note 5.

[1] *Sukh Dial* v. *Mani Ram*, (1915) 27 Ind Cas 489 (492): 29 Pun Re 1915: 29 Pun L R 1916; *Ghulam Murtza Khan* v. *Changoomal*, (1911) 11 Ind Cas 192 (195): 5 Sind L R 71.

[2] *Kishen Chand* v. *Sohan Lal*, (1915) 28 Ind Cas 913 (915): 20 Pun L R 1915: 245 Pun W R 1915. See *Ganapat* v. *Krishnama Chariar*, 1917 P C 121: 41 Mad 403: 45 Ind App 54: 16 Mad L Jour 358: 20 Bom L R 580: 27 Cal L Jour 367: 22 Cal W N 553: 34 Mad L Jour 463: 23 Mad L Tim 196: 8 Mad L W 427: 1918 Mad W N 810: 4 Pat L W 310: 44 Ind Cas 855 P C [Decree not fixing any time—But property sold in execution of the decree—Sale confirmed—Held that right to redeem was barred].

[3] *Rakhal Chandra* v. *Sidhi Nath*, (1919) 53 Ind Cas 922 (923): 1919 Pat H C C 890 [Decree providing that if sale proceeds of mortgaged property falls short of mortgage debt, there should be a personal decree against mortgagor. *Held*, that it was not a preliminary decree on a mortgage in the strict sense of the term]; *Pitambar Baur* v. *Chandi Charan*, (1914) 23 Ind Cas 389 (390) [Preliminary decree should not direct that no application against properties

O. 34, R.4, Notes 5—6.

taken before passing the final decree. A direction in the decree for taking accounts in *execution* is against law.[4] A decree directing sale of the mortgaged property in default of the mortgage money being paid within a fixed time[5] or a decree for the debt which provides that the mortgaged property shall be liable for the debt[6] is in substantial compliance with the present rule. Where a decree purporting to be a decree on a mortgage is ambiguous, it should be construed so as to accord with the law.[7] *See* the following cases as regards the construction of mortgage decrees.[8]

6. **Contents of decree in suit for sale by first mortgagee.**—For the form of a preliminary decree in a suit for sale impleading the mortgagor and a *puisne mortgagee, see* Appendix D, Form 9. For the form of a decree in a suit by a puisne mortgagee for redemption of a prior mortgage and for foreclosure or sale on the puisne mortgage, *see* Form 10 in Appendix D. In a suit on a prior mortgage in which puisne mortgagees are also impleaded as parties, each of them is entitled to an order that an account be taken of the amount due to him and to a declaration of his right to participate in the surplus sale proceeds remaining after paying off the prior mortgagee in the order of his priority.[1] But the puisne mortgagee's right is dependent on a *sale being held under the prior mortgage*. Hence, where the prior mortgage is paid off before the sale under it is held, the puisne mortgagee cannot ask for a sale of the property.[2] Where the puisne mortgage includes some properties in addition to those mortgaged to the prior mortgagee the puisne mortgagee cannot ask that, if the sale proceeds of the properties subject to the prior mortgage are not sufficient to pay off both the prior and the puisne mortgages, the additional properties subject to the puisne mortgage should also be sold. His right is only to have his mortgage debt satisfied out of the sale proceeds of the properties subject to the prior mortgage.[3] In a suit by a prior mortgagee impleading both the mortgagor and the puisne mortgagee, the mortgagor cannot be called upon to pay off both the mortgages on pain of his

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other than the mortgaged property shall be entertained—Question should be left for determination under R 6]; *Banu Mal* v. *Paras Ram*, 1925 Lah 640 (641): 7 Lah L Jour 397: 26 Pun L R 784: 92 Ind Cas 254 [A combined decree under Rr 4 and 6 is in contravention of the rules]; *Chandi Charan Roy Chowdhry* v. *Ambika Charan Dutt*, (1904) 31 Cal 792 (795) [Combined decree under Ss 88 and 90 of the Transfer of Property Act contravenes provisions of the Act].

(4) *Varid Sahayam Fernandez* v. *Ranchordin Kheki*, (1912) 15 Ind Cas 862 (863): (1912) 1 Mad W N 400.

(5) *Poresh Nath* v. *Ram Jadu*, (1889) 16 Cal 246 (249); *Tara Prosad* v. *Bhobodeb*, (1895) 22 Cal. 931 (934).

(6) *Jogemaya* v. *Thackomoni*, (1897) 24 Cal 478 (488); *Fazil* v. *Krishna Bandhoo*, (1898) 25 Cal 580 (583): 2 Cal W N 118; *Lall Behary* v. *Habibur Rahman*, (1899) 26 Cal 166 (171): 3 Cal W N 8; *Anna Pillai* v. *Thangathammal*, (1906) 20 Mad 78 (79).

(7) *Pirbhu Narain Singh* v. *Rup Singh*, (1898) 20 All 397 (399): 1898) All W N 93.

(8) *Janki Prashad* v. *Baldeo Narain*, (1881) 3 All 216 (219, 220, 221) F B; *Ram Prosad* v. *Raghunandan*, (1881) 3 All 239 (242, 246); *Debi Charan* v. *Pirbhudin*, (1881) 3 All 388 (389, 390, 391) F B: 1881 All W N 43; *Ram Chander* v. *Kondo*, (1900) 22 All 442 (444): 1900 All W N 155.

Note 6.

(1) *Berhamdeo Pershad* v. *Tara Chand*, (1906) 33 Cal 92 (111): 9 Cal W N 989.

(2) *Sarat Chandra* v. *Nahapiet*, (1910) 37 Cal 907 (910, 911): 8 Ind Cas 1142; *Vedavyasa* v. *Madura Hindu Sabah Nidhi Co*, (1919) 49 Ind Cas 36 (38): 35 Mad L Jour 639: 1918 Mad W N 898: 27 Mad L Tim 478: 9 Mad L W 70: 42 Mad 90. See *Kalipada Mukerji* v. *Basanta Kumar*, 1932 Cal 126 (129): 35 Cal W N 877: 59 Cal 117: 138 Ind Cas 177 [He must file a separate suit].

(3) *Sarat Chandra Roy* v. *Nahapeit*, (1910) 37 Cal 907 (910, 911): 8 Ind Cas 1142; *Jamna Das* v. *Misri*, (1904) 26 All 504 (506). See *Kalipada Mukerji* v. *Basanta Kumar*, 1932 Cal 126 (129): 35 Cal W N 877: 59 Cal 117: 138 Ind Cas 177 [But he must bring a suit of his own].

O. 34, R.4, Notes 6—8.

property being sold.[4] The puisne mortgagee's right to have his mortgage debt satisfied out of the surplus sale proceeds is not affected by such sale proceeds being withdrawn from the Court by a person having notice of the puisne mortgagee's title.[5]

7. **Courts' power to adjust equities.**—Where a sale of the mortgaged properties is impossible, as where the mortgaged properties have been sold for arrears of revenue or of rent the decree must be suitably modified. The Court has inherent power, in such cases, to give appropriate directions for the disposal of the fund which represents the property.[1] *See also* Note 19 to R. 1.

8. **Power to extend time in suit for sale—Sub-R. (2).**—*See also* Note 18 to R. 2.

The provision in sub-R. (2) enabling the Court to extend the time fixed for payment of the mortgage money under the preliminary decree is new. There was no such provision before the amendment of the present rule by Act XXI of 1929.[1] Hence, it was held that the Court had no power to extend the period fixed for payment of the mortgage money under a preliminary decree for sale.[1-a] It was, however, open to the mortgagor to prevent a sale at any time before it was actually held, by payment under O. 21, R. 69.[2] Even after the sale it was open to him to have the sale set aside at any time before it was confirmed, by applying under O. 21, R. 89.[3] But in some cases it was held that the provisions of the Code as to execution of decrees were not applicable to mortgage decrees.[4] This view is no longer tenable especially since the transfer, to the Civil Procedure Code, of the provisions of the Transfer of Property Act relating to suits on mortgages. O. 21, R. 83 expressly provides that that rule does not apply to decrees on mortgage.[5]

In a suit for sale by a puisne mortgagee he was given a decree conditional on his redeeming a prior mortgage within two months from the decree. He failed to redeem the prior mortgage within the period fixed but did so about four months after the decree. It was held that as the defendant had not taken any steps to redeem the plaintiff was entitled to the benefit of the payment though made after the prescribed time and to a decree absolute for sale.[6]

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[4] *L J Mackintosh* v. *N S Watkins*, (1905) 1 Cal L Jour 81 (85) [Prior to T P Act (Amendment Act) of 1929].

[5] *Karan Singh* v. *Ishtiaq*, 1921 All 312 (314): 43 All 268: 19 All L J 16: 61 Ind Cas 376.

Note 7.

[1] *Krishna Chandra Mandal* v. *Jogendra Narain Roy*, (1915) 27 Ind Cas 139 (143): 20 Cal L Jour 469: 19 Cal W N 937.

Note 8.

[1] See *Sat Parkash* v. *Bahal Bai*, 1931 All 386 (387): 1931 All L J 508: 53 All 288.

[1-a] *Chenniah Chetty* v. *Ma Mi*, (1911) 9 Ind Cas 771 (772): 4 Bur L Tim 48; *Taniram* v. *Gajanan*, (1900) 24 Bom 800 (802): 1 Bom L R 821; *Rajaram* v. *Chunni Lal*, (1897) 19 All 205 (207): 1897 All W N 47; *Durga Bharthi* v. *Andesh Rai*, (1911) 11 Ind Cas 528 (530): 14 Oudh Cas 147.

[2] *Adipuranam* v. *Gopalasami*, (1908) 31 Mad 354 (358): 3 Mad L Tim 281: 18 Mad L Jour 259; *Bibijan* v. *Sachi*, (1904) 31 Cal 863 (868): 8 Cal W N 684; *Harjas Rai* v. *Rameshwar*, (1898) 20 All 354 (356): 1898 All W N 70; *Rajaram* v. *Chuni Lal*, (1897) 19 All 205 (208): 1897 All W N 47; *Behari* v. *Ganpat*, (1888) 10 All 1 (4): 1887 All W N 288.

[3] *Adipuranam Pillai* v. *Gopalasamy Mudali*, (1908) 31 Mad 354 (358): 3 Mad L Tim 281: 18 Mad L Jour 259; *Mallikarjanudu* v. *Lingamurthy*, (1902) 25 Mad 244 (258): 12 Mad L Jour 279; *Tirumal* v. *Syed Dastaghiri*, (1899) 22 Mad 286 (288); *Krishnaji* v. *Mahdev*, (1901) 25 Bom 104 (106, 107): 2 Bom L R 685.

[4] *Pramatha Chandra* v. *Khetra*, (1902) 29 Cal 651 (658).

[5] *Kora Lal* v. *Punjab National Bank*, 1921 Lah 384 (385): 5 Lah L Jour 67. See also Note 20 to R 5 of O 34.

[6] *Debi Prasad* v. *Jaikaran Singh*, (1902) 24 All 479 (481): 1902 All W N 125.

O. 34, R.4,
Notes
9—10.

9. **Decree for sale in a foreclosure suit—Sub-R. (3).**—Sub-R. (3) has been taken from S. 25 of the English Conveyancing Act, 1881.[1] The provision occurred even in S. 88 of the Transfer of Property Act and was repeated in O. 34, sub-R. (2) [now sub-R. (3)].

The Transfer of Property Act (Amendment) Supplementary Act, XXI of 1929, has made a slight change in the language of the sub-rule, and it is this. The old rule applied to mortgages other than *mortgages by conditional sale*. The new rule applies only to *anomalous* mortgages. The doubt that was felt under the old sub-rule as regards its applicability to anomalous mortgages[2] can thus no longer exist. In such cases, the Court in order to protect the interests of all parties, concerned, can in the exercise of its discretion under this sub-rule pass a decree for sale instead of one for foreclosure, although the suit may be for foreclosure.[3] But the Court will not pass a decree for sale instead of for foreclosure under this sub-rule where it does not appear that the property was *undervalued*.[4]

Where a plaintiff mortgagee sues for foreclosure on the allegation that the mortgage is one by conditional sale, and it is found that the mortgage is not one by conditional sale, the proper course is not to dismiss the suit but to grant relief under sub-R. (3).[5]

10. **Order in which properties should be sold.**—*Prima facie* the decree-holder is entitled to have the mortgaged properties sold in any order he likes.[1-a] There are, however, two important exceptions to this general rule:—

(1) the doctrine of *marshalling* securities as laid down in the Transfer of Property Act, and

(2) the Court's power under O. 34, R. 4 to *adjust the equities* between the parties.

Doctrine of marshalling.—S. 56 of the Transfer of Property Act, as it stood before its amendment, applied only as between the *seller* and his *buyer*.[1] The Section has now been recast by Act XX of 1929 and it is now provided that

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Note 9.

(1) *Venkatasamy v. Subramaniya*, (1888) 11 Mad 88 (90) [44 and 45 Vict., c. 41, S. 25].

(2) *Nawab Saiyad Baquaran Hussain v. Babu Balak*, (1913) 18 Ind Cas 24 (25) Oudh [Provision does not apply to anomalous mortgage]. See *Nihal Singh v. B Shishadhar Singh*, 1929 Oudh 282 (282): 115 Ind Cas 839 [R 4, cl 3 applies to anomalous mortgages].

(3) *Ganga Prosad v. Ganesh Prashad*, 1926 Oudh 487 (489): 13 Oudh L J 270: 96 Ind Cas 228.

(4) *Muhammad Musaffar Ali v. Bhagwathi Prasad Singh*, 1921 Oudh 176 (182): 8 Oudh L J 358: 66 Ind Cas 642; *Baquar Hussain v. Balak Ram*, (1913) 18 Ind Cas 24 (27) Oudh [Discretion will be exercised only on clear evidence of some distinct advantage to accrue thereby to the party in whose favour the discretion is asked to be exercised without injury to the reasonable and equitable claims of the opposite side].

(5) *Sheo Ratan v. Jai Mangal*, 1885 All W N 329.

Note 10.

(1-a) *Narayanasamy Chetty v. Vellayya Pillai*, 1924 Mad 366 (367): 45 Mad L Jour 722: 33 Mad L Tim 181: 1923 Mad W N 831: 47 Mad 688: 83 Ind Cas 852; *Khitish Chandra Sanyal v. Hari Charan Das*, (1909) 4 Ind Cas 398 (399) Cal; *Hoolas Kooeree v. Sufeehun*, (1867) 8 Suth W R 379 (382); *Ameer Chand v. Sheo Prasad*, (1907) 34 Cal 13 (17): 4 Cal L Jour 573; *Bhikhari Das v. Dalip Singh*, (1895) 17 All 434 (435): 1895 All W N 83; *Kasikrishnamachariar v. Bogiammal*, (1911) 12 Ind Cas 439 (439, 440): (1911) 2 Mad W N 355: 10 Mad L Tim 525: 22 Mad L Jour 125; *Bishun Chand v. Abhoy Komar Chand*, 1924 Pat 700 (703): 5 Pat L Tim 276: 76 Ind Cas 452.

(1) *Mt Dhanwanti Chaudhrain v. Hargobind Prasad*, 1924 Pat 484 (485, 487): 3 Pat 435: 5 Pat L Tim 103: 78 Ind Cas 614; *Kommimeri Appayya v. Mangala Rangayya*, (1908) 31 Mad 419 (421, 423): 18 Mad L Jour 229: 3 Mad L Tim 287 F B.

O. 34, R. 4, Notes 10—12.

the buyer can claim the right of marshalling against, not only the seller but also against the *mortgagee,* but not so as to prejudice his rights. Similarly, the old S. 81 of the Transfer of Property Act provided for marshalling where there were two properties only. The scope of the Section has now been widened by Act XX of 1929 by providing that the Section should apply to cases where there are *more than two* properties and to *all* subsequent mortgagees.

Court's power to adjust equities.—Even if the doctrine of marshalling above referred to is not strictly applicable the Court has, under this rule, the power to direct the order in which the various mortgaged properties should be sold, for the purpose of protecting the equities that may exist in favour of any of the parties.[2] Thus where a son undertakes that where the sale of the father's share alone is insufficient to satisfy the mortgage, he will agree that his own share also may be sold, the Court may direct that the interest of the father alone may be sold first.[3]

A and *B* mortgage certain items of property to *C*. *B* then mortgages to *D* his own items of the mortgaged property. In a suit by *C, D* cannot claim that the items belonging to *A* alone should be sold first; the reason is that the mortgagor is not the same in both the mortgages.[4] If, however, the mortgagee has agreed that the properties should be sold in a particular order the agreement should be given effect to.[5]

See also Note 17 to R. 5.

11. **Interest.**—*See* Notes under O. 34, R. 11.

12. **Costs.**—Costs awarded to a mortgagee in a suit for sale on a mortgage are part of the mortgage money[1] and are primarily recoverable from the mortgaged property and not from the mortgagor personally,[2] unless the

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(2) *Rajkeshwar Prasad Narain Singh* v. *Muhammad Khalil-ul-Rahman,* 1924 Pat 459 (464): 3 Pat 522: 5 Pat L Tim 228: 78 Ind Cas 796; *Jatadhari Singh* v. *Baldeo Lal,* (1919) 51 Ind Cas 444 (445): 4 Pat L Jour 207; *Sitaram* v. *Ramrao,* 1931 Nag 91 (94): 13 Nag L R 213: 130 Ind Cas 817; *Appayya* v. *Rungayya,* (1908) 31 Mad 419 (421, 422, 423): 18 Mad L Jour 229: 3 Mad L Tim 287 (F B); *Krishnier* v. *Muthukumarasamiah,* (1906) 29 Mad 217 (223); *Nobin Chandra Battachararjya* v. *Debendra Sen,* 1927 Cal 522 (526): 45 Cal L Jour 255: 31 Cal W N 521: 101 Ind Cas 124; *Rajkeshwar Prasad* v. *Mahommad Kalil-ul-Rahman,* 1924 Pat 459 (464): 3 Pat 522: 5 Pat L Tim 223: 78 Ind Cas 796; *Bhagwan Chandra Das* v. *Dharam Narain Das,* 1924 Pat 802 (802): 3 Pat 962: 2 Pat L R Civ 242: 1925 P H C C 62: 84 Ind Cas 203: 6 Pat L Tim 392; *Mahommad Siddick* v. *Ram Lal Mandar,* (1910) 7 Ind Cas 4 (5): 15 Cal W N 80; *Ram* v. *Mohesh,* (1883) 9 Cal 406 (410): 11 Cal L Rep 365; *Tara Prasanna* v. *Nilmoni Khan,* (1914) 25 Ind Cas 118 (119): 41 Cal 418; *Dattatraya Vishnu* v. *Vishnu Narain,* (1911) 12 Ind Cas 949 (952): 13 Bom L R 1161: 36 Bom 68; *Arunachallam Chetty* v. *Murugappa Chetty,* (1916) 36 Ind Cas 516 (516): 20 Mad L Tim 223: 4 Mad L W 327; *Shaida Hussain* v. *Hub Hussain,* (1903) 25 All 42 (45): 1902 All W N 189; *Raghavachariar* v. *Duvvuru Krishna Reddi,* 1924 Mad 509 (510): 46 Mad L Jour 32: 19 Mad L W 23: 1924 Mad W N 134: 83 Ind Cas 918 [Executing Court can also do so]; *Mirza Quaiser Beg* v. *Sheo Shankar,* 1932 All 85 (87, 88, 90): 1931 All L J 103: 129 Ind Cas 708: 53 All 891.

(3) *Dattatraya Vishnu* v. *Vishnu Narain,* (1911) 12 Ind Cas 949 (952): 13 Bom L R 1161: 36 Bom 61.

(4) *Venkayya* v. *Venkataramayya,* 1930 Mad 178 (180): 1929 Mad W N 629: 125 Ind Cas 66.

(5) *Jatadhari* v. *Baldeo Lal,* (1919) 51 Ind Cas 444 (446): 4 Pat L Jour 207.

Note 12.

(1) *Pandya Jagannath* v. *Musammat Junian,* (1914) 24 Ind Cas 63 (63, 64): 12 All L J 645.

(2) *Maqbul Fatima* v. *Lalta Prasad,* (1898) 20 All 523 (526, 527, 528): 1898 All W N 157; *Dambar Singh* v. *Kalyan Singh,* (1918) 43 Ind Cas 557 (559): 15 All L J 914: 40 All 109; *Matukdari* v. *Ramdas,* (1917) 38 Ind Cas 214 (215): 2 Pat L Jour 51; *Siddiq Hussain* v. *Ummatul Fatima,* (1918) 48 Ind Cas 329 (329) Oudh; *Kamalamma* v. *Komandar,* (1907) 30 Mad 464 (465, 466): 17 Mad L Jour 317: 2 Mad L Tim 359; *Bahadur Singh* v. *Basiruddin,* 1925 Cal 1135 (1135, 1136): 41

O. 34, R.4.
Notes
12—15.

decree makes the mortgagor personally liable for the costs.[3]

13. **Succession certificate.**—It has been held by the High Courts of Bombay,[1] Calcutta[2] and Madras[3] that S. 4 of the Succession Certificate Act (now S. 214 of the Succession Act, 1925) does not apply to suits for sale on mortgages of immoveable property, where no personal decree against the mortgagor is asked for. But a contrary view is held by the Allahabad High Court.[4]

14. **Award.**—Rr. 4 and 5 of O. 34 do not apply to a decree passed on the award of an arbitrator and hence, a *final decree* is not necessary in such a case before the decree can be executed.[1]

15. **Consent decree.**—It is open to the parties to a mortgage suit to enter into a compromise and the Court can, in such a case, pass a decree in terms of the compromise. Such a decree need not conform to the provisions of O. 34.[1] For instance, instead of a lump sum being directed to be paid on a fixed day, a compromise decree may provide that the mortgage money should be paid in certain instalments and that in default the mortgaged property should be brought to sale. In such a case, it is not necessary to have a final decree passed under R. 5 before bringing the property to sale.[2] For it is open to the mortgagor to waive the benefit of the provision which requires that a final decree should be passed before the property can be sold and where by his agreement he has waived the benefit, a final decree which is intended only for his benefit is not necessary.[3] But the decree-holder is not *precluded* from

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Cal L Jour 607: 93 Ind Cas 364; *Sri Ram* v. *Suraj Bali* alias *Babu,* 1926 Oudh 27 (28): 88 Ind Cas 507.

(3) *Siddiq Hussain* v. *Ummatul Fatima,* (1919) 50 Ind Cas 730 (731): 17 All L J 582: 41 All 478. See also *Kashi Bai* v. *Chunilal,* 1930 Bom 11 (15): 122 Ind Cas 857: 31 Bom L R 1199 [Official Receiver disputing validity of mortgage—Ordered to pay costs, the question of his right to reimbursement out of surplus being left for Insolvency Court to decide]; And *Maung Po Mya* v. *Chettyar Firm,* 1931 Rang 153 (159, 160): 9 Rang 186: 133 Ind Cas 225 [Persons other than mortgagors such as prior mortgagees impleaded and unsuccessful—Ordered to pay costs personally].

Note 13.

(1) *Nanchand* v. *Yenawa,* (1904) 28 Bom 630 (634): 6 Bom L R 582.

(2) *Mahomed Yousuf* v. *Abdur Rahim,* (1899) 26 Cal 839 (841, 842): 4 Cal W N 558; *Kanchan* v. *Baij Nath,* (1892) 19 Cal 336 (339); *Baidanath* v. *Shamanand,* (1895) 22 Cal 143 (149). See, however, *Benode Lall* v. *Bussunto Kumari,* (1900) 27 Cal 855 (357).

(3) *Palaniandi* v. *Veerammal,* (1906) 29 Mad 77 (79).

(4) *Fateh Chand* v. *Muhammad Bakhsh,* (1894) 16 All 259 (268): 1894 All W N 74.

Note 14.

(1) *Ghulam Rasid* v. *Pamandas Dewandas,* 1927 Sind 103 (104): 19 Sind L R 202: 99 Ind Cas 178; *Nirpendra Nath* v. *Jhumak,* 1924 Pat 263 (264): 3 Pat 221: 4 Pat L Tim 694: 2 Pat L R 9: 80 Ind Cas 588; *Punjab National Bank, Ltd, Lyallpur* v. *Thakar Das,* 1930 Lah 116 (117): 121 Ind Cas 79; *Kashi Chandra* v. *Priya Nath,* 1924 Cal 645 (646): 28 Cal W N 550: 83 Ind Cas 424. But see *Bhagwan* v. *Ganu,* (1899) 23 Bom 644 (650): 1 Bom L R 136 [S 89 of the Transfer of Property Act applies to the award of a conciliator under S 44 of the Dekkhan Agriculturists' Relief Act].

Note 15.

(1) *Mangar* v. *Bhatoo,* (1920) 57 Ind Cas 473 (474): 1 Pat L Tim 446: 5 Pat L Jour 672; *Arunbati* v. *Ram Niranjan,* (1920) 58 Ind Cas 299 (299): 1921 Pat 320 (320): 2 Pat L Tim 38; *Ahmed Mirza Beg* v. *Allahabad Bank,* 1926 Oudh 385 (386): 12 Oudh L J 139: 87 Ind Cas 188; *Kumar Ganganand* v. *Maharaja Sir Rameshwar Singh,* 1927 Pat 271 (277): 6 Pat 388: 102 Ind Cas 449: 8 Pat L Tim 730; *Isan Chandra Kuntu* v. *Nilratan Adhikari,* 1923 Pat 375 (378): 103 Ind Cas 615: 7 Pat 28: 8 Pat L Tim 789; *Sivasubramaniya* v. *Rakkamuthu,* 1924 Mad 645 (646): 19 Mad L W 502: 1924 Mad W N 454: 79 Ind Cas 418; *Kora Lal* v. *Punjab National Bank,* 1921 Lah 384 (385): 5 Lah L Jour 67: 55 Ind Cas 816; *Sital Singh* v. *Baik Nath,* 1922 All 383 (384): 20 All L J 602: 44 All 668: 75 Ind 485.

(2) *Kora Lal* v. *Punjab National Bank, Ltd,* (1920) 55 Ind Cas 816 (816): 2 U P L R (Lah) 91: 118 Pun L R 1920: 5 Lah L Jour 67; *Gopal Rao* v. *Kanshi Ram,* 1929 Lah 390 (391): 113 Ind Cas 541; *Bechu Singh* v. *Bicharam Sahu,* (1909) 1 Ind Cas 677; *Utanka Lal* v. *Tarak Nath,* 1929 Cal 11 (12, 14): 48 Cal L Jour 357: 114 Ind Cas 156; *Askari Hasan* v. *Jahangiri Mal,* 1927 All 167 (168): 25 All L J 107: 100 Ind Cas 59: 49 All 297 F B.

(3) *Abir Paramani* v. *Johar,* (1907) 34 Cal 886 (890): 6 Cal L Jour 95: 11 Cal W N 879; *Bishwanath* v. *Bhagwan Din,* (1911) 10

O. 34, R. 4, Notes 15—16.

applying for a final decree in such a case.[4] So also where the parties have agreed that the decree should be drawn up under R. 4, a final decree under R. 5 is necessary.[5] O. 34, R. 14 does not apply to a compromise decree.[6]

A compromise decree on a mortgage may fix a longer period than the six months allowed under the rule, for payment by the mortgagor.[7] The Court has no power to extend the period fixed for payment by a consent decree.[8] Where a compromise mortgage decree authorises its enforcement against properties other than the mortgaged property, execution of the decree by the arrest of the mortgagor is permissible.[9]

See also Note 5 to R. 5.

16. **Appeal.**—Under O. 43, R. 1(*o*) an appeal lies from on order refusing to extend time for payment under this rule. But no such appeal lies after the *final decree has been passed*.[1] In an appeal from a preliminary decree, *ad valorem* Court-fee is payable on the amount *found due* and not the amount claimed by the plaintiff.[2] Under S. 97 of the Code, where a preliminary decree is not appealed from, it cannot be questioned in an appeal from the final decree.[3] Under the former Code it was held that an application for taking accounts on a mortgage, directed by a decree thereon, was one in execution and that an order on such application was appealable under S. 244 (now S. 47).[4] This view is not tenable under the present Code.

O. 34, R. 5.

Final decree in suit for sale.

R. **5**. [New. Act IV of 1882, S. 89.] (1) Where, on or before the day fixed or at any time before the confirmation of a sale[13] made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court[14] of all amounts due from him under sub-rule (1) of rule 4, the Court shall, on

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Ind Cas 536 (537): 14 Cal L Jour 648; *Munna Lal* v. *Sarat Chunder*, 1914 P C 150: 42 Cal 776: 42 Ind App 88: 17 Bom L R 408: 21 Cal L Jour 118: 19 Cal W N 561: 28 Mad L Jour 470: 17 Mad L Tim 120: 2 Mad L W 282: 27 Ind Cas 688 P C; *Raja Hemendralal Singh Deo* v. *Fakir Chund Datta*, 1928 Cal 626 (628): 27 Cal W N 621: 50 Cal 650: 74 Ind Cas 929.

(4) *Nanku Singh* v. *Parmatmanand Singh*, 1931 All 840 (841): 1931 All L J 58: 130 Ind Cas 487.

(5) *Nanku Singh* v. *Parmatmanand Singh*, 1931 All 340: 1931 All L J 58: 130 Ind Cas 487; *Mahomed Unis* v. *Janeshar Das*, 1929 All 881 (883).

(6) *Murad* v. *Daya Ram*, 1925 Sind 156 (157): 78 Ind Cas 49 [Compromise provided for sale of property *in execution*]. See, however, *Posti Mal* v. *Radha Kishen*, 1932 All 439 (440): 1932 All L J 486: 138 Ind Cas 603 [Case of a suit on a pro-note—Compromise hypothecating properties for decree amount—No provision in compromise to sell hypotheca *in execution*—Held O 34, R 14 applied].

(7) *Muhammad Unis* v. *Janeshar Das*, 1929 All 881 (883).

(8) *Dawlat* v. *Kashirao*, 1926 Nag 280 (281): 92 Ind Cas 822.

(9) *Hira Lal* v. *Lalchand*, 1929 Lah 86 (87): 110 Ind Cas 185. See also *Fala Krista* v. *Jagannath*, 1932 Cal 775 (780): 36 Cal W N 709: 56 Cal L Jour 187: 140 Ind Cas 788; *Posti Mal* v. *Firm, Radha Kishan*, 1932 All 439 (440): 138 Ind Cas 603: 1932 All L J 486 [Consent decree creating charge or mortgage—Silent as to mode of execution—Arrest or execution against other properties available in execution—But properties charged or mortgaged can be sold only by separate suit under R 14].

Note 16.

(1) *Tikaram* v. *Onkar*, 1930 Nag 240 (240): 124 Ind Cas 241: 13 Nag L J 100.

(2) *Valiram* v. *Karachi Bank*, 1927 Sind 251 (252): 104 Ind Cas 391.

(3) See *Murlidhar* v. *Vishnudas*, (1916) 33 Ind Cas 749 (751): 18 Bom L R 38: 40 Bom 321 [This was the law even under the old Code].

(4) *Aryan Bank of Vizagapatam* v. *Venkata Narasayyamma*, (1901) 26 Mad 237 (238).

application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order—

(*a*) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,[15]

and, if necessary,—

(*b*) ordering him to transfer the mortgaged property as directed in the said decree,

and, also, if necessary,—

(*c*) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent., of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for re-payment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court[9] shall, on application[10] made by the plaintiff in this behalf, pass a final decree[4] directing that the mortgaged property or a sufficient part thereof be sold,[17] and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4.

[*Cf.* O. 21, R. 89.]

Synopsis.

1. Transfer of Property Act, S. 89.
2. Amendments after 1908.
3. Scope of the rule.
4. Final decree when can be passed.
    5. Consent decrees and decrees on award.
6. Only one final decree to be passed.
    7. Form of final decree for sale.
    8. Court cannot go behind preliminary decree.
    9. Court to which application for final decree is to be made.
10. Application for final decree, if and when necessary.
11. Notice to judgment-debtor, if necessary before passing final decree.
12. Limitation for application for final decree.
13. Mortgagor's rights before confirmation of sale.
    14. Payment into Court.
    15. Return of documents relating to property.

O. 34, R.5, Notes 1—2.

16. Dismissal of mortgagee's application for final decree.
17. "Directing that the mortgaged property or a sufficient part thereof be sold."
18. Power to enlarge time.
19. Effect of sale under mortgage decree.
20. Execution of final decree for sale.
21. Transfer of final decree.
22. Injunction restraining mortgagor from receiving income of mortgaged property.
23. Construction of mortgage decree.
24. Appeal.
25. Court-fee.
26. Costs not recoverable from mortgagor personally.
27. Dekkhan Agriculturists Relief Act.
28. Limitation for application for execution of final decree.
29. Nature of proceedings for final decree.
30. Joint decree-holders.

Acquisition under the Land Acquisition Act—Effect—Final decree, if essential. See Note 17, Pt. (2).
Decree directing payment by instalments—Not a decree under R. 4. See Note 5, Pt. (1).
Defective applications—Effect. See Note 10, Pt. (4), also Note 16, Pt. (3).
Defective final decree—Effect. See Note 7, F.-N. (4).
Enlargement of mortgagor's interest. See Note 19, Pt. (3).
Mortgage suits—Decree for money can be passed. See R. 4, Note 4, Pt. (1), see also R. 6, Note 10, Pts. (3), (4), (6) and (8).
Non-liability of non-parties to final decree. See Note 20, F.-N. (2).
"Order absolute," and final decree—Effect of—Difference. See Note 13, Pts. (4) and (5).
Order in which properties are to be sold. See Note 17, Pt. (1) also R. 4, Note 10.
Partition subsequent to mortgage—Remedy of mortgagee. See Note 17, Pt. (3).
Preliminary decree not questionable in appeal from final decree. See Note 24, also S. 97, Notes 1 and 5.
Sub-mortgagee's rights. See R. 1, Note 9, Pt. (3).
Who may apply for final decree. See Note 10, Pts. (1) and (5) also see Note 30, Pt. (2).

1. **Transfer of Property Act, S. 89.**—This rule corresponds to S. 89 of the Transfer of Property Act. The chief points of distinction between the two provisions are the following:—

(1) Under S. 89 an *order absolute* for sale was passed while under the present rule a final *decree* is passed.

(2) Under S. 89, payment of the mortgage money could be made either to the *plaintiff* or *into the Court*. Under the present rule, payment has to be made only *into the Court*.

(3) The words at the end of S. 89, "and thereupon, the defendant's right to redeem and the security shall both be extinguished" have been omitted in the present rule.

(4) The provision for the passing of a *decree* in case of payment by the mortgagor within the proper time is new.

2. **Amendments after 1908.**—The chief changes introduced in the rule by the Amendment Act, XXI of 1929 are as follows:—

(1) The present rule makes it quite clear that the decree under it is a *final* decree.

(2) Upon payment of the mortgage money under the preliminary decree, the present rule requires the mortgagor to *apply* for a *final decree*.

O. 34, R. 5, Notes 2–4.

(3) The provision in Sub-R. (1) as to the defendant paying the mortgage money at any time before the confirmation of the sale is new.

(4) Sub-R. (2) is new.

3. **Scope of the rule.**—The present rule applies only where a preliminary decree has been passed under R. 4.[1]

4. **Final decree when can be passed.**—O. 34 contemplates the passing of a preliminary decree and a final decree in all mortgage suits. The final decree for sale is passed when the payment directed by the preliminary decree has not been made within the proper time. A final decree under R. 5 is necessary only when the decree originally passed is a preliminary decree under R. 4. Hence where only a money decree has been passed, a final decree under the rule is not necessary although the decree may authorise the decree-holder to realise the decree-amount by sale of the judgment-debtor's property.[1] Similarly, where, at the time of the coming into force of the present Code of Civil Procedure, a decree had already been passed under Transfer of Property Act, S. 88, it has been held that a final decree under the present rule is not necessary.[2] But where property is charged with the payment of the decretal amount it was held in the undermentioned case that the proper mode of realising the decree-amount is to obtain a decree absolute for sale and that it was not necessary to *attach* the property.[3]

Where the plaintiff under a preliminary decree on a mortgage is directed to pay off a prior mortgage before bringing the mortgaged property to sale, he is entitled to apply for a final decree for sale even though he has made the payment only *after* the time fixed by the decree.[4]

Where the purchaser of a portion of the equity of redemption is made one of the defendants to a suit on a mortgage and, after the preliminary decree is passed, obtains an assignment of the mortgagee's rights, he is entitled to apply for a final decree, although only for a *proportionately reduced portion* of the mortgage-amount.[5] Although a final decree is necessary to be passed before execution, yet a mortgagor who allows execution to take place, without raising any objection, will be estopped from contending that the want of a final decree is fatal to the proceedings.[6] Similarly, it was held under the

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Order 34, Rule 5—Note 3.

[1] *Bechu v. Bisharam*, (1909) 1 Ind Cas 677 (680): 10 Cal L Jour 91.

Note 4.

[1] *Machullathil Chandukutty Nair v. Narayanan Nair*, 1925 Mad 1083 (1084): 87 Ind Cas 557.

[2] *Pedda Aswatappa v. Ankulu Gadu*, 1924 Mad 603 (603): 19 Mad L W 290: 1924 Mad W N 306: 78 Ind Cas 70; *Balaji Rao Sahib v. Harirama Chetty*, (1916) 32 Ind Cas 39 (40) Mad; *Keshawesarindra Sahi v. Debendra Bala Dassi*, (1918) 48 Ind Cas 245 (249): 4 Pat L Jour 213: 1919 Pat H C C 121; *Viswanatha Sastri v. Sitalakshmi Ammal*, 1921 Mad 126 (130, 131): 13 Mad L W 37: 1921 Mad W N 181: 61 Ind Cas 979.

[3] *Ananthalwar v. Narayana Prasad*, 1927 Mad 190 (191, 192): 24 Mad L W 836: 99 Ind Cas 656.

[4] *Debi Prasad v. Jaikaran Singh*, (1902) 24 All 479 (481): 1902 All W N 125. See also *Nasab Ali v. Nageshar*, (1900) 20 All W N 95 (95).

[5] *Sundarammal v. Sundara Reddi*, 1927 Mad 560 (561): 38 Mad L Tim 148: 100 Ind Cas 338.

[6] *Keshawesarindra v. Debendra Bala*, (1918) 48 Ind Cas 245 (250): 4 Pat L Jour 213: 1919 Pat H C C 121; *Epoor Ramaswamy Reddy v. Kandadai Rangamannar Iyengar*, (1914) 23 Ind Cas 390 (391): 26 Mad L Jour 255: 15 Mad L Tim 246: 1914 Mad W N 622; *Chhaganlal v. Jayaram*, 1927 Bom 131 (133): 29 Bom L R 107: 51 Bom 125: 100 Ind Cas 956.

O. 34, R. 5, Notes 4—6.

Transfer of Property Act, that no objection as to the want of a formal order absolute for sale could be raised where execution had once proceeded without objection.[7]

5. **Consent decrees and decrees on award.**—We have already seen in Note 4 that this rule applies only where a preliminary decree has been passed under R. 4. A consent decree providing for payment by instalments is not a *preliminary* decree under R. 4 and hence, a final decree under the present rule is not necessary in such a case.[1] Similarly, a decree on an *award* is not a preliminary decree under R. 4 and no final decree is necessary to be passed.[2] But a decree-holder is not *precluded* from applying for a final decree where a preliminary decree by consent has been passed.[3] *See* Note 15 to R. 4 for further notes.

Where a mortgage itself is invalid, as being opposed to a certain statute, it cannot be validated by a consent decree on the mortgage. The mortgagor can resist an application for final decree on the ground that the mortgage is not binding on him.[4]

6. **Only one final decree to be passed.**—This rule contemplates the passing of only *one* final decree.[1] Where the preliminary decree is appealed from, the final decree should be based on the appellate decree.[2] From this it was concluded by the Allahabad High Court in the undermentioned case that a final decree cannot be passed pending an appeal from the preliminary decree and a final decree so passed is invalid and inexecutable.[3] But this view has

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(7) *Nobin Chandra Chatterjee* v. *Mazhar Ali Khan*, (1899) 2 Oudh Cas 337 (339, 340); *Appa Rao* v. *Krishna Ayyangar*, (1902) 25 Mad 537 (539); *Gunindra* v. *Baijnath*, (1904) 31 Cal 370 (371, 372); *Phul Chand Ram* v. *Nursing Pershad*, (1901) 28 Cal 73 (77); *Siva Prasad Maity* v. *N Lall Kar Mahapatra*, (1891) 18 Cal 139 (142). But see *Subramaniam Pillai* v. *Narayana Aiyangar*, (1893) 9 Mad L Jour 349 (350).

Note 5.

(1) *Biswa Nath Prosad* v. *Bhagwandin*, (1911) 10 Ind Cas 536 (537, 538): 14 Cal L Jour 648; *Ganganand Singh* v. *Rameshwar Singh*, 1927 Pat 271 (277): 6 Pat 388: 102 Ind Cas 449: 8 Pat L Tim 730; *Kunhammad Hajee* v. *Kozhuvammal*, 1928 Mad 38 (39): 106 Ind Cas 395; *Ishan Chandra* v. *Nilratan*, 1923 Pat 375 (378): 4 Pat L Tim 311: 1 Pat L R 217: 1923 Pat H C C 184: 72 Ind Cas 1049: 2 Pat 538; *Sivasubramania Pillai* v. *Rukkumuthu Mooppan*, 1924 Mad 645 (646): 19 Mad L W 502: 1924 Mad W N 454: 79 Ind Cas 418; *Kora Lal* v. *Punjab National Bank, Ltd*, 1921 Lah 384 (385): 5 Lah L Jour 67; *Utanka Lal* v. *Tarak Nath*, 1929 Cal 11 (14): 48 Cal L Jour 357: 114 Ind Cas 156; *Abdul Halim Abdul Hossain* v. *Hemandra Kumar Roy*, 1926 Cal 1179 (1180): 96 Ind Cas 686; *Raja Hemendra Lal Singh Deo* v. *Fakir Chand*, 1923 Cal 626 (628): 27 Cal W N 621: 50 Cal 650: 74 Ind Cas 929; *Shankar* v. *Ganpat*, 1929 Bom 227 (228): 31 Bom L R 439: 119 Ind Cas 186; *Askari Hasan* v. *Jahangiri Mal*, 1927 All 167 (168): 25 All L J 107: 100 Ind Cas 59: 49 All 297; *Bechu Singh* v. *Bichharam Sahu*, (1909) 1 Ind Cas 677: 1 Cal L Jour 91; *Sital Singh* v. *Baijnath*, 1922 All 383 (384): 20 All L J 602: 44 All 668: 75 Ind Cas 485; *Sarat Chandra* v. *Joy Sankar*, 1931 Cal 546 (548): 35 Cal W N 332: 134 Ind Cas 80 [Solenama expressly stating that no final decree is needed].

(2) *Ghulam Rasul* v. *Pamandas*, 1927 Sind 103 (104): 19 Sind L R 202: 99 Ind Cas 178; *Nripendranath Chatterjee* v. *Jhumack Mandar*, 1924 Pat 263 (264): 3 Pat 221: 4 Pat L Tim 694: 2 Pat L R 9: 80 Ind Cas 588; *Mam Chand* v. *Roshan Lal*, 1933 Lah 48 (50): 33 Pun L R 975 [O 34 not applicable to decrees on an arbitration award].

(3) *Nanku Singh* v. *Paramatmanand Singh*, 1931 All 340 (341): 1931 All L J 58: 130 Ind Cas 487; *Abir Pramanik* v. *Jahar Mahammad Mandal*, (1907) 34 Cal 886 (891): 6 Cal L Jour 95: 11 Cal W N 879.

(4) *Ramchandra Suru* v. *Venkatalakshminarayana*, (1919) 50 Ind Cas 577 (579): 1919 Mad W N 332: 37 Mad L Jour 65.

Note 6.

(1) *Gajadhar Singh* v. *Kishen Jiwan Lal*, (1917) 42 Ind Cas 93 (94): 39 All 641: 15 All L J 734; *Ram Ratan* v. *Prag Dutt Pande*, (1911) 9 Ind Cas 835 (836): 8 All L J 364.

(2) *Gajadhar Singh* v. *Kishen Jiwan Lal*, (1917) 42 Ind Cas 93 (94): 39 Mad 641: 15 All L J 734; *Jowad Hussain* v. *Gendan Singh*, 1926 P C 93 (94): 53 Ind App 197: 24 All L J 765: 7 Pat L Tim 575: 1926 Mad W N 591: 44 Cal L Jour 63: 3 Oudh W N 690: 24 Mad L W 394: 6 Pat 24: 28 Bom L R 1395: 31 Cal W N 58: 51 Mad L Jour 761: 98 Ind Cas 499 P C; *Wahid Ali* v. *Durga Shankar*, 1926 All 343 (348): 93 Ind Cas 223.

(3) *Lalman* v. *Shiam Singh*, 1926 All 291 (292): 24 All L J 288: 92 Ind Cas 608.

not been accepted by the High Court of Patna,[4] Lahore[5] and Calcutta[6] and has been overruled by the Allahabad High Court itself subsequently.[7] Where a final decree is passed and subsequently the preliminary decree is modified on appeal the Court of first instance may either prepare a *new* final decree or *amend* the preliminary decree already passed.[8]

Under S. 89 of the Transfer of Property Act, successive applications for an order absolute were maintainable, such applications being proceedings in *execution*.[9]

7. **Form of final decree for sale.**—For the form of a final decree for sale, *see* Appendix D, Form 6. Nothing in R. 4 or in this rule requires the *specification* of the mortgaged property in the decree.[1] Where the mortgage-money is payable under the bond in a *lump sum* the Court is not justified in allowing it to be paid in *instalments*.[2]

Where a co-mortgagee was made a party-defendant to a suit for sale on the mortgage and the decree directed a payment to him of a part of the decretal amount, it was held that the form of the decree was correct.[3] *See also* the undermentioned cases.[4]

8. **Court cannot go behind preliminary decree.**—When preparing a final decree under this rule, the Court has no power to go behind the preliminary decree.[1] Similarly, the amount fixed in the preliminary decree cannot be altered except for some reason which may have happened *subsequent* to the preliminary decree.[2]

9. **Court to which application for final decree is to be made.**—Though the preliminary decree may be modified by the appellate Court, the application

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(4) *Somar Singh* v. *Deonandan*, 1927 Pat 215 (218): 6 Pat 780: 102 Ind Cas 811: 8 Pat L Tim 879.

(5) *Shibbamal* v. *Rup Narain*, 1928 Lah 904 (906): 29 Pun L R 571: 111 Ind Cas 274; *Bishamber Dass* v. *Nizam Ali*, (1928) 108 Ind Cas 751: 1928 Notes 57 (*d*).

(6) *Ram Ghulam Lalsahu* v. *Chowdri Babu Barsati Singh*, (1906) 10 Cal W N 910 (912).

(7) *Sat Parkash* v. *Bahal Rai*, 1931 All 386 (388): 1931 All L J 508: 53 All 283 F B [1926 All 291 overruled]; *Khair-un-nissa* v. *Oudh Commercial Bank*, 1929 All 287 (289): 1929 All L J 480: 51 All 640: 119 Ind Cas 510 [1926 All 291 doubted]. See also *Janki Das* v. *Sheo Prasad*, 1932 All 238 (238): 1932 All L J 43: 136 Ind Cas 75: 54 All 344 [Appeal from preliminary decree—Final decree not to be stayed but execution of final decree may be stayed under S 151, C P C].

(8) *Mahomed Yusuf Khan* v. *Mahadev Prasad*, 1926 All 134 (135): 6 L R All (Civ) 533: 89 Ind Cas 131. But see *Fateh Singh* v. *Umrao*, (1932) 15 Nag L Jour 124 (127, 128) [Preliminary decree affirmed on appeal—Final decree passed—Amendment of preliminary decree not available].

(9) *Bal Krishnaji Maharaj* v. *Mithu Lal*, (1903) 25 All 212 (213): 1903 All W N 17; *Sat Narain* v. *Radha Krishna*, (1903) 25 All 264 (265): 1903 All W N 80.

Note 7.

(1) *Udhister Singh* v. *Kausilla*, (1916) 34 Ind Cas 79 (80): 38 All 398.

(2) *Maya Das* v. *Buta*, 1930 Lah 132 (133).

(3) *Upendra Nath Basa* v. *Kali Charan Mitra*, 1930 All 634 (635): 1930 All L J 1472: 128 Ind Cas 439.

(4) *Mancherji Harmusji* v. *Thakordas Harkishondas*, (1903) 5 Bom L R 389 (392) [Absence of the word "absolute" after "order" in order under S 89 was not fatal]; *Bepin Behari* v. *Brojo Nath*, (1882) 8 Cal 357 (363, 364): 6 Ind Jur 523 [Apportionment of mortgage debt]; *Dhanpat Rai* v. *Nathe Khan*, 1926 Lah 364 (364, 365): 94 Ind Cas 58 [Final decree made by endorsement on preliminary decree itself—Absence of separate final decree is merely an irregularity].

Note 8.

(1) *Kallo* v. *Naider Singh*, 1929 All 252 (253): 1929 All L J 425: 115 Ind Cas 462. See also *Ghasi Ram* v. *Ram Dial*, 1931 All 657 (658, 659): 132 Ind Cas 807: 1931 All L J 1007 [Order in which properties are to be sold—Put in issue and negatived—Not incorporated in preliminary decree —Not to be introduced in the final decree].

(2) *Mitthu Lal* v. *Deoji*, 1927 All 589 (589): 25 All L J 591: 102 Ind Cas 1: 49 All 809. See also *Moha Prosad Singh* v. *Ramani Mohan Singh*, (1909) 4 Ind Cas 546 (547): 13 Cal W N 744 [Provision for any further interest than that provided for in preliminary decree cannot be added].

O. 34, R. 5, Notes 9--12.

for final decree should be made only to the Court of *first instance.*[1] Under S. 89 of the Transfer of Property Act, it was held that the application for an order absolute under S. 89 could be made to the Court charged with the execution of decrees, the proceeding being one in *execution.*[2]

10. Application for final decree, if and when necessary.—The rule requires that the mortgagee must *apply* for a final decree.[1] But it has been held that an application for sale of the mortgaged property may be treated as an application for a decree absolute.[2] An application for a final decree in a mortgage suit need not, however, be in *writing.*[3] Nor need the plaintiff, in his application, *describe the properties* with respect to which he asks for final decree for sale and therefore, if any item is omitted in the application, it cannot be contended that the final decree should not be passed in respect thereof.[4] A benamidar-transferee of a preliminary decree may apply for a final decree.[5]

11. Notice to judgment-debtor, if necessary before passing final decree.—As has been seen in the Note 7 to R. 3, *ante,* this rule also does not require any *notice* to be issued to the judgment-debtor before the passing of a final decree though, as a matter of practice, such notice should generally be given, on the principle that a party should be heard before any order is passed against him.[1] Where a final decree has been passed *ex parte* against a mortgagor to whom no notice has been given of the application for final decree, the Court has inherent jurisdiction to set aside the *ex parte* decree in furtherance of justice and equity.[2] For cases under S. 89, Transfer of Property Act, *see* the undermentioned cases.[3]

See also Note 7 to R. 3, *ante.*

12. Limitation for application for final decree.—An application for a final decree under O. 34 is not an application for *execution.*[1] The article

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Note 9.

[1] *Venkata Krishna Aiyar* v. *Thiagaraja Chetty,* (1900) 23 Mad 521 (523): 10 Mad L Jour 145; *Shamal Dhone Dutt* v. *Lakkimoni Debi,* (1910) 6 Ind Cas 323 (325): 13 All L J 459.

[2] *Oudh Behari* v. *Nageshar,* (1891) 13 All 278 (280): 1891 All W N 83 F B.

Note 10.

[1] *Narayan Rao* v. *Bandha Krishna,* (1918) 46 Ind Cas 107 (112): 20 Bom L R 481: 42 Bom 309.

[2] *Natesa Udayan* v. *Annasami Udayan,* (1916) 34 Ind Cas 756 (757): 3 Mad L W 468; *Veera Reddi* v. *Ramalinga Mudaly,* (1909) 4 Ind Cas 42 (43): 6 Mad L Tim 861; *Sreekakulam Venkatasubbayya* v. *Lavaaru Dade Sahib,* (1909) 2 Ind Cas 433 (433): 8 Mad L Tim 232; *Banu Mal* v. *Paras Ram,* 1925 Lah 640 (642): 7 Lah L Jour 397: 26 Pun L R 784: 92 Ind Cas 254; Contra *Saker Chand Narsidas* v. *Yacoob,* 1923 Sind 14 (15): 73 Ind Cas 311: 17 Sind L R 255.

[3] *Sitaram* v. *Laxman Rao,* 1926 Nag 152 (153): 87 Ind Cas 820.

[4] *Probit Basant Lal* v. *Basanti,* 1929 All 551 (551): 117 Ind Cas 102: 1929 All L J 1097.

[5] *Kamta Prasad* v. *Indomati,* (1915) 29 Ind Cas 593 (594): 37 All 414: 13 All L J 557.

Note 11.

[1] *Rasan Chettiar* v. *Rangayan Chettiar,* 1930 Mad 105 (107): 30 Mad L W 551: 1929 Mad W N 867: 120 Ind Cas 72; *Mahomed* v. *Thomas,* (1906) 4 Cal L Jour 317 (318); *Krishna Aiyar* v. *Muthusami Aiyar,* (1901) 25 Mad 506 (507): 12 Mad L Jour 62; *Annaji* v. *Fakira,* 1922 Nag 175 (177): 67 Ind Cas 282: 6 Nag L Jour 27; *Chaitram* v. *Daolat Gond,* (1896) 9 C P L R 5 (7); *Narayana* v. *Papayya,* (1899) 22 Mad 133 (136): 8 Mad L Jour 205; *Sri Maruthi Swamiar* v. *Subramania Iyer,* 1929 Mad 893 (894): 29 Mad L W 393: 118 Ind Cas 831.

[2] *Bibi Tasliman* v. *Harihar Mahto,* (1905) 32 Cal 253 (256): 9 Cal W N 81 F B; *Mahim Chandra* v. *Noba Chandra,* 1931 Cal 58 (59): 34 Cal W N 758: 130 Ind Cas 441; *Pochanna* v. *Pochanna,* 1930 Nag 136 (136): 120 Ind Cas 332; But see *Babooji* v. *Ramgopal,* 1923 Nag 320 (320): 19 Nag L R 124: 73 Ind Cas 32 [Notice served —Defendant not appearing—Second notice not necessary—If one is ordered but not served, there is no ground for setting aside the *ex parte* decree].

[3] *Stevens* v. *Kamta Pershad,* (1909) 2 Ind Cas 941 (943): 10 Cal L Jour 19; *Pandu Prabhu* v. *Juje Lobo,* (1904) 27 Mad 40 (42).

Note 12.

[1] *Lakshmi Achi* v. *Subbarama Aiyar,* (1915) 29 Ind Cas 142 (143): 39 Mad 488: 2 Mad L W 403: 28 Mad L Jour 491: 1915 Mad W N 327: 17 Mad L Tim 385.

of the Limitation Act applicable to such an application is Art. 181 and time begins to run when the right to apply for a final decree accrues.[1-a] On this point, however, there was a conflict of opinion under the Transfer of Property Act. The reason for this was that, under that Act, the procedure was to get an *order* absolute and not a *final decree*. Three views were taken of the question:—

(1) An application for an order absolute was an application for execution[2] and was governed by Art. 179 of the Limitation Act of 1877 (now Art. 182 of the Limitation Act of 1908).[3]

(2) The proceedings for an order absolute under the Transfer of Property Act were proceedings in *suit*[4] and that Art. 178 (now Art. 181 of the Limitation Act of 1908) was applicable to them.[5]

(3) Art. 178 did not apply to applications for order absolute under the Transfer of Property Act as they were not applications

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(1-a) *Subbalakshmi* v. *Ramalinga*, (1919) 48 Ind Cas 298 (299): 42 Mad 52: 1918 Mad W N 792: 35 Mad L Jour 552: 8 Mad L W 526: 24 Mad L Tim 486; *Ahmed Khan* v. *Gaura*, (1918) 43 Ind Cas 518 (519): 16 All L J 143; *Vinayak Rao Krishna Rao* v. *Baijnath Sahligram*, (1918) 48 Ind Cas 934 (934, 935): 15 Nag L R 86; *Bala Ram* v. *Kanhai*, (1916) 38 Ind Cas 385 (386): 1 Pat L Jour 364: 3 Pat L W 74; *Madho Ram* v. *Nihal Singh*, (1915) 30 Ind Cas 494 (496, 497): 38 All 21: 13 All L J 985; *Beni Singh* v. *Berhamdeo*, (1915) 28 Ind Cas 211 (212, 213): 19 Cal W N 473: 22 Cal L Jour 66; *Datto* v. *Shankar*, (1914) 21 Ind Cas 318 (319): 38 Bom 32: 15 Bom L R 841; *Amolak Chand* v. *Sarat Chunder*, (1911) 11 Ind Cas 943 (946): 38 Cal 913: 16 Cal W N 49; *Rudra Partab Singh* v. *Mt Suraj Kuar*, 1926 Oudh 12 (12): 2 Oudh W N 842: 91 Ind Cas 617; *Chhotey Narain Singh* v. *Kedar Nath Singh*, 1922 Pat 201 (202): 3 Pat L Tim 565: 1 Pat 435: 1922 P H C C 342: 66 Ind Cas 97; *Mummadi* v. *Venkata*, 1922 Mad 65 (66): 1922 Mad W N 11: 42 Mad L Jour 51: 16 Mad L W 198: 30 Mad L Tim 228: 69 Ind Cas 366; *Bhutnath* v. *Tara Chand*, 1921 Cal 551 (552): 33 Cal L Jour 115: 25 Cal W N 595: 59 Ind Cas 177; *Harjivan* v. *Gajanan*, 1923 Bom 420 (421): 25 Bom L R 459: 73 Ind Cas 187; *Jagdish Singh* v. *Ram Adhin Singh*, (1917) 41 Ind Cas 858 (859): 20 Oudh Cas 205; *Sital Singh* v. *Baijnath*, 1922 All 383 (384): 20 All L J 602: 44 All 668: 75 Ind Cas 485; *Mahamad Kamel* v. *Ahmed Ali*, 1925 Cal 1030 (1031): 87 Ind Cas 746; *Thathara Naunabha* v. *Krishnammal*, (1912) 16 Ind Cas 799 (800): 14 Mad L Tim 194; *Bala Ram Naik* v. *Kanhai Bharan*, (1917) 38 Ind Cas 385 (386): 1 Pat L Jour 364: 3 Pat L W 74; *Baldeo Das* v. *Pitambar*, 1923 All 29 (29): 70 Ind Cas 840; *Chuni Lal* v. *Tikamdass*, (1917) 39 Ind Cas 854 (856): 13 Nag L R 76; *Ramji Lal* v. *Karan Singh*, (1918) 40 Ind Cas 424 (425): 39 All 532: 15 All L J 448; *Nazamuddin* v. *Bohra Bhaim Sen*, (1918) 43 Ind Cas 870 (871): 40 All 203: 16 All L J 85; *Pattabirama Naidu* v. *Subramania Chetti*, (1918) 45 Ind Cas 76: 7 Mad L W 438. But see *Biswambhar* v. *Ram Sundar Kaibarta Das*, (1915) 30 Ind Cas 719 (720): 42 Cal 294.

(2) *Balkishnaji Maharaj* v. *Mithu Lal*, (1903) 25 All 212 (213, 214): 1903 All W N 17; *Appiah* v. *Rami Reddi*, (1906) 16 Mad L Jour 503 (504): 1 Mad L Tim 294; *Ali Ahmad* v. *Naziran Bibi*, (1902) 24 All 542 (544): 1902 All W N 160; *Oudh Behari* v. *Nageshar*, (1890) 13 All 278 (281): 1891 All W N 83 F B.

(3) *Chunnilal* v. *Harnamdas*, (1898) 20 All 302 (304): 1898 All W N 40; *Parmeshri Lal* v. *Mohan Lal*, (1898) 20 All 357 (358): 1898 All W N 71; *Munna Lal* v. *Sarat Chunder*, (1915) 27 Ind Cas 683 (685): 17 Mad L Tim 120: 21 Cal L Jour 118: 2 Mad L W 282: 19 Cal W N 561: 17 Bom L R 408: 28 Mad L Jour 470: 42 Cal 776: 42 Ind App 88: 1914 P C 150 P C; *Krishna Bar* v. *Srimati Ramamoyi Debia*, (1915) 29 Ind Cas 120 (122): 19 Cal W N 470; *Batuk Nath* v. *Munni Dai*, (1914) 23 Ind Cas 644 (645): 18 Cal W N 740: 12 All L J 596: 19 Cal L Jour 574: 16 Bom L R 360: 27 Mad L Jour 1: 16 Mad L Tim 1: 36 All 284: 1 Mad L W 729; *Abdul Majid* v. *Jawahir Lal*, (1914) 23 Ind Cas 649 (651): 36 All 350: 1 Mad L W 483: 12 All L J 624: 16 Bom L R 395: 18 Cal W N 963: 19 Cal L Jour 626: 27 Mad L Jour 17: 1914 Mad W N 485: 16 Mad L Tim 44 [Reversing 33 All 154: 7 All L J 1001: 7 Ind Cas 926 F B]; *Mahomed Husain Sahib* v. *Abdul Kareem Sahib*, (1915) 29 Ind Cas 237 (238): 17 Mad L Tim 424: 39 Mad 544; *Baldeo* v. *Ibn*, (1905) 27 All 625 (627): 1905 All W N 136: 2 All L J 371; *Bhagwan* v. *Ganu*, (1899) 23 Bom 644 (650): 1 Bom L R 136; *Troylokya Nath* v. *Joti*, (1903) 30 Cal 761 (768): 8 Cal W N 251; *Venkatarazu* v. *Chinna Ramayya*, (1901) 24 Mad 695 (702); *Ramayyan* v. *Kadir Bacha Sahib*, (1908) 31 Mad 68 (69, 70): 17 Mad L Jour 596: 3 Mad L Tim 254.

(4) *Parsotam Narain* v. *Chheda Lal*, (1907) 29 All 76 (80): 3 All L J 675: 1906 All W N 283; *Ganpati* v. *Daji*, (1908) 4 Nag L R 158 (160); *Adjudhia Pershad* v. *Baldeo Singh*, (1894) 21 Cal 818 (823, 824). See *Baxi* v. *Kesho Rao*, (1894) 7 C P L R 40 (41). See also *Akikunnissa* v. *Roop Lal*, (1898) 25 Cal 133 (135); *Tara Pado Ghose* v. *Kamini Dassi*, (1902) 29 Cal 644 [Question regarding order absolute for sale is not regarding execution within S 244].

(5) *Ali Ahmad* v. *Naziran Bibi*, (1902) 24 All 542 (544, 546): 1902 All W N 60 [In this case it was held that Art. 178 applied though the application was to be held to be one for execution]; *Rungiah* v. *Nanjappa*, (1903) 26 Mad 780 (784): 13 Mad L Jour 412; *Udit Narain* v. *Jagannath*, (1904) 1 All L J 15 (17); *Chhedi* v. *Lalu*, (1902) 24 All 300 (301, 302): 1902 All W N 60; *Thakur Das* v. *Shadi Lal*, (1886) 8 All 56 (57): 1885 All W N 327. See *Appiah* v. *Rami Reddi*, (1906) 16 Mad L Jour 503: (504): 1 Mad L Tim 294.

O. 34, R. 5, Note 12.

under the Civil Procedure Code, within the meaning of that article[6] and, therefore, there was no period of limitation applicable to such an application.[7]

All these cases are only of academic interest now in view of the fact that it is made quite clear that an application under this rule is for a final *decree* and not one on *execution*.

Where the Court, in effect, directs the stay of proceedings for a final decree, limitation runs from the date of the removal of the bar.[7-a]

Where the preliminary decree directs the mortgagee to pay off a prior mortgage as a condition of his enforcing his own mortgage, the time requisite for ascertaining the amount due to the prior mortgagee may be deducted when calculating limitation for an application for final decree.[8] Where, in such a case, no time is fixed for payment to the prior mortgagee, the plaintiff is not entitled to claim that limitation does not begin to run for his application for final decree until he has paid off the prior mortgage, however long he may take to do so; he is only entitled to a deduction of six months from the date of the preliminary decree.[9]

Where, on an application for final decree, an extension of time is granted to the mortgagor, and a fresh application is made by the mortgagee subsequently, it is to be deemed a continuation of the previous application.[10]

Where an appeal is preferred against a preliminary decree, limitation for an application for a final decree runs only from the date of the appellate decree and not from the expiry of the period fixed by the lower Court for payment,[11] though the appellate decree is passed three years after the expiry

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(6) *Tiluck Singh* v. *Parsotein Proshad*, (1895) 22 Cal 924 (927); *Madhab Moni Dasi* v. *Pamela Lambert*, (1910) 37 Cal 796 (803): 12 Cal L Jour 328: 6 Ind Cas 537: 15 Cal W N 337; *Tallappa* v. *Dattu*, (1892) 5 C P L R 61 (62); *Nathuram* v. *Gokuldas*, (1898) 11 C P L R 141 (142) (Cf) *Seth Bhagwandas* v. *Shridhar*, (1907) 3 Nag L R 55 (59) [Proceedings between decree *nisi* and order absolute are neither a continuation of the suit, nor proceedings in execution].

(7) *Madhab Moni Dasi* v. *Pamela Lambert*, (1910) 37 Cal 796 (803): 12 Cal L Jour 328: 6 Ind Cas 537: 15 Cal W N 337; *Rambir* v. *Drigpal*, (1894) 16 All 23 (24, 25): 1893 All W N 198; *Ahmadali* v. *Maung Ton*, (1910) 8 Ind Cas 986 (988): 3 Bur L Tim 142; *Ganu* v. *Narayan Vithal*, (1903) 5 Bom L R 540 (541). See *Bechu Singh* v. *Bicharam Sahu*, (1909) 1 Ind Cas 677 (682): 10 Cal L Jour 91 [Court to be guided by consideration whether any delay on mortgagee's part has not been unreasonable so as to bring it within the rules applied in such cases by Courts of equity]. See also *Jaka Patel* v. *Mt Jamma*, (1903) 16 C P L R 114 (116).

(7-a) *Chhotey Narain Singh* v. *Kedar Nath Singh* 1922 Pat 201 (203): 66 Ind Cas 97: 3 Pat L Tim 565: 1 Pat 435: 1922 Pat H C C 342.

(8) *Hemendra* v. *Dharani*, 1921 Cal 381 (382): 33 Cal L Jour 260: 25 Cal W N 376: 62 Ind Cas 418. See *Gayan Singh* v. *Ata Husain*, 1921 All 56 (58): 43 All 320: 19 All L J 83: 60 Ind Cas 817 [The running of time is postponed only for six months].

(9) *Gayan Singh* v. *Ata Husain*, 1921 All 56 (58): 43 All 320: 19 All L J 83: 60 Ind Cas 817.

(10) *Chimnaji* v. *Sonaji*, 1925 Nag 291 (292): 21 Nag L R 47: 88 Ind Cas 901.

(11) *Gajadhar Singh* v. *Kishen Jiwan Lal*, (1917) 42 Ind Cas 93 (94): 39 All 641: 15 All L J 734; *Nizamuddin* v. *Bohra*, (1918) 48 Ind Cas 870 (871): 40 All 203: 16 All L J 85; *Jayanti Venkayya* v. *Damisetti*, 1921 Mad 414 (415): 44 Mad 714: 41 Mad L Jour 117: 14 Mad L W 180: 64 Ind Cas 470; *Jowad Hussain* v. *Gendan Singh*, 1926 P C 93 (94): 53 Ind App 197: 24 All L J 765: 7 Pat L Tim 575: 1926 Mad W N 591: 44 Cal L Jour 63: 3 Oudh W N 690: 24 Mad L W 394: 6 Pat 24: 28 Bom L R 1395: 31 Cal W N 58: 51 Mad L Jour 781: 98 Ind Cas 499 P C; *Fitzholmes* v. *Bank of Upper India, Ltd*, 1927 P C 25 (25, 26): 1927 Mad W N 87: 25 All L J 78: 38 Mad L Tim 46: 4 Oudh W N 181: 52 Mad L Jour 1866: 28 Pun L R 117: 100 Ind Cas 22: 54 Ind App 52: 31 Cal W N 444: 45 Cal L Jour 297: 25 Mad L W 722: 29 Bom L R 782: 8 Pat L Tim 377: 8 Lah 253 P C; *Fitzholmes* v. *Bank of Upper India, Ltd*, 1924 Lah 582 (583): 5 Lah 257: 81 Ind Cas 649; *Tula Ram* v. *Bhup Singh*, 1925 All 691 (692): 23 All L J 867: 6 L R All Civ 485: 89 Ind Cas 214: 47 All 918; *Jowad Hussain* v. *Gendan Singh*, 1922 Pat 205 (207): 1922 Pat H C C 164: 3 Pat L Tim 329: 66 Ind Cas 790: 1 Pat 444; *Lallu Ram* v. *Jot Singh*, (1918) 47 Ind Cas 206 (207): 21 Oudh Cas 176; *Subbarayalu* v. *Sundararaja*, (1918) 48 Ind Cas 185 (186): 35 Mad L Jour 507. But see *Madho Ram* v. *Nihal Singh*, (1917) 30 Ind Cas 494 (497): 38 All 21: 13 All L J 985. But see also *Jagdish* v. *Ram Adhim*, (1917) 41 Ind Cas 858 (859): 20 O C 205.

O. 34, R. 5, Notes 12–13.

of the period fixed by the lower Court for payment.[12] But the dismissal of an appeal for *non-prosecution* does not give rise to a fresh starting point for limitation for an application for final decree.[13] *See* Note 9 to S. 148.

There is a conflict of opinion as to whether a plaintiff, who obtained a decree under the Transfer of Property Act, is bound, on the coming into force of the Civil Procedure Code, 1908, to apply for a *final decree* before proceeding to execute his decree. The High Courts of Madras and Patna have held that he is not bound to do so and that the Code will not affect his rights to execute the decree which had vested in him under the old law.[14] The High Court of Bombay has, on the other hand, taken a contrary view.[15] It is, however, clear that where the right to apply for an order absolute is barred by limitation even before the Code of 1908, came into force, no *fresh right* to apply for a final decree is conferred by the Code.[16]

There is no limitation for the mortgagor's application for deposit of the mortgage money under the preliminary decree.[17] Where an application for a final decree is dismissed, a subsequent application is not for a revival of the previous application.[18]

13. **Mortgagor's rights before confirmation of sale.**—Even before the amendment of 1929 it was held that the right of a mortgagor to redeem under a mortgage-decree was not lost till the sale was actually held and confirmed.[1] Thus it was held that the mortgagor could apply to stop a sale under O. 21, R. 69,[2] or have the sale set aside under O. 21, R. 89.[3] The amend-

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(12) *Fitzholmes* v. *Bank of Upper India, Ltd*, 1927 P C 25 (25, 26): 1927 Mad W N 87: 25 All L J 78: 38 Mad L Tim 46: 4 Oudh W N 181: 52 Mad L Jour 366: 28 Pun L R 117: 100 Ind Cas 22: 54 Ind App 52: 31 Cal W N 444: 45 Cal L Jour 297: 25 Mad L W 722: 29 Bom L R 782: 8 Pat L Tim 877: 8 Lah 253 P C.

(13) *Chhotey Narain* v. *Kedar Nath*, 1922 Pat 201 (203): 66 Ind Cas 97: 3 Pat L Tim 565: 1 Pat 435: 1922 Pat H C C 342.

(14) *Ramasami Reddi* v. *Sokkappa Reddi*, (1918) 48 Ind Cas 732 (733): 35 Mad L Jour 194; *Ganapathia Pillai* v. *Gopala Aiyar*, (1920) 56 Ind Cas 563 (566) Mad; *Balaji Rao Sahib* v. *Harirama Chetty*, (1916) 32 Ind Cas 39 (39, 40) Mad; *Keshawesarindra* v. *Rani Debendra*, (1918) 48 Ind Cas 245 (249): 4 Pat L Jour 213: 1919 Pat H C C 121.

(15) *Narsingrao* v. *Bandu Krishna*, (1918) 46 Ind Cas 107 (112): 42 Bom 309: 20 Bom L R 481.

(16) *Vemaraju Ramamma* v. *Mygopala Narayanaswami*, (1914) 22 Ind Cas 40 (41): 1914 Mad W N 251.

(17) *Banke Bihari Lal* v. *Ghani Ahmad*, 1922 Oudh 83 (84): 9 Oudh L J 14: 66 Ind Cas 944.

(18) *Ahmad Khan* v. *Gaura*, (1918) 43 Ind Cas 518 (519): 16 All L J 143; *Mummadi Venkatiah* v. *Boganatham Venkata Subbiah*, 1922 Mad 65 (66): 1922 Mad W N 11: 30 Mad L Tim 228: 16 Mad L W 198: 42 Mad L Jour 51: 69 Ind Cas 366.

Note 13.

(1) *Naubat Lal* v. *Mahadeo Prasad*, 1929 All 309 (311): 1929 All L J 419: 116 Ind Cas 297: 51 All 606; *Maulvi Mahomed Musa* v. *Aidal Singh*, 1922 Pat 92 (94): 65 Ind Cas 801: 3 Pat L Tim 232; *Jai Kishori* v. *Muhammad Ali Muhammad Khan*, (1921) 60 Ind Cas 560 (564): 7 Oudh L J 620; *Shah Mahadi Hasan* v. *Ismail Hasan*, (1920) 56 Ind Cas 172 (172): 18 All L J 622: 2 U P L R All 213: 42 All 517; *Muhammad Rafi* v. *Muhammad Askari*, (1917) 37 Ind Cas 433 (434): 1 Pat L Jour 261: 3 Pat L W 390; *Shiam Sunder Lal* v. *Har Narayan*, (1911) 9 Ind Cas 158 (159) All; *Lakhan Chowdhry* v. *Bacha Lal*, 1930 Pat 451 (452): 11 Pat L Tim 500: 126 Ind Cas 295; *Nakonda Nagasami Iyer* v. *Thirukonda Ellaragan*, 1925 Mad 1191 (1192): 86 Ind Cas 527 [Final decree for sale not executed—Mortgagor can bring separate suit for redemption]. But see *Asia Khatun* v. *Nurjahan Khatun*, 1933 Cal 39 (42, 43): 36 Cal W N 955: 59 Cal 1464 [Held that prior to Amendment of 1929, right of redemption was extinguished by the sale itself even before confirmation and also, that Act XXI of 1929 is not retrospective].

(2) *Misri Lal* v. *Mitthu Lal*, (1906) 28 All 28 (29): 1905 All W N 168; *Harjas Rai* v. *Rameshar*, (1898) 20 All 354 (356): 1898 All W N 70; *Raja Ram Singhji* v. *Chunni Lal*, (1897) 19 All 205 (208): 1897 All W N 47; *Alimea Chowdhuri* v. *Roshun Ali Matbar*, (1906) 3 Cal L Jour 533 (536); *Indarjit* v. *Ghulam Mohi-ud-din*, (1904) 1 All L J 699 (700); *Adipuranam* v. *Gopalasami*, (1908) 31 Mad 354 (358): 3 Mad L Tim 281: 18 Mad L Jour 259; *Bibi Jan Bibi* v. *Sri Sachi Bewah*, (1904) 31 Cal 863 (868): 8 Cal W N 684 F B; *Shyamkishen* v. *Sundar Koer*, (1904) 31 Cal 373 (377).

(3) *Dakshinamohan Roy* v. *Srimati Basubati Debi*, (1900) 4 Cal W N 474 (479); *Malikarju-*

O. 34, R. 5, Notes 13—14.

ment of 1929 gives express legislative sanction to the said view, namely, that the mortgagor's right to redeem continues till the *confirmation of the sale.*

In this connection it may be noted that, under S. 89 of the Transfer of Property Act, the defendant's right to redeem and the security became both *extinguished* on the passing of the order absolute.[4] The words "as to the extinguishment" have been omitted in the present rule with the effect that a final decree does not now extinguish the mortgage security or the right to redeem.[5]

Where a period has been fixed for the payment of the mortgage money under the preliminary decree, it is not open to the mortgagor to pay the money before the date fixed with costs and interest calculated *up to the date of payment* only and avoid further liability for costs and interest.[6]

See also the undermentioned case.[7]

14. **Payment into Court.**—Unlike the provisions of S. 89 of the Transfer of Property Act under which the defendant had to pay the mortgage money either to the *plaintiff* or into the *Court,* this rule provides that it should be paid *into the Court.*[1] But suppose the money is paid out of Court to the mortgagee. Then, if such payment is made *after* the *final decree* or after the order absolute (under the Transfer of Property Act) is passed, O. 21, R. 2

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nadu v. *Lingamurti,* (1902) 25 Mad 244 (257, 258): 12 Mad L Jour 279; *Tirumal Rao* v. *Syed Dastaghiri Miyah,* (1899) 22 Mad 286 (288); *Ashruf Ali Chowdhry* v. *Net Lal Sahu,* (1896) 23 Cal 682 (685); *Krishnaji* v. *Mahadev,* (1901) 25 Bom 104 (107): 2 Bom L R 635. But see *Kedar Nath Raut* v. *Kali Churn Ram,* (1898) 25 Cal 703 (709, 710): 2 Cal W N 353. See also *Khetter* v. *Faizuddin,* (1897) 24 Cal 682 (685) [Sale not set aside under Order 21, Rule 89, or R 90—Sale must be confirmed].

(4) *Commercial Bank of India* v. *Ateendrulayya,* (1900) 23 Mad 637 (641,, 642); *Lutar Ram* v. *Lal Ranjit Singh,* 1924 Oudh 85 (91): 73 Ind Cas 113: 11 Oudh L J 381; *Nanda Lal Agrani* v. *Jogendra Chandra Dutta,* 1924 Cal 881 (888): 39 Cal L Jour 222: 28 Cal W N 403: 82 Ind Cas 297; *Digambar* v. *Suajan,* 1929 Cal 233 (236): 33 Cal W N 100: 120 Ind Cas 97; *Matru Mal* v. *Durga Kunwar,* (1920) 55 Ind Cas 969 (971): 1920 P C 79: 1920 Mad W N 338: 18 All L J 396: 38 Mad L Jour 419: 11 Mad L W 529: 2 U P L R P C 75: 22 Bom L R 553: 32 Cal L Jour 121: 42 All 364: 47 Ind App 71: 27 Mad L Tim 319: 25 Cal W N 397 P C; *Rabnath Baksh* v. *Ganesh Prasad,* (1921) 60 Ind Cas 213 (215): 23 Oudh Cas 334: 2 U P L R (Oudh) 196; *Vidyasagar* v. *Ratipal,* (1914) 25 Ind Cas 752 (755): 17 O C 347: 1 Oudh L J 433 [Foreclosure suit—Right of redemption subsists till final decree—No question of limitation]; *Shadi Ram* v. *Het Ram,* (1913) 20 Ind Cas 59 (60): 11 All L J 634; *Het Ram* v. *Shadi Ram,* (1918) 45 Ind Cas 798 (800): 40 All 407: 45 Ind App 130: 5 Pat L W 88: 16 All L J 607: 1918 P C 34: 1918 Mad W N 518: 20 Bom L R 798: 22 Cal W N 1033: 35 Mad L Jour 1: 24 Mad L Tim 92: 28 Cal L Jour 188: 9 Mad L W 550: 12 Bur L Tim 73 P C; *Lakshmanan Chetty* v. *Muthaya Chetty,* (1921) 62 Ind Cas 833 (837): 40 Mad L Jour 126: 29 Mad L Tim 189. But see *Wanmi Kalinga Mudali* v. *Chidambara Chetty,* (1905) 29 Mad 37 (40); *Shyam Lal* v. *Bashiruddin,* (1906) 28 All 778 (780) ; 3 All L J 630 : 1906 All W N 230 [Person advancing money to mortgagor for paying off mortgage after order absolute but before sale, is entitled to subrogation—Last clause in S 89 only refers to matters connected with execution of mortgage decrees and does not affect principles of subrogation]. See also *Premchand* v. *Purnima,* (1888) 15 Cal 546 (552); *Bhugwan Das Khettry* v. *Nilkanta Ganguli,* (1905) 9 Cal W N 171 [Until sale is confirmed mortgage subsists].

(5) *Sukhi* v. *Ghulam Safdar Khan,* 1922 P C 11 (13): 26 Cal W N 279: 42 Mad L Jour 15: 65 Ind Cas 151: 24 Bom L R 590: 30 Mad L Tim 175: 48 Ind App 465: 43 All 469: 14 Mad L W 162: 1922 Mad W N 445; *Muthammal* v. *Razu Pillai,* (1918) 44 Ind Cas 753 (756): 28 Mad L Tim 106: 1918 Mad W N 251: 7 Mad L W 420; *Venkata Reddy* v. *Kunjappa Goundan,* 1924 Mad 650 (653): 47 Mad 551: 46 Mad L Jour 391: 20 Mad L W 137: 34 Mad L Tim 225: 1924 Mad W N 366: 83 Ind Cas 1022; *Jnanendra Nath Singh Roy* v. *Shorashi Charan Mitra,* 1922 Cal 28 (27): 49 Cal 626: 69 Ind Cas 759; *Ewaz Ali Beg* v. *Genden Lal,* (1928) 111 Ind Cas 788: 1928 Notes 83 (a); *Ram Narain* v. *Sahadeo,* 1922 Pat 181 (182): 1922 P H C C 174: 3 Pat L Tim 261: 67 Ind Cas 221: 1 Pat 332 [Person lending money for paying off the mortgage after final decree but before sale is entitled to subrogation]. But see *Mahomed Abdul Rahim Khan* v. *Ram Bharos Ojha,* 1925 All 6 (8): 22 All L J 825: 5 L R All (Civ) 596: 83 Ind Cas 1033; *Thirukondu Ellarayan* v. *Nakonda Rangaswami Aiyar,* 1926 Mad 816 (819): 50 Mad L Jour 612: 49 Mad 691: 96 Ind Cas 607: 25 Mad L W 258.

(6) *Khuman* v. *Bholanath,* (1905) 1 Nag L R 106 (107). See *Hardayal* v. *Chadamilal,* (1885) 7 All 194 (196): 1884 All W N 332 [Property cannot be sold before the time fixed by the Court].

(7) *Sarat Koomari Dassi* v. *Hari Charan Pal,* (1910) 8 Ind Cas 806 (806): 12 Cal L Jour 596 [Plaintiff dying after date of order for payment—His heir substituted—Fresh order for payment into Court must be taken before sale takes place].

Note 14.

(1) *See* Note 16 to Rule 2, *ante.*

will clearly apply and a payment can be certified to the executing Court; in the absence of such certification within the limitation period, the executing Court will not take cognisance of it.[2] Even if the payment is made after the *preliminary* and before the *order absolute* or the *final decree* is passed, the Court *executing the final decree* cannot, by virtue of the provisions of O. 21, R. 2, recognise such a payment unless certified.[3] On the question whether the Court *dealing with an application for a final decree,* can recognise such a payment, it has been held by the High Court of Madras[4] and the Chief Court of Punjab[5] that O. 34, R. 5 prescribes only one method of payment, namely, *into Court* and that a payment *out* of Court cannot be recognised. On the other hand it was held by the High Courts of Allahabad,[6] Calcutta,[7] Patna[8] and Rangoon[8-a] and by the Judicial Commissioner's Court of Nagpur,[9] that such a payment could be *certified* to the Court (though it is not the executing Court) under the provisions of O. 21, R. 2, that therefore a certified payment can be recognised, or a payment can be certified by the Court dealing with the application to pass a final decree, but that a payment, not so certified within the period of limitation prescribed therefor, cannot be recognised. The High Court of Patna,[10] the Chief Court of Oudh[10-a] and the Judicial Commissioner's Court of Nagpur[10-b] have also held that such a payment can be recognised under O. 23, R. 3 as an adjustment of a *pending* suit, though, in a later case,[11] the Nagpur Court has disagreed with this view on the ground that O. 23, R. 3 cannot apply to a satisfaction of a decree *already passed.* The High Court of Lahore has also held that O. 23, R. 3 is inapplicable to such a payment.[11-a]

Even in cases arising under the Transfer of Property Act, there was a conflict of opinion, but of a somewhat different nature. It was held by the

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(2) *Hiramony Biswas* v. *Musa Khan,* (1910) 7 Ind Cas 625 (626): 16 Cal L Jour 169 [After order absolute]; *Nistarini Dasi* v. *Kazim Ali,* (1910) 7 Ind Cas 258 (259): 12 Cal L Jour 65; *Harish Chandra Mondol* v. *Jagabandhu,* (1907) 12 Cal W N 282 (283): 8 Mad L Tim 202: 7 Cal L Jour 581 [After order absolute].

(3) *Sambasiva Iyer* v. *Thirumalairamanuja Thathachariar,* (1920) 54 Ind Cas 137 (140): 37 Mad L Jour 356; *Mahbub Ali* v. *Md Husain,* 1927 All 710 (711): 104 Ind Cas 419: 25 All L J 823.

(4) *Ramana Goundan* v. *Velappa Goundan,* 1926 Mad 1069 (1071): 24 Mad L W 520: 1926 Mad W N 662: 97 Ind Cas 989; *Singa Raja* v. *Pethu Raja,* (1918) 48 Ind Cas 196 (197): 1918 Mad W N 609: 35 Mad L Jour 579: 8 Mad L W 497: 24 Mad L Tim 501: 42 Mad 61; *Adari Sanyasi* v. *Nookalamma,* 1931 Mad 592 (594, 595): 131 Ind Cas 487: 54 Mad 708: 34 Mad L W 556 [1925 Mad 80 held overruled by 1930 Mad 105]. See, however, *Viswanatha* v. *Chinnukutti Amma,* 1932 Mad 115 (119): 1931 Mad W N 1141: 34 Mad L W 635: 62 Mad L Jour 272: 135 Ind Cas 535: 55 Mad 320 [Where mortgagor and mortgagee settle out of Court and report to the Court, preliminary decree ceases to exist].

(5) *Banarsi Das* v. *Nathu Mal,* (1912) 16 Ind Cas 987 (987): 281 Pun W R 1912: 12 Pun Re 1913: 276 Pun L R 1914; *Mt Durga Devi* v. *Nand Lal,* 1932 Lah 231 (232): 33 Pun L R 138: 136 Ind Cas 732 [Payment out of Court—Not recognisable under O 21, R 2 or O 23, R 3].

(6) *Ramji Lal* v. *Karan Singh,* (1917) 40 Ind Cas 424 (424): 15 All L J 448: 39 All 532; *Sital Singh* v. *Baijnath,* 1922 All 383 (384): 20 All L J 602: 44 All 668: 75 Ind Cas 485.

(7) *Piran Bibi* v. *Jitendra Mohan,* (1917) 40 Ind Cas 845 (846): 25 Cal L Jour 553: 21 Cal W N 920.

(8) *Mangar Sahu* v. *Bhatoo Singh,* (1920) 57 Ind Cas 473 (475): 1 Pat L Tim 416: 5 Pat L Jour 672.

(8-a) See *Ahmed Rahman* v. *A L A R Chettiar Firm,* 1928 Rang 194 (195): 6 Rang 285: 110 Ind Cas 873.

(9) *Dulichand* v. *Goreylal,* 1925 Nag 49 (49): 20 Nag L R 122: 83 Ind Cas 162; *Mt Bayabai* v. *Purshottam,* (1915) 27 Ind Cas 919 (920): 11 Nag L R 16.

(10) *Jogendra Prasad Narain Singh* v. *Gouri Sankar Prasad Sahu,* (1917) 40 Ind Cas 138 (138): 2 Pat L W 66: 2 Pat L Jour 533.

(10-a) *Tirloki Nath Dube* v. *Sadhu Ram Tewari,* 1927 Oudh 275 (276): 1 Luck Cas 63: 102 Ind Cas 428 [Suit for redemption].

(10-b) *Dharam Singh* v. *Ganeshram,* (1918) 43 Ind Cas 399 (400) Nag.

(11) *Dulichand* v. *Goreylal,* 1925 Nag 49 (49): 20 Nag L R 122: 83 Ind Cas 162.

(11-a) *Durga Devi* v. *Nand Lal,* 1932 Lah 231 (232): 33 Pun L R 138: 136 Ind Cas 732.

O. 34, R. 5, Notes 14—17.

Allahabad High Court and the Judicial Commissioner's Court of Oudh, that a proceeding under S. 89 of that Act for obtaining an order absolute was a proceeding in execution, and, therefore, the Court dealing with an application for an order absolute, being an *executing* Court could not recognise a payment after the preliminary decree unless it had been certified within time.[12] The High Court of Calcutta, on the other hand, held that a proceeding for an order absolute is not one in execution, and that the Court dealing with such application can recognise such payments, especially as S. 89 expressly provided that payment may be to the *plaintiff* or into the Court.[13]

Where the decree is not one under R. 4, as in the case of a compromise decree, R. 5 does not apply and the Court can recognise payments made out of Court,[14] *see also* the undermentioned cases.[15]

15. **Return of documents relating to property.**—Where the preliminary decree does not provide for the payment of damages by the plaintiff to the defendant if the plaintiff fails to deliver all the documents relating to the mortgaged property as directed by the decree, the Court cannot grant such relief by way of execution. The mortgagor may sue separately for damages.[1]

16. **Dismissal of mortgagee's application for final decree.**—O. 34, R. 5 requires only that the plaintiff should *apply* for a final decree. His *subsequent absence* is not any ground for dismissing his application. If it is dismissed on this ground, it should be set aside and a final decree passed.[1] The Court can also entertain a fresh application for final decree in such a case.[2] An application for final decree cannot be dismissed for failure to give *list of properties* in respect to which the final decree was prayed for, or for a *wrong calculation of interest.*[3]

17. **"Directing that the mortgaged property or a sufficient part thereof be sold."**—As to the Court's powers to direct the order in which the

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(12) *Hakim Singh* v. *Ram Singh*, (1908) 30 All 248 (250): 1908 All W N 103: 5 All L J 272; *Sheorani* v. *Chanderpal*, (1910) 6 Ind Cas 1000 (1001): 13 Oudh Cas 137. See *Badri Narayan* v. *Kunj Behari Lal*, (1913) 18 Ind Cas 731 (732): 35 All 178: 11 All L J 224.

(13) *Pramatha Chandra Roy* v. *Khetra Mohan Ghose*, (1902) 29 Cal 651 (653); *Nistarini Dasi* v. *Kasim Ali*, (1910) 7 Ind Cas 258 (259): 12 Cal L Jour 65; *Hatem Ali Khundakar* v. *Abdul Gaffur Khan*, (1903) 8 Cal W N 102 (104).

(14) *Sital Singh* v. *Baijnath Prasad*, 1922 All 383 (384): 20 All L J 602: 44 All 668: 75 Ind Cas 485; *Mangar Sahu* v. *Bhatoo Singh*, (1920) 57 Ind Cas 473 (474): 5 Pat L Jour 672: 1 Pat L Tim 416.

(15) *Shamal Dhone Dutt* v. *Rakhimoni Debi*, (1910) 6 Ind Cas 323 (325): 13 Cal L Jour 459 [Mortgagee in possession as receiver must account for rents and profits before he can obtain order absolute for sale]; *Gujadhur* v. *Naik Pauree*, (1882) 8 Cal 528 (529) [Payment into Court within a certain time ordered—It is sufficient compliance if judgment-debtor brings the money into Court within the time fixed and diligently takes the necessary steps for actual payment into the Treasury]; *Muhammad Akbar* v. *Abdul Aziz*, 1898 All W N 105 (106) [Preliminary decree providing that plaintiff should redeem certain prior mortgages—Plaintiff paying the money into Court but subsequently withdrawing it—Payment is illusory].

Note 15.

(1) *Marathelvaraman Nair* v. *Seshu Pattar*, 1922 Mad 299 (300): 42 Mad L Jour 356: 16 Mad L W 589: 70 Ind Cas 529 [*Quaere.*—Whether the decree in the absence of specification of documents to be delivered was not too indefinite for execution].

Note 16.

(1) *Jodhu* v. *Gokaran*, 1925 All 622 (623): 47 All 546: 23 All L J 405: 87 Ind Cas 225; *Chandra* v. *Amir*, 1927 All 439 (440): 25 All L J 437: 101 Ind Cas 676: 49 All 592. See also *Venkatarama* v. *Marudachela*, 1931 Mad 795 (796, 797): 1931 Mad W N 1002: 135 Ind Cas 347 [Dismissal for not taking steps as ordered —Period of three months under O 9, R 5 not given—*Ultra vires*].

(2) *Ahmad Khan* v. *Gaura*, (1918) 48 Ind Cas 518 (519): 16 All L J 143. See also *Sriramulu* v. *Sriramulu*, 1933 Mad 55 (56): 63 Mad L Jour 719: 36 Mad L W 688: 1932 Mad W N 1191: 140 Ind Cas 324 [Dismissal for non-payment of batta—Fresh application allowed under O 9, R 4 and S 141].

(3) *Chandra Shekhar* v. *Amir Begam*, 1927 All 439 (440): 49 All 592: 25 All L J 437: 101 Ind Cas 676.

O. 34, R. 5. Notes 17—19.

mortgaged properties are to be sold, *see* Note 10 R. 4 and the undermentioned case.[1] But the Court cannot overrule any specific provisions in the *mortgage-deed itself* concerning the matter.[1-a]

Where the mortgaged property has been compulsorily acquired by the Government under the Land Acquisition Act, the rights of the mortgagee are transferred to the compensation awarded under the Act.[2]

Similarly, where a share in joint family property has been mortgaged, and subsequent thereto there is a *bona fide* partition of family properties in which the specific property mortgaged is allotted to another co-parcener, the mortgagee can only proceed against the property allotted to his mortgagor.[3] A mortgagee cannot release from his claim any portion of the properties so as to prejudice the persons interested in the other portions.[4]

Where the judgment-debtor contends that the decree refers to some other property than the one proceeded against by the judgment-creditor, it is for him to show which that property is.[5]

18. Power to enlarge time.—R. 4 as amended by Act, XXI of 1929 empowers the Court to enlarge the time fixed for payment of the mortgage money under a preliminary decree. This renders obsolete the cases[1] before Act XXI of 1929 which held that as there was no provision in R. 5 (as there was in R. 3 or R. 8) for enlargement of time, the Court had no power to enlarge the time fixed by a preliminary decree for payment.

Where a preliminary decree is appealed from but the appellate decree merely confirms the lower Court's decree, the time fixed for payment by the lower Court's decree is not in any way extended.[2] *See* Note 9 to S. 148.

19. Effect of sale under mortgage decree.—The effect of a sale under an ordinary money-decree is to vest in the purchaser the right, title and interest of the *judgment-debtor*. But a sale under a mortgage-decree passes the

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Note 17.

(1) *Ghasi Ram* v. *Ram Dial*, 1931 All 657 (658, 659): 132 Ind Cas 807: 1931 All L J 1007 [Order in which properties are to be sold—Raised in issue and found against—Not provided for in preliminary decree—Not to be incorporated in final decree].

(1-a) *Jatadhari Singh* v. *Baldeo Lal*, (1919) 51 Ind Cas 444 (446): 4 Pat L J 207.

(2) *Debendra Nath* v. *Abdul Ahmad*, (1909) 1 Ind Cas 264 (278): 10 Cal L Jour 150; *Jatyni* v. *Amar Krishna*, (1907) 6 Cal L Jour 745.

(3) *Joy Sankari* v. *Bharat Chandra*, (1899) 26 Cal 434 (438): 3 Cal W N 209; *Hem Chunder* v. *Thakomoni*, (1894) 20 Cal 533 (535): *Hakim Lal* v. *Ram Lal*, (1907) 6 Cal L Jour 46 (49): *Lakshman* v. *Gopal*, (1899) 23 Bom 385 (390).

(4) *Imam Ali* v. *Baijnath*, (1906) 33 Cal 613 (622): 8 Cal L Jour 576: 10 Cal W N 551.

(5) *Bhugobat Singh* v. *Ram Adhin*, (1874) 22 Suth W R 330 (331).

Note 18.

(1) *Ganga Ratan* v. *Chandika Prasad*, 1924 Oudh 179 (179): 74 Ind Cas 573; *Chenniah Chetti* v. *Mami*, (1911) 9 Ind Cas 771 (772): 4 Bur L Tim 43; *Durga Bharathi* v. *Andesh Rai*, (1911) 11 Ind Cas 528 (529): 14 Oudh Cas 147; *Raja Ram* v. *Chunni Lal*, (1897) 19 All 205 (207): 1897 All W N 47; *Taniram* v. *Gajanan*, (1900) 24 Bom 300 (302): 1 Bom L R 821; *Ram Golam Lal Sahu* v. *Chowdhry Babu Barsati Singh*, (1906) 10 Cal W N 910 (912); *Kashi Prasad* v. *Sheo Sahai*, (1897) 19 All 186 (188): 1897 All W N 12; *Narendra Bahadur* v. *Ajudhya Prasad*, (1910) 13 Oudh Cas 28; *Bholanath* v. *Kanti Chandra*, (1898) 25 Cal 311 (312): 1 Cal W N 671.

(2) *Thathara Nannabha Kuppal Chetty* v. *Krishnammal*, (1912) 16 Ind Cas 799 (799): 14 Mad L Tim 194. See *Maqbul Ahmad* v. *Pateshri Partab Narain Singh*, 1929 All 677 (680): 1929 All L J 926: 118 Ind Cas 670 [Appellate Court affirming decree is not bound to extend the period]; *Maung Yan* v. *Katharasan*, 1921 U B R 5 (7): 4 U B R 1: 63 Ind Cas 799 [Date fixed in preliminary decree is not affected by appeal]. See *Daulat Jugjivan* v. *Bhukandas*, (1889) 11 Bom 172 (173): 11 Ind Jur 229 [*Held*, Appellate Court intended that period should be computed from its decree].

O. 34, R. 5, Notes 19—20.

interests both of the mortgagor as well as of the mortgagee.[1] Where the mortgagee has waived his claim against a particular mortgagor, the sale does not operate on the rights of that mortgagor.[2]

Any enlargement which takes place in the interest of the mortgagor subsequent to the final decree enures for the benefit of the auction-purchaser.[3] On the other hand, he is liable to pay the Government Revenue accruing due on the property after the purchase.[4]

A mortgagee-decree-holder purchasing the mortgaged property in execution of his decree is not bound to give credit to the mortgagor for the market-value of the property but only for the actual price for which he purchased it.[5]

A mortgagee who himself purchases the mortgaged property in execution of his decree for sale becomes the owner of the property and cannot maintain, as against subsequent purchasers, the position that the mortgage still remained an encumbrance.[5-a]

See also the undermentioned cases.[6]

20. **Execution of final decree for sale.**—Proceedings for sale under a final decree or under an order absolute are proceedings in execution.[1] Consequently, the Court executing the final decree cannot go behind the decree,[2] though, by consent of parties, accounts not allowed by the decree can be taken in execution.[3] A mere *preliminary decree* under R. 4 is in-

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Note 19.

(1) *Venkatanarasammah* v. *Ramiah*, (1878-80) 2 Mad 108 (112); *Perumal* v. *Kaveri*, (1893) 16 Mad 121 (125, 126): 2 Mad L Jour 281; *Desai Lallubhai* v. *Mundas*, (1896) 20 Bom 390 (393); *Karamat Ali* v. *Gorakhpur Bank, Ltd*, 1922 All 495 (496): 44 All 488: 20 All L J 337: 67 Ind Cas 29; *Nand Kishore* v. *Shadi Ram*, 1926 All 457 (459): 24 All L J 519: 96 Ind Cas 137; *Ma Saw Tint* v. *Abdul Bari*, 1929 Rang 183 (183): 119 Ind Cas 222. But see *Ram Saheni Lal* v. *Janki Prasad*, 1931 All 466 (480): 1931 All L J 729: 134 Ind Cas 1 F B; *Pratap Bahadur Singh* v. *Maheshwar Baksh Singh*, (1909) 12 Oudh Cas 45 (51): 2 Ind Cas 52; *Kalipada Mukerji* v. *Basanta Kumar Datta*, 1932 Cal 126 (131 to 133): 35 Cal W N 877: 59 Cal 117: 138 Ind Cas 177 [Purchase by puisne mortgagee in prior mortgagee's suit—Right of redemption of mortgagor is extinguished though puisne mortgagee gets subrogated to plaintiff's rights]. See also *Asia Khatun* v. *Nurjahan Khatun*, (1932) 36 Cal W N 955 (959): 59 Cal 1464: 1933 Cal 39 (42, 43). See also *Daud Bahadur Singh* v. *Deonandan Prasad Singh*, (1918) 43 Ind Cas 915 (916): 4 Pat L W 108: 1918 Pat H C C 69 [Mortgage decrees in favour of same mortgagee under successive mortgages—Purchase by him under prior mortgage decree—Subsequent encumbrance over the property sold is destroyed].

(2) *Nga Hu* v. *Palaniappa*, (1911) 12 Ind Cas 199 (200): 4 Bur L Tim 242.

(3) *Umes* v. *Zahur*, (1891) 18 Cal 164 (176, 177): 17 Ind App 201: 5 Sar 507 P C; *Ajijuddin* v. *Budan*, (1895) 18 Mad 492 (495).

(4) *Bhawani Kumar* v. *Mathura Prasad Singh*, (1912) 16 Ind Cas 210 (212): 16 Cal W N 985: 23 Mad L Jour 311: 12 Mad L Tim 352: 1912 Mad W N 944: 14 Bom L R 1046: 16 Cal L Jour 606: 40 Cal 89: 39 Ind App 228 P C.

(5) *Md Hasen Ali Khan* v. *Thakur Dharam Singh*, (1896) 18 All 31 (32): 1895 All W N 144.

(5-a) *Indra Narain* v. *Tarini Prosad*, 1926 Cal 165 (166, 167): 90 Ind Cas 746.

(6) *Chiraunji Lal* v. *Ishwar Das*, 1930 All 578 (579): 128 Ind Cas 755 [Final decree for sale containing no exemption of particular property sold—Subsequent correction of decree does not affect validity of sale]; *Baldeo* v. *Fakhruddin*, (1905) 27 All 62 (66): 1 All L J 402 [Judgment-debtor standing by and allowing sale to take place is estopped from questioning validity of sale].

Note 20.

(1) *Syed Fida Husain* v. *Kailasa*, (1900) 3 Oudh Cas 1 (7).

(2) *Ramjas* v. *Sheo Prasad*, (1906) 28 All 193 (195): 2 All L J 640: 1905 All W N 241; *Basdeo* v. *Sheo Adhin*, (1898) 1 Oudh Cas 49 (51); *Sita Nath Saha Bonik* v. *Madan Mohan Das*, (1918) 43 Ind Cas 22 (23) Cal; *Abbas Ali* v. *Gulab Rai*, 1930 All 520 (520): 121 Ind Cas 818 [Final decree passed by Court having jurisdiction cannot be contested by judgment-debtor who remains absent on notice being served]; *Bhagwan Das* v. *Mansumrat Das*, 1901 All W N 23 (23) [Decree cannot be executed against person not named therein]; *Brij Raj* v. *Rameshwar*, (1917) 42 Ind Cas 625 (627): 2 Pat L W 208 [Final decree providing for interest which was disallowed by the preliminary decree—Remedy of judgment-debtor is by appeal and not objection in execution]; *Sant Bakhsh* v. *Bhagwandin Singh*, 1931 Oudh 121 (122): 8 Oudh W N 142: 131 Ind Cas 435.

(3) *Lodd Govinda Doss* v. *Rajah of Karvetnagar*, (1915) 30 Ind Cas 357 (363): 29 Mad L Jour 219.

O. 34, R. 5. Notes 20—22.

capable of execution it is only the *final* decree that can be executed.[4] But where, in a case under the Transfer of Property Act, a decree was executed without an order absolute having been obtained, and the judgment-debtor did not raise any objection to such course at the proper time, it was held that he was estopped from raising the contention subsequently that the decree was not executable.[5] A decree for sale providing in terms that the rights of prior mortgagees should not be prejudiced is not incapable of execution.[6]

No *attachment* is necessary before sale under a mortgage decree[7] and, consequently, O. 21, R. 58 does not apply to claims preferred against the execution of mortgage-decrees.[8] Under S. 20 of the Oudh Laws Act (XVIII of 1876) the restrictions imposed by S. 60 of the Code are applicable to mortgage-decrees also.[9]

The transferee of the mortgagor's interests after the final decree is not a necessary party to the execution-proceedings.[10]

A Court can sell under a mortgage-decree only the property comprised in the mortgage,[11] and the mortgagee, cannot, in execution of his *mortgage-decree,* seek any remedy against the other properties of the mortgagor.[12]

Proceedings for execution of a final decree for sale can be stayed under O. 41, R. 6 of the Code.[13]

O. 21, R. 83, of the Code, does not, under the express terms thereof, apply to mortgage-decrees.[14]

21. **Transfer of final decree.**—A transfer of a final decree for sale does not require registration.[1]

22. **Injunction restraining mortgagor from receiving income of mortgaged property.**—After a final decree for sale has been passed in a mortgage suit, the Court has no power to grant an injunction restraining

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(4) *Bansidhar* v. *Abu Talib Khan,* (1905) 8 Oudh Cas 75; *Arunbati Kumari* v. *Ram Niranjan,* (1920) 58 Ind Cas 299 (299): 2 Pat L Tim 88; *Subrahmanyam* v. *Narayana,* (1899) 9 Mad L Jour 349 (350) [Case before Code of 1908—Decree not executable till order absolute].

(5) *Inayat-ul-Rahman* v. *Sadik Husain,* (1902) 5 Oudh Cas 251 (254); *Dhani Ram* v. *Hurdeo Das,* 1890 All W N 223 (224); *Narasima* v. *Venkatanarasayya,* (1906) 15 Mad L Jour 418: *Rayilu* v. *Narayana,* (1900) 10 Mad L Jour 205 (206).

(6) *Hasebazad Singh* v. *Laisa Singh,* (1916) 35 Ind Cas 152 (158): 14 All L J 324.

(7) *Daya Chand* v. *Hem Chand,* (1879-80) 4 Bom 515 (520) F B; *S R M A N Muthappa Chetty* v. *S A R M Palaniappa Chetty,* (1903-04) 2 L B R 138 (139); *Muhammad Husain* v. *Muthu Chettiar,* (1915) 30 Ind Cas 280 (281): 2 Mad L W 689.

(8) *Muhammad Yahya* v. *Lalta Dei,* 1906 All W N 62 (68); *Kundan Lal* v. *Allah Baksh,* 1932 Lah 618 (618): 33 Pun L R 868. See also *Suryanarayana* v. *Ramachendrudu,* 1932 Mad 716 (718, 719): 139 Ind Cas 452 [Rent decree under Estates Land Act which gives first charge is not a mortgage decree; so a claim is sustainable].

(9) *Syed Fida Husain* v. *Kailasa,* (1900) 3 Oudh Cas 1 (7).

(10) *Zahural Hasan* v. *Badri Narain,* 1930 All 597 (599): 1930 All L J 1302; *Ram Charan* v. *Kanhai Lal,* (1921) 63 Ind Cas 144 (144) All.

(11) *Radha Krishna Chanderji* v. *Ram Bahadur,* (1918) 43 Ind Cas 268 (271): 16 All L J 33: 23 Mad L Tim 26: 4 Pat L W 9: 34 Mad L Jour 97: 7 Mad L W 149: 22 Cal W N 330: 27 Cal L Jour 191: 1918 Mad W N 163: 20 Bom L R 502. See also *Ram Chander* v. *Kondo,* (1900) 22 All 442 (444): 1900 All W N 155 [Even though mortgage decree erroneously includes non-hypothecated properties also].

(12) See *Allahabad Bank, Ltd* v. *Raja Pratab Bahadur Singh,* (1902) 5 Oudh Cas 108.

(13) *Rup Narain* v. *Gokal Chand,* 1929 Lah 552 (552): 30 Pun L R 371: 117 Ind Cas 88.

(14) See also Note 8 to R 4 of O 34. But see *Chandika Bakhsh* v. *Brij Behari Lal,* (1900) 3 Oudh Cas 42 (46) [Submitted not correct].

Note 21.

(1) *Durga Prasad* v. *Jakhoo Ram,* 1925 Oudh 399 (399): 2 Oudh W N 70: 86 Ind Cas 591: 12 Oudh L J 109: 28 Oudh Cas 382.

O. 34, R.5, Notes 22—26.

the mortgagor from receiving the income of the mortgaged property. It can only bring the property to sale.[1]

23. **Construction of mortgage-decree.**—*See* the undermentioned cases.[1]

24. **Appeal.**—An appeal lies from a final decree for sale as from any other decree. Such decree is therefore not open to revision under S. 115.[1]

An order rejecting an application for a final decree amounts to a dismissal of the suit and, as such, is appealable as a decree.[2]

A decision as to the order in which the mortgaged properties should be sold may amount to a decree if it affects the rights of co-defendants *inter se.*[3]

See S. 97, Notes 1 and 5 also in the question as to whether, when, and how far, a preliminary decree can be attacked in an appeal from a final decree.

25. **Court-fee.**—An appeal from a final decree for sale should be stamped with an *ad valorem* Court-fee and not as an appeal from an *order.*[1] Similarly, the Court-fee on an appeal against an order rejecting an application for a final decree is *ad valorem* on the amount claimed.[2]

See also Note 7 to S. 97, *ante.*

26. **Costs not recoverable from mortgagor personally.**—In the absence of anything to the contrary in the decree itself the costs awarded against a mortgagor in a mortgage suit form part of the mortgage money and cannot be recovered *personally* from the mortgagor.[1] But *see* the under-

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Note 22.

(1) *Muhammad Inamullah* v. *Narain,* (1915) 29 Ind Cas 601 (602): 13 All L J 565: 37 All 423.

Note 23.

(1) *Bapamma Rao* v. *Vira Pratap,* (1896) 19 Mad 249 (254): 23 Ind App 32: 6 Mad L Jour 53 P C; *Sami Gurukkal* v. *Thirupathiya Pillai,* 1924 Mad 193 (196): 18 Mad L W 288: 72 Ind Cas 798; *Hanmant Timaji* v. *Raghavendra,* (1920) 58 Ind Cas 221 (222, 223): 22 Bom L R 650: 44 Bom 981; *Debi Charan* v. *Pirbhu Din,* (1881) 3 All 388 (390): 1881 All W N 43 F B; *Ram Prasad* v. *Raghunandan,* (1881) 3 All 239 (243); *Janki Prasad* v. *Baldeo,* (1881) 3 All 216 (219); *Harsukh* v. *Maghraj,* (1878-80) 2 All 345 (349); *Thaman Singh* v. *Gangaram,* (1878-80) 2 All 342 (344, 345); *Ram Chander* v. *Kondo,* (1900) 22 All 442 (444): 1900 All W N 155 [Mortgage decree as per plaint wrongly including non-hypothecated properties also—Held intention was only to decree against hypothecated properties specified in the plaint]; *Mahadeo Prasad* v. *Jaikaran,* 1933 Oudh 1 (3): 9 Oudh W N 1128: 141 Ind Cas 183 [Mortgaged property ordinarily means hypotheca—If any part is found invalid, it will be excluded from the decree].

Note 24.

(1) *Kumar Gangan and* v. *Pirthichand,* (1920) 5 Pat L Jour 342; *Pramatha Chandra Roy* v. *Khetra Mohan Ghose,* (1902) 29 Cal 651 (653, 654); *Bechu Singh* v. *Bicharam Sahu,* (1909) 1 Ind Cas 677: 10 Cal L Jour 91 [Order absolute for sale under S 89 is appealable as a final decree]. See *Mallikarjunadu Seth* v. *Lingamurti Pantulu,* (1902) 25 Mad 244 (263): 12 Mad L Jour 279; *Kedar* v. *Lalji,* (1890) 12 All 61 (62): 1889 All W N 198 F B [Order absolute under S 89, Transfer of Property Act, being one in execution is appealable under S 244 (now S 47) of the Code].

(2) *Subbalakshmi* v. *Ramanujan,* (1919) 48 Ind Cas 298 (298): 1918 Mad W N 792: 35 Mad L Jour 552: 8 Mad L W 526: 24 Mad L Tim 486: 42 Mad 52; *Bhutnath Jana* v. *Tara Chand Jana,* 1921 Cal 551 (552): 33 Cal L Jour 115: 25 Cal W N 595: 59 Ind Cas 177; *Nathu Mal* v. *Ude Ram,* 1932 Lah 214 (215): 33 Pun L R 56: 137 Ind Cas 273.

(3) *Meenakshisundaram* v. *Chokkalinga,* 1929 Mad 506 (507): 55 Mad L Jour 624: 1929 Mad W N 289: 1929 Mad W N 290: 29 Mad L W 855: 120 Ind Cas 849; *Mirza Quaiser Beg* v. *Sheo Shankar,* 1932 All 85 (89): 1931 All L J 108: 129 Ind Cas 708: 53 All 391.

Note 25.

(1) *Jankibai* v. *Chinna,* (1920) 57 Ind Cas 579 (580): 22 Bom L R 811; *Bajrangi Lal* v. *Mahabir Kunwar,* (1913) 21 Ind Cas 498 (498): 11 All L J 801: 35 All 476.

(2) *Mussammat Mathura Kuar* v. *Lal Singh,* (1920) 57 Ind Cas 67 (69): 2 U P L R (All) 169; *Charu Chandra Mitter* v. *Bagirath Pershad,* (1906) 12 Cal W N 1028 (1029).

Note 26.

(1) *Muhammad.* v. *Banki Lal,* 1924 All 104 (104): 45 All 630: 21 All L J 617: 4 L R (All) Civ 301: 73 Ind Cas 950; *Ramaswami*

O. 34, R. 5, Notes 26—29.

mentioned cases.[2]

27. **Dekhan Agriculturists' Relief Act.**—A decree for sale upon a mortgage under S. 15 (*b*) of the Dekhan Agriculturists' Relief Act is not a *decree nisi* and no final decree is necessary before it can be enforced.[1] But the award of a conciliator under S. 44 of the Act was held to be not exempt from the requirements of S. 89 of the Transfer of Property Act.[2]

28. **Limitation for application for execution of final decree.**—Art. 182 of the Limitation Act applies to an application for the execution of a final decree for sale passed under this rule;[1] and time runs under that article from the *date of the final decree*.[2] But when there has been an appeal, time runs from the appellate decree.[3] Where an appeal to the Privy Council is dismissed for non-prosecution, the executable decree is that of the lower Court and Art. 182 applies.[4] *See also* the undermentioned case.[5]

29. **Nature of proceedings for final decree.**—There was a conflict of decisions, before the coming into force of the present Code of Civil Procedure, as to whether proceedings for order absolute under S. 89 of the Transfer of Property Act were proceedings in execution of the decree under S. 88 or proceedings in the suit itself, some cases taking the former view[1] and others taking the latter view.[2] This conflict is now settled under the new Code

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Nayaker v. *Chinnathayammal*, 1928 Mad 604 (606): 109 Ind Cas 63 [Question is one of construction of mortgage decree in each case]; *Sheo Darshan* v. *Beni Chaudhri*, 1926 All 424 (425): 24 All L J 424: 94 Ind Cas 872: 48 All 425: *Matukdhari* v. *Ramdas*, (1917) 38 Ind Cas 214 (215): 2 Pat L Jour 51; *Dambar Singh* v. *Kalyan Singh*, (1918) 43 Ind Cas 557 (559): 40 All 109: 15 All L J 914; *Maqbal* v. *Lalta*, (1898) 20 All 523 (526): 1898 All W N 157; *Raj Kumar* v. *Sheo Narayan*, (1908) 35 Cal 431 (433): 12 Cal W N 364: 8 Cal L Jour 152; *Kamalamma* v. *Komandur*, (1907) 30 Mad 464 (465): 17 Mad L Jour 317: 2 Mad L Tim 359; *Kannu Lal* v. *Bhagwan Das*, 1931 All 124 (125): 129 Ind Cas 554.

(2) *Het Ram* v. *Dat Prasad Singh*, 1926 All 68 (69): 6 L R (All) Civ 530: 88 Ind Cas 829 [Costs subsequent to final decree need not be added to mortgage money]; *Amina Bibi* v. *Ram Shankar*, (1919) 50 Ind Cas 730 (731): 41 All 473: 17 All L J 582; *Ramakrishna* v. *Raghunatha*, 1931 Mad 272 (272): 33 Mad L W 263: 131 Ind Cas 151 [Purchaser of equity of redemption—Frivolous defence in the mortgage suit—Court can make him personally liable for costs of mortgagee].

Note 27.

(1) *Kashinath Vinayak Bhave* v. *Rama Daji Kale*, (1917) 37 Ind Cas 255 (256): 40 Bom 492: 18 Bom L R 475; *Suklya* v. *Suklal*, 1924 Bom 169 (170): 48 Bom 172: 25 Bom L R 1214: 81 Ind Cas 684.

(2) *Bhagwan Ramji Marwadi* v. *Ganu*, (1901) 23 Bom 644 (650): 1 Bom L R 136.

Note 28.

(1) *Somar Singh* v. *Deonandan*, 1927 Pat 215 (217): 8 Pat L Tim 379: 102 Ind Cas 811: 6 Pat 780; *Amolak Chand* v. *Sharat Chandra*, (1911) 11 Ind Cas 943 (945): 38 Cal 913: 16 Cal W N 49.

(2) *Mahabir Prasad* v. *Sital Singh*, (1897) 19 All 520 (521): 1897 All W N 137; *Ashfaq Husain* v. *Gauri Sahai*, (1911) 9 Ind Cas 975 (977): 33 All 264: 15 Cal W N 370: 8 All L J 332: 13 Cal L Jour 351: 9 Mad L Tim 380: 13 Bom L R 367: 4 Bur L Tim 121: 21 Mad L Jour 1140: 38 Ind App 37: 1911 Mad W N 177 P C; *Ramaswamy Iyengar* v. *Chinnathambi Chetty*, (1913) 18 Ind Cas 10 (10) Mad [Decree under S 88, Transfer of Property Act—Time runs from order absolute for sale under S 89, as till then, there is no executable decree]. But see *Appiah* v. *Rami Reddi*, (1906) 16 Mad L Jour 503 (504): 1 Mad L Tim 294 [Decree under S 88 is capable of execution and application under S 89 is application for execution and time begins to run from the date of the decree and not from the date of the order absolute for sale].

(3) *Kristnama Chariar* v. *Mangammal*, (1903) 26 Mad 91 (92).

(4) *Baluk Nath* v. *Mt Munni Dei*, 1914 P C 65: 36 All 284: 41 Ind App 104: 12 All L J 596: 16 Bom L R 360: 19 Cal L Jour 574: 18 Cal W N 740: 27 Mad L Jour 1: 16 Mad L Tim 1: 1 Mad L W 729: 1914 Mad W N 437: 23 Ind Cas 644 (645) P C.

(5) *Appiah* v. *Rami Reddi*, (1906) 16 Mad L Jour 503 (504): 1 Mad L Tim 294.

Note 29.

(1) *Raj Kumar* v. *Biseshar*, (1894) 16 All 270 (273): 1894 All W N 20; *Mahabir* v. *Sital*, (1897) 19 All 520 (521): 1897 All W N 137; *Ali Ahmed* v. *Naziranbibi*, (1902) 24 All 542 (544): 1902 All W N 160; *Baldeo* v. *Ibn Hydar*, (1905) 27 All 625 (627): 1905 All W N 136; 2 All L J 371; *Singaravelu Pillai* v. *Santhana Krishna Mudaliar*, (1915) 31 Ind Cas 9 (9): 1915 Mad W N 643.

(2) *Jehangir Cowasji* v. *The Hope Mills, Ltd*, (1909) 33 Bom 273 (277): 10 Bom L R 1057: 2 Ind Cas 296; *Mahomed* v. *Bai Cooverbai*, (1904) 6 Bom L R 1043 (1048); *Purna Chandra Mandal* v. *Radha Nath Dass*, (1906) 33 Cal

which makes it clear that a decree under R. 4 is incapable of execution[3] and that the proceedings under R. 5 are proceedings in the suit itself for a supplemental decree and not proceedings in execution.[4] Hence, the provisions of O. 22 apply to proceedings for final decree.[5] Similarly, the doctrine of *lis pendens* applies to such proceedings.[6] But O. 1, R. 10 refers to a stage not concluded by a decree and hence does not apply to proceedings for final decree so as to enable the addition of persons who were not parties to the preliminary decree as parties to the proceedings for final decree.[7]

30. **Joint decree-holders.**—One of several joint decree-holders cannot certify satisfaction of the decree beyond his own interest in the decree so as to bind the other decree-holders.[1]

Under the Transfer of Property Act, where a joint decree under S. 88 of the Act was passed in favour of several persons, some of them could apply for an order absolute in favour of all.[2]

O. 34, R.6.

Recovery of balance due on mortgage in suit for sale.

R. 6. [*New.* Act IV of 1882, S. 90 (1)] *Where* the net proceeds of any sale held under the last preceding rule are found insufficient[10] to pay the amount due[11] to the plaintiff, the Court, on application by him may, if the balance is legally recoverable[12] from the defendant[6] otherwise than out of the property sold,[13] pass a decree for such balance.[3]

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867 (870): 4 Cal L Jour 141; *Akikunnissa Bibee* v. *Roop Lal Das*, (1898) 25 Cal 183 (135): *Ajudhia Pershad* v. *Baldeo Singh*, (1894) 21 Cal 818 (823). See also the following cases in which it was held that till order absolute for sale, there was no executable decree]; *Ram Lal* v. *Narain*, (1890) 12 All 539 (541): 1890 All W N 97; *Tara Prosad* v. *Bhobodeb Ray*, (1895) 22 Cal 931 (934): 23 Ind App 75: 6 Mad L Jour 181: 7 Sar 41 P C; *Jehangir Cowasji* v. *The Hope Mills Co. Ltd.* (1909) 2 Ind Cas 296 (296): 33 Bom 273: 10 Bom L R 1057; *Bansidhar* v. *Talib*, (1905) 8 Oudh Cas 75 (76); *Chunni Lal* v. *Abdul Ali Khan*, (1901) 23 All 331 (334): 1901 All W N 91.

(3) *Bulkee Bee* v. *Md Ummar*, 1926 Mad 415 (416): 50 Mad L Jour 39: 1926 Mad W N 143: 93 Ind Cas 99; *Kanniah Naidu* v. *Chengamma Naidu*, (1916) 32 Ind Cas 981 (981) Mad.

(4) *Bhutnath Jana* v. *Tara Chand Jana*, 1921 Cal 551 (552): 33 Cal L Jour 115: 25 Cal W N 595: 59 Ind Cas 177; *Lakshmi Achi* v. *Subbarama Aiyar*, (1915) 29 Ind Cas 142 (143): 28 Mad L Jour 491: 17 Mad L Tim 385: 2 Mad L W 403: 1915 Mad W N 327; *Mahabir Prasad* v. *C N Banking Association*, 1927 Pat 105 (107): 1926 Pat H C C 358: 99 Ind Cas 959: 8 Pat L Tim 189; *Jogemaya Dassi* v. *Baidyanath Prammanick*, (1919) 50 Ind Cas 924 (925): 46 Cal 245; *Shankar Rao* v. *Ganpat Rao*, 1925 Nag 15 (16): 80 Ind Cas 283; *Parsotam Narain* v. *Chheda Lal*, (1907) 29 All 76 (79): 3 All L J 675: 1906 All W N 283; *Natesa Pillai* v. *Kannammal Anni*, 1924 Mad 786 (786): 46 Mad L Jour 181: 19 Mad L W 173: 1924 Mad W N 216: 78 Ind Cas 64; *Nageswara Ayyar* v. *Ramanathan Chettiar*, 1929 Mad 197 (197): 56 Mad L Jour 197: 29 Mad L W 510: 117 Ind Cas 123; *Rama Tulsa Mahar* v. *Bhagchand Motiram*, (1915) 27 Ind Cas 249 (250): 39 Bom 41: 16 Bom L R 687. See *Dhakeshwar Prasad Singh* v. *Harihar Prasad Narain Singh*, (1915) 27 Ind Cas 780 (783): 21 Cal L Jour 104 [Mortgage security not extinguished by preliminary decree]; *Bhutnath* v. *Tarachand*, 1921 Cal 551 (552): 33 Cal L Jour 115: 25 Cal W N 595: 59 Ind Cas 177; *Thulsidas Keshowdas* v. *Ramzan Abdulla*, 1926 Sind 20 (21): 89 Ind Cas 238. See also *Sat Parkash* v. *Bahal Rai*, 1931 All 386 (387, 388): 1931 All L J 508: 53 All 283: 135 Ind Cas 550.

(5) *Jungi Lal* v. *Laddu Ram*, (1919) 50 Ind Cas 529 (533): 1919 Pat H C C 105: 4 Pat L Jour 240 F B; *Moti Lal* v. *Ram Narain*, (1917) 40 Ind Cas 1006 (1007): 39 All 551: 15 All L J 549; *Man Singh* v. *Amantaka Prasad*, (1915) 26 Ind Cas 879 (880) All.

(6) *Digambar* v. *Ganpat*, (1916) 33 Ind Cas 496 (496): 12 Nag L R 50; *Brojo Kishore Bashinavi* v. *Meajan Biswas*, (1909) 3 Ind Cas 791 (792): 13 Cal W N 1138.

(7) *Raghunath* v. *Sheo Lal*, (1917) 39 Ind Cas 849 (850): 13 Nag L R 69.

Note 30.

(1) *Sri Ram* v. *Kesrimal*, (1904) 26 All 185 (188): 1903 All W N 219; *Tamman Singh* v. *Lachmin Kunwari*, (1904) 26 All 318 (320): 1904 All W N 22; *Ramchandra* v. *Rajjan*, (1910) 32 All 164 (166): 7 All L J 99: 5 Ind Cas 129.

(2) *Gayan Singh* v. *Banwari Lal*, (1911) 11 Ind Cas 700 (701, 702): 34 All 72: 8 All L J 1229.

Synopsis.

1. Transfer of Property Act, S. 90.
2. Amendments after 1908.
3. Personal decree for balance against mortgagor.
    4. Personal liability of purchaser from mortgagor.
    5. Personal liability is a question of construction of the instrument.
    6. Personal decree against person not the mortgagor.
    7. Personal decree against the heirs of mortgagor.
    8. Personal remedy under compromise decree.
    9. Right of mortgagee to attach other properties of mortgagor before date fixed for payment of mortgage money.
10. "Where net proceeds of any such sale are found insufficient."
11. "Amount due."
12. "Legally recoverable."
13. "Legally recoverable otherwise than out of the property sold."
14. Prior and puisne mortgagees.
    15. Costs against puisne mortgagee.
16. Insolvency of mortgagor.
17. Limitation.
18. Succession certificate.
19. Notice.
20. Execution of personal decree.
21. Appeal.
22. Nature of proceedings, under R. 6.
23. Miscellaneous.

Application—Necessity and form of. See Note 3, Pts. (16) and (17).
Costs. See Note 11, Pt. (2).
Court to which it is to be made. See Note 23, Pt. (1).
Form of decree. See Note 3, Pt. (20).
Hindu Law—Junior members' liability under this rule. See Note 6, Pt. (3) and Note 7, Pts. (2) and (3).
Mortgaged properties not saleable—Effect as regards personal decree. See Note 10, Pts. (3) to (6), (11) and (12).
Personal covenant in the mortgage—Express or implied. See Note 3, Pt. (22), also Note 5, Pts. (2) and (3), also Note 12, Pt. (1).
Scope and object. See Note 3.
Separate decree for personal remedy, if necessary. See Note 3, Pts. (7), (10) 11 and (12-a), also Note 8, Pts. (2) to (5).
Separate suit for personal remedy barred. See Note 3, Pt. (2).
Two mortgage-decrees in favour of same person—Personal decree how far available. See Note 3, Pt. (14).

1. Transfer of Property Act, S. 90.—This rule corresponds to S. 90 of the Transfer of Property Act, with the difference that the word "found" between the words "are" and "insufficient" is new.

As to the law before the Transfer of Property Act, *see* the undermentioned cases.[1]

2. Amendments after 1908.—The rule was amended by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929, as follows:—

(1) The words "any sale held under the last preceding rule" have been substituted for the words "any such sale."

(2) The words "on application by him" (plaintiff) are new.

3. Personal decree for balance against mortgagor.—This rule provides that the mortgagee may, *by way of application*, obtain a decree *personally* against the mortgagor, for the balance still remaining due to him after the mortgaged property is sold.[1] The object of the rule is to enable such a

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Order 34, Rule 6—Note 1.

(1) *Dundiya* v. *Giyani Ram*, (1917) 39 Ind Cas 119 (120) All; *Yado Rao* v. *Ramachandra Rao*, 1926 Nag 168 (169): 89 Ind Cas 931.

Note 3.

(1) *Wahid Ali* v. *Durga Sankar*, 1926 All 343 (344): 93 Ind Cas 223; *Mangat Rai* v. *Babu Singh*, 1927 Lah 445 (446, 447): 9 Lah L Jour 301: 103 Ind Cas 437: 28 Pun L R

O. 34, R. 6.
Note 3.

decree to be passed in the mortgage *suit* itself and to avoid multiplicity of proceedings.[1-a] In fact, a separate suit for enforcing the personal liability would be barred under the provisions of O. 2, R. 2.[2]

A personal decree under this rule, will, however, be granted only after the mortgagee has exhausted his remedies against the security, in other words, it will be granted only after the sale has been carried out and the *deficiency ascertained;* it is a relief which will not be granted to the mortgagee until that stage is reached.[3] The mere fact, therefore, that the *plaint* does not contain a prayer for such relief[4] or that the original decree does not reserve a liberty to the plaintiff to apply for a personal decree[5] will not preclude the mortgagee from applying under this rule when the deficiency is ascertained. Where a compromise in a mortgage suit provided for payment of the mortgage money in certain instalments and, on default, for execution by sale of the mortgaged properties "in the usual way", but did not reserve any right to the plaintiff to apply for a personal judgment, it was held by their Lordships of the Privy Council that there was nothing to suggest that the plaintiff agreed to forego the benefit of the personal covenant, and that the powers of the Court to give that relief do not depend on O. 34, R. 6 of the Code nor are they derived from the clause in the decree reserving leave to the plaintiff to apply for a personal judgment.[6]

It follows from what has been said above that the rule contemplates a *separate* decree being passed for the balance; a Court will be acting irregularly, therefore, in providing, in the decree for sale itself, that the mortgagee may proceed personally against the mortgagor for the balance.[7] On

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380: 8 Lah 721; *Sadasaiva Mahadu* v. *Narain Vithal,* (1911) 11 Ind Cas 987 (989): 13 Bom L R 661: 35 Bom 452.

(1-a) *Uttam Ishlok Rai* v. *Ram Narain Rai,* (1906) 28 All 365 (372): 1906 All W N 44: 3 All L J 171; *Musahel* v. *Inayat-ul-lah,* (1892) 14 All 513 (516): 1892 All W N 80; *Rajsing* v. *Parmanand,* (1889) 11 All 486 (488): 1889 All W N 191; *Janardan Shankar* v. *Krishnaji Balkrishna Bhate,* (1920) 58 Ind Cas 377 (379): 22 Bom L R 953; *Malikarjunadu* v. *Lingamurthi,* (1902) 25 Mad 244 (286): 12 Mad L Jour 279 F B.

(2) *Brij Behari Lal* v. *Indarpal Singh,* (1920) 57 Ind Cas 967 (968): 23 Oudh Cas 145: 2 U P L R (O) 139; *Mallikarjunadu* v. *Lingamurthi,* (1902) 25 Mad 244 (287): 12 Mad L Jour 279; *Hari Prasad Singha* v. *Sourendra Mohan,* 1922 Pat 450 (458): 66 Ind Cas 945: 1 Pat 506: 3 Pat L Tim 709; *Hari Prasad Singha* v. *Babu Sourendra Mohon Sinha,* 1922 Pat 450 (458): 1 Pat 506: 3 Pat L Tim 709: 66 Ind Cas 945; *Lakshmamma* v. *Krishniah,* (1904) 14 Mad L Jour 490 (491). See *Muh Husain* v. *Dhaneshar Rai,* (1911) 10 Ind Cas 336 (337): 8 All L J 599.

(3) *Rai Saheb Sundermull* v. *John Carapiet Galstaun,* (1932) 62 Mad L Jour 170 (173, 174): 36 Cal W N 109: 54 Cal L Jour 400: 1931 Notes 23 (a): 137 Ind Cas 672 P C; *Radha Krishna* v. *Tej Saroop,* 1930 All 69 (71): 52 All 363: 1929 All L J 1294: 123 Ind Cas 321. See also O 21, R 30, Note 4, Foot-note (1). But this rule is not applicable to charge decrees. See *Srinivasa Iyer* v. *Lakshmi Ammal,* 1933 Mad 33 (33): 1932 Mad W N 1200: 36 Mad L W 714: 140 Ind Cas 408: 63 Mad L Jour 843 [Maintenance decree making whole family property liable and creating charge on specific items—Charged items need not be proceeded against and exhausted before execution against other properties—Analogy of mortgage decrees not applicable].

(4) *Badriman* v. *Raja Ram,* 1899 All W N 72; *Rama Dattu* v. *Sakharam Lingu,* (1909) 4 Ind Cas 256: 11 Bom L R 1127. But see *Benarsi Das* v. *Gopi Chand,* 1924 Lah 132 (135, 136): 5 Lah L Jour 279: 76 Ind Cas 529.

(5) *Sundermull* v. *John Carapiet Galstoun,* (1932) 62 Mad L Jour 170 (173, 174): 36 Cal W N 109: 54 Cal L Jour 400: 1931 Notes 23 (a): 137 Ind Cas 672 P C [Confirming 1929 Cal 387 (389)]; *Rama* v. *Sakharam,* (1909) 11 Bom L R 1127: 4 Ind Cas 256; *Sanatun* v. *Ali,* (1889) 16 Cal 423 (425); *Mushab Zaman Khan* v. *Inayatulla,* (1892) 14 All 513 (517): 1892 All W N 80; *Govindaswami* v. *Kundaswami,* 1927 Mad 779 (780): 1927 Mad W N 330: 39 Mad L Tim 22: 103 Ind Cas 528: 53 Mad L Jour 489.

(6) *Rai Saheb Sundermull* v. *John Carapiet Galstaun,* (1932) 62 Mad L Jour 170 (173, 174): 36 Cal W N 109: 54 Cal L Jour 400: 1931 Notes 23 (a): 137 Ind Cas 672 P C [Confirming 1929 Cal 387 (389)].

(7) *Chandi Charan* v. *Ambika Charan,* (1904) 31 Cal 792 (796) *Hafizuddin* v. *Damodar,* 1889 All W N 149; *Kamalamma* v. *Komandur,* (1907) 30 Mad 464 (465): 17 Mad L Jour 317: 2 Mad L Tim 359; *Damodar* v. *Vyanku,* (1907) 31 Bom 244 (248): 9 Bom L R 199; *Keshav Manja Bhat* v. *Govind Naga Bhat,* 1923 Bom 32 (32): 24 Bom L R 848: 75 Ind Cas 188; *Mahamaya*

O. 34, R. 6, Note 3.

the other hand the preliminary decree should not direct that properties, not mortgaged, should not be proceeded against, the question must be left for decision at the proper time.[8] But where, at the time of the original decree, a *decision* has been given as to the *personal liability* of the defendant, the question cannot be raised again on general principles of *res judicata*.[9] A decree for sale, providing for execution thereof personally against the mortgagor in case of deficiency, though contrary to the provisions of R. 6, is not void on that ground. No fresh supplementary decree under R. 6 can be passed[10] or is necessary in such a case,[11] before enforcing the personal liability,

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Prusad Singh v. *Ram Khelawan Singh*, (1912) 15 Ind Cas 911 (913): 15 Cal L Jour 684; *Aiyasami Ayyar* v. *Venkatachala*, (1917) 37 Ind Cas 741 (745, 747): 31 Mad L Jour 513: (1916) 2 Mad W N 296: 20 Mad L Tim 391: 4 Mad L W 507: 40 Mad 989; *Gulam Murt Zahan* v. *Changoomal*, (1911) 11 Ind Cas 192 (195): 5 Sind L R 71 [But this does not apply to Sind where the Transfer of Property Act is not in force].

(8) *Pitambar* v. *Chandicharan Haldar*, (1914) 23 Ind Cas 389 (390) Cal.

(9) *Chunni Lall* v. *Tikam Das*, (1917) 39 Ind Cas 854 (855): 13 Nag L R 76; *Abbakki* v. *Krishanaya*, (1909) 32 Mad 534 (535, 536): 5 Mad L Tim 246; *Uttam Ishlok* v. *Ram Narain*, (1906) 28 All 365 (368): 1906 All W N 44: 3 All L J 171; *Ram Nath* v. *Nageshur Singh*, 1930 Oudh 378 (381): 7 Oudh W N 774: 126 Ind. Cas 689 [Srivastava, J. dissenting]; *Suraj Bakhsh* v. *Munno Bibi*, 1929 Notes 33 (a): 6 Oudh W N 974: 124 Ind Cas 669; *Lala* v. *Amir Haider Khan*, 1930 Oudh 10 (12): 123 Ind Cas 215: 6 Oudh W N 969. But see *Bibi Basal* v. *Kedar Nath*, 1925 Oudh 462 (464): 88 Ind Cas 810: 12 Oudh L J 372. See also *Bauki Sahu* v. *Mosaheb Ali*, (1918) 46 Ind Cas 892 (893) Pat [Where the original decree does not reserve such liberty the defendant is not estopped from disputing his liability].

(10) *Dinabandhu Nandi* v. *Mashudu Khatun*, (1912) 17 Ind Cas 263 (265): 16 Cal L Jour 318 [A personal decree cannot be passed under R 6 where the mortgage decree itself has granted personal remedy]. See also *Fala Krista* v. *Jagannath*, 1932 Cal 775 (778): 36 Cal W N 709: 56 Cal L Jour 187 [Solenamah—Composite decree thereon incorporating personal decree on deficiency—Not invalid]. But see *Samanta Gagarnath Mahapatra* v. *Lokenath Sukul*, 1921 Pat 49 (51): 6 Pat L Jour 106: 2 Pat L Tim 736: 61 Ind Cas 635 [Application for personal decree under R 6 need not be dismissed].

(11) *Kandaswami Goundan* v. *Kuppa Moopan*, (1920) 55 Ind Cas 320 (320): 38 Mad L Jour 203: 11 Mad L W 221: 1920 Mad W N 181: 27 Mad L Tim 96: 43 Mad 421; *Lala Tirtti* v. *Lala Hurruck*, (1894) 21 Cal 26 (28); *Miller* v. *Digambari Debyar*, 1890 All W N 142 (143); *Kumara Venkata Perumal Raja Bahadur Varu* v. *Velayuda Reddi*, (1914) 24 Ind Cas 195 (197): 27 Mad L Jour 25; *Dina Nath* v. *Bejoy*, (1903) 7 Cal W N 744 (745); *Muthana Kone* v. *Kumarasami*, (1905) 15 Mad L Jour 6 [Construction of decree—Decree providing that person of judgment-debtor should not be proceeded against—Other properties liable]; *Lalji Lal* v. *Barber*, (1893) 15 All 334 (337): 1893 All W N 121; *Batuk Nath* v. *Pitambar*, (1891) 13 All 360 (361): 1891 All W N 127; *Durga Dai* v. *Bhagwat Prasad*, (1891) 13 All 356 (356): 1891 All W N 104; *Joharimal* v. *Sant Lal*, (1887) 9 All 484 (485): 1887 All W N 101; *Sadho Singh* v. *Maharaja of Benares*, (1907) 29 All 12 (13): 3 All L J 606: 1906 All W N 251; *Ram Baran* v. *Gobind*, (1906) 28 All 295 (297): 1906 All W N 7: 3 All L J 95; *Zamindar of Karvetnagar* v. *Subbaraya Pillai*, (1918) 43 Ind Cas 871 (876, 883): 7 Mad L W 36: 1918 Mad W N 146; *Narayana Ayyar* v. *Singaravelu Vannian*, (1917) 42 Ind Cas 282 (283, 284): 33 Mad L Jour 543: 1917 Mad W N 845: 6 Mad L W 675; *Lachmi Dai* v. *Asman Singh*, (1876-77) 2 Cal 213 (221): 25 Suth W R 421: 1 Ind Jur 625; *Jenna Bahu* v. *Parmeshwar Narayan Nahtha*, (1919) 49 Ind Cas 620 (624): 36 Mad L Jour 215: 17 All L J 207: 23 Cal W N 490: 25 Mad L Tim 278: 29 Cal L Jour 443: 21 Bom L R 589: 10 Mad L W 26: 1919 Mad W N 347: 12 Bur L Tim 80: 47 Cal 370: 1918 P C 159 P C; *Kandasami Goundan* v. *Kuppa Moopan*, (1920) 55 Ind Cas 320 (321): 43 Mad 421: 38 Mad L Jour 203: 11 Mad L W 221: 1920 Mad W N 181: 27 Mad L Tim 96; *Sitanath Shah Banik* v. *Madan Mohan Das*, (1919) 53 Ind Cas 904 (905): 23 Cal W N 924 [Held on construction of decree that it was not a composite decree granting personal relief as well as relief against mortgaged property]; *Ralia Ram* v. *Hira Lal*, 1928 Lah 653 (654): 111 Ind Cas 808; *Parambath Parkum* v. *Chathothparkun*, 1928 Mad 38 (39): 106 Ind Cas 395; *Karachi Bank, Ltd* v. *Khemchand Mewaram*, 1929 Sind 44 (45): 115 Ind Cas 336 [Rights under a valid mortgage decree directing recovery of balance personally from judgment-debtor cannot be deemed as abandoned by presenting an application under O 34, R 6]; *Total Das* v. *Utumal*, (1911) 10 Ind Cas 975 (976): 4 Sind L R 244; *Arunachalam Ayyar* v. *Atmakumar Rao*, (1911) 12 Ind Cas 184 (185): 10 Mad L Tim 213: (1912) 1 Mad W N 85; *Raja of Kalahasti* v. *Venkata Perumal*, (1911) 12 Ind Cas 689 (690): 10 Mad L Tim 429: (1911) 2 Mad W N 458: 21 Mad L Jour 1036; *Mohunga Ojha* v. *Ram Bahadur Singh*, (1912) 15 Ind Cas 23 (24): 16 Cal W N 731 [Personal decree for costs]; *Muthukarupan Chettiar* v. *Chinnaswamy Pillai*, (1914) 22 Ind Cas 293: 1914 Mad W N 152; *Periasawmi Kone* v. *Muthia Chettiar*, (1914) 23 Ind Cas 515 (516): 15 Mad L Tim 232: 38 Mad 677; *Cheruvalath* v. *Theyyatath*, (1914) 25 Ind Cas 50 (51): 1914 Mad W N 497; *Bisheshar Bakhsh Singh* v. *Debi Bakhsh Singh*, (1914) 25 Ind Cas 121 (121): 17 Oudh Cas 153; *Madhoo Mal* v. *Muhammad Zakaria*, (1916) 32 Ind Cas 820 (820, 821): 75 Pun W R 1916; *Deputy Commissioner, Fyzabad* v. *Sant Baksh*, (1915) 27 Ind Cas 72 (73): 1 Oudh L J 742: 18 Oudh Cas 55; *Shachari Peari* v. *Ram Kishori Kuer*, 1924 Pat 262 (263): 2 Pat 796: 74 Ind Cas 867. See *Fala Krista* v. *Jagannath*, 1932 Cal 775 (778): 36 Cal W N 709: 56 Cal L Jour 187 [The necessity of separate decree under this rule in such cases depends on the terms of decree already passed].

O. 34, R.6, Note 3.

though execution cannot be issued until the mortgage property has been sold and the proceeds found insufficient to satisfy the mortgage.[12]

Similarly the mortgagee is not entitled to proceed against the non-hypothecated properties under the original decree for sale without a personal decree under this rule[12-a] but where execution is allowed against the non-mortgaged properties of the mortgagor, without such a personal decree having been obtained, and the mortgagor *fails to object* to such procedure, he will be estopped subsequently from objecting to the execution on the ground of the want of a personal decree.[13]

A personal decree under R. 6 can only be based on a *decree for sale under which the mortgaged property has been sold.* Thus, where a person holds two mortgages over the same property and obtains two decrees upon them but sells the mortgaged property under *one* of them, he cannot apply for a decree under R. 6 if the balance of the sale proceeds, after satisfying the decree under which the sale is held, is not sufficient to satisfy the *other* mortgage.[14] Similarly, where a puisne mortgagee who has obtained a decree on his mortgage is joined as a party to a suit on a prior mortgage and the property is sold in execution of the decree on the *prior* mortgage but the balance of sale proceeds after satisfying the prior mortgage is not sufficient to satisfy the *puisne* mortgage, the puisne mortgagee cannot obtain a decree under R. 6 for his amount.[15]

The present rule makes it clear that the plaintiff must *apply* for a decree under this rule and that the Court cannot pass the decree *suo motu.* The law was the same even before the amendment of the rule in this respect by Act XXI of 1929.[16] But the application need not be in *writing* nor need it be signed.[17]

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(12) *Kommachi Kathear* v. *Pakker*, (1897) 20 Mad 107 (112): 7 Mad L Jour 66; *Damodara* v. *Vyanku*, (1907) 31 Bom 244 (249): 9 Bom L R 199; *Munawar* v. *Jani Bijai*, (1905) 27 All 619 (621): 1905 All W N 132: 2 All L J 376; *Jeuna Baha* v. *Parmeshwar Narayan Mahtha*, (1919) 49 Ind Cas 620 (624): 36 Mad L Jour 215: 17 All L J 207: 23 Cal W N 490: 25 Mad L Tim 278 29 Cal L Jour 443: 21 Bom L R 589: 10 Mad L W 26: 1919 Mad W N 347: 12 Bur L Tim 80: 47 Cal 370: 1918 P C 159 P C; *Varadiah* v. *Kumara Venkata Perumal*, (1914) 21 Ind Cas 782 (782): 14 Mad L Tim 530: 26 Mad L Jour 83: 1914 Mad W N 157; *Manti Kamoji* v. *Ramamoorthy*, (1908) 3 Mad L Tim 335.

(12-a) *Badan* v. *Ramachandra*, (1887) 11 Bom 537 (540); *Mata Ghulam Singh* v. *Kandhai Bakhsh*, (1903) 6 Oudh Cas 59 (60); *Janardan* v. *Krishnaji*, (1920) 58 Ind Cas 377 (379, 380): 22 Bom L R 953; *Gopal Das* v. *Ali Muhammad*, (1888) 10 All 632 (633): 8 All W N 254; *Bulkee Bee* v. *Kaka Haji Muhammad Ummar Sahib*, 1926 Mad 415 (416): 50 Mad L Jour 39: 1926 Mad W N 143: 93 Ind Cas 99; *Bhagirath* v. *Bank of Northern India*, 1930 Lah 103 (104): 31 Pun L R 143: 121 Ind Cas 293; *Surjo Kumar* v. *Promoda*, (1913) 20 Ind Cas 829 (830): 17 Cal W N 1039; *Muhammad Hussain Khan* v. *Amar Chand Paul*, (1913) 21 Ind Cas 283 (284): 16 Oudh Cas 238; *Pran Kuar* v. *Durga Prasad*, (1888) 10 All 127 (128): 1888 All W N 21; *Lal Behari* v. *Habibar Rahman*, (1899) 26 Cal 166 (171): 3 Cal W N 8.

(13) *Lakshmi Ammal* v. *Subramania Pillai*, (1904) 14 Mad L Jour 103; *Madhu Sudan* v. *Kailash Chunder*, (1898) 2 Cal W N 254 (256).

(14) *Kamta Prasad* v. *Sayed Ahmad*, (1909) 31 All 373 (376): 6 All L J 451: 1 Ind Cas 799; *Ballamdas* v. *Amar Raj*, (1890) 12 All 537 (538): 1890 All W N 90. But see *Bageshri Dial* v. *Muhammad Nazir*, (1893) 15 All 331 (332): (1893) 13 All W N 120.

(15) *Badri Das* v. *Inayat Khan*, (1900) 22 All 404 (404, 405): 1900 All W N 132; *Muhammad Akbar* v. *Munshi Ram*, 1899 All W N 208 (209); *Darbari Mal* v. *Moola Singh*, (1920) 56 Ind Cas 139 (141): 2 U P L R (All) 160: 18 All L J 628: 42 All 519; *Muhammad Akbar* v. *Munshi Ram*, (1899) 19 All W N 208. But see *Wasi Ali* v. *Jang Bahadur Singh*, (1916) 34 Ind Cas 48 (50): 2 Oudh L J 614. See also *Thirumalai Kandamma Kondala* v. *Eastern Development Corporation, Ltd, London*, (1917) 42 Ind Cas 953 (954): 33 Mad L Jour 382: 22 Mad L Tim 257: 1918 Mad W N 4.

(16) *Chuni Lal* v. *Tikamdas*, (1917) 39 Ind Cas 854 (856, 857): 13 Nag L R 76.

(17) *Santi Lal* v. *Raj Narain*, 1924 All 804 (805): 5 L R (All) Civ 565: 82 Ind Cas 65.

O. 34, R. 6, Notes 3—5.

A decree under R. 6 can be made only against the defendants in the original suit.[18]

A personal decree under this rule can be executed either against the person of the mortgagor or by attachment and sale of his other properties.[19] A decree under this rule should not, therefore, direct the realisation of the amount from any *specific* property.[20]

Although a decree merely declares the amount due to be a charge on the mortgaged property, it should be construed as a mortgage decree for sale to which R. 6 is applicable.[21]

Although a mortgage is invalid, a personal decree may be passed in the same suit against the mortgagor on the basis of the *personal covenant* in the mortgage deed.[22] A personal decree obtained without informing the Court of a previous refusal by it to grant such a decree, cannot be set aside as fraudulent.[23]

4. **Personal liability of purchaser from mortgagor.**—The word "defendant" in R. 6 means the defendant *mortgagor* and a personal decree cannot be passed under the rule against a purchaser of the equity of redemption.[1] This is so even if the purchaser has contracted with the mortgagor to pay off the mortgage and has retained with himself a portion of the consideration for the purpose. The reason is, that there is no *privity of contract* between himself and the mortgagee.[2]

5. **Personal liability is a question of construction of the instrument.**—A personal liability to pay the mortgage amount is, in each case, a question of the construction of the mortgage deed.[1] But every simple mortgage[2] and

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(18) *Mt Fayazi Begam* v. *Sabir Hosain*, 1927 All 691 (692): 103 Ind Cas 264.

(19) *Sonatun Shah* v. *Ali Newaz*, (1889) 16 Cal 423 (425); *Jagannath Prasad* v. *Jado Rai*, 1925 All 352 (352) [Decree against Hindu widow—Other properties can be attached]. See *Masutullah Mandal* v. *John Mamud Shah*, (1901) 28 Cal 12 (16, 17): 4 Cal W N 735 [Suit on mortgage is brought not only upon the lien but also upon the personal covenant]. See also O 21, R 30 and Note 4, Foot-note (1) thereto.

(20) *Rup Ram* v. *Gopal Das*, (1899) 19 All W N 125 (126).

(21) *Muhammad Hussain* v. *Muthu Chettiar*, (1915) 30 Ind Cas 280 (281): 2 Mad L W 689. See also *Fala Krista* v. *Jagannath*, 1932 Cal 775 (781): 36 Cal W N 709: 56 Cal L Jour 187 [Solenamah—Decree creating charge and incorporating personal liability in case of deficiency—Even as charge-holder, entitled to benefit of this rule].

(22) *Jagannatham Pillai* v. *Official Assignee, Madras*, 1931 Mad 124 (128): 32 Mad L W 666: 1930 Mad W N 865: 129 Ind Cas 814: 60 Mad L Jour 309; *Rakhal Chandra Dugar* v. *Sidha Nath Singh*, (1919) 53 Ind Cas 922 (923): 1919 Pat 390; *Javerbhai* v. *Gordhan*, (1915) 28 Ind Cas 442 (446): 39 Bom 358: 17 Bom L R 259.

(23) *Ram Ratan Lal* v. *Bhuri Beham*, (1915) 30 Ind Cas 792 (795).

Note 4.

(1) *Ajkumar* v. *Ram Saran*, (1909) 3 Ind Cas 33 (33) All; *Tarachand Marwari* v. *Brojogopal Mukerjee*, (1913) 18 Ind Cas 747 (749): 17 Cal W N 457: 17 Cal L Jour 120; *Venugopalachariar* v. *Padmanabha*, (1915) 30 Ind Cas 188 (188, 189): 29 Mad L Jour 120. See *Ram Kuran Singh* v. *Raja Ram*, 1924 All 877 (878): 5 L R (All) Rev 225: 84 Ind Cas 26 [Right to personal decree is different from the right given by covenant in deed to recover money by sale].

(2) *Jamna Das* v. *Ram Autar*, (1912) 13 Ind Cas 304 (304): 16 Cal W N 97: 11 Mad L Tim 6: 9 All L J 37: 1912 Mad W N 32: 15 Cal L Jour 68: 14 Bom L R 1: 21 Mad L Jour 1158: 34 All 63: 39 Ind App 7 P C; *Jamna Das* v. *Ramandar Pande*, (1909) 31 All 352 (358): 2 Ind Cas 460: 6 All L J 427; *Jamna Das* v. *Ram Autar Pande*, (1916) 33 Ind Cas 351 (351): 38 All 209: 14 All L J 151; *Nanku Prasad Singh* v. *Kamta Prasad Singh*, 1923 P C 54: 26 Cal W N 771: 3 Pat L Tim 637: 95 Ind Cas 970 P C.

Note 5.

(1) *Ram Kishore Gir* v. *Surajdeo Prasad*, (1909) 1 Ind Cas 442 (443): 13 Cal W N 138: 9 Cal L Jour 5; *Bunseedhur* v. *Sujat Ali*, (1889) 16 Cal 540 (544); *Lachman Singh* v. *Kesri*, (1882) 4 All 3 (5): 1881 All W N 93; *Suri Markendaya Sastri* v. *Gottumukkala Subhanandra Charyalu*, (1907) 42 Ind Cas 288: 6 Mad L W 692; *Askaran Boid* v. *Gobordhan Kobar*, 1922

O. 34, R. 6. Notes 5—7.

every English mortgage[3] involves, *prima facie*, a personal obligation to pay. Similarly, *prima facie*, there is no personal obligation to pay in a usufructuary mortgage or a mortgage by conditional sale.[4] *See* S. 58 of the Transfer of Property Act.) Where the time for payment fixed under the decree *nisi* was enlarged on condition of the mortgagor paying interest not provided for in the decree, it was *held* that the mortgagor was *personally* liable for the payment of such interest.[5]

6. **Personal decree against person not the mortgagor.**—The word "defendant" in the rule means as has been seen in Note 4 above, the *mortgagor defendant*.[1] Where a mortgage bond was executed by the Court of Wards on behalf of a ward, a decree may be passed against the ward under this rule for the balance of mortgage money due after the sale of the mortgaged property and appropriation of the sale proceeds.[2] A personal decree against the managing member of a Hindu joint family binds the junior members of the family though they were not parties to the suit.[3]

7. **Personal decree against the heirs of the mortgagor.**—Where mortgaged property is found to be insufficient to satisfy a mortgage decree obtained against the heirs of a mortgagor, a decree may be passed against them under this rule *to the extent of the assets of the deceased* in their hands.[1] Where a decree under this rule exempts the person, and property, of the sons of the mortgagor, who is the manager of a joint Hindu family, but a decree is passed

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Cal 52 (52, 53): 26 Cal W N 318: 70 Ind Cas 158; *Arasalwar Peria Tiruwadi Aiyangar* v. *Muthammal Janaki*, (1915) 27 Ind Cas 770 (771): 2 Mad L W 66; *Pars Ram* v. *Brij Mohan*, 1932 Lah 164 (166, 167): 135 Ind Cas 33: 13 Lah 259: 33 Pun L R 536 [In all mortgages, personal covenant is presumed unless negatived by the nature and terms thereof—In certain classes, much more clearly implied covenant is required than in others].

(2) *Abbake* v. *Krishnamma*, (1906) 29 Mad 491 (495); *Parbati* v. *Gobinda*, (1906) 4 Cal L Jour 246 (248 and 253); *Bhugwan Das* v. *Parmeswari Prasad*, (1907) 5 Cal L Jour 287 (289); *Jangi Singh* v. *Chander Mal*, (1908) 30 All 388 (390): 5 All L J 670: 1908 All W N 161: *Seth Jiwandas* v. *Mt Janki*, 1922 Nag 98 (99): 65 Ind Cas 53: 5 Nag L J 49: 18 Nag L R 145.

(3) But see *Manly* v. *Patterson*, (1881) 7 Cal 394 (400).

(4) *Balkishen Das* v. *W F Legge*, (1900) 22 All 149 (159): 27 Ind App 58: 4 Cal W N 153: 7 Sar 601: 2 Bom L R 523 P C. See also *Pars Ram* v. *Brij Mohan*, 1932 Lah 164 (166, 167): 135 Ind Cas 33: 13 Lah 259: 33 Pun L R 536 [In usufructuary mortgages in the absence of express covenant a much more clearly implied covenant is required than in other forms of mortgage—On the terms of a bond assumed to be a usufructuary mortgage, *held*, personal covenant was clearly implied].

(5) *Mukund Lal* v. *Seth Mangaljeet*, (1899) 12 C P L R 78 (82).

Note 6.

(1) *Mata Ambar* v. *Sri Dhar*, (1904) 26 All 507 (508): 1904 All W N 73: 1 All L J 250; *Ramoo* v. *Miterjit*, (1910) 7 Ind Cas 784 (785) Cal; *Venugopalachariar* v. *Padmanabha Rao*, (1915) 30 Ind Cas 188 (188, 189): 29 Mad L Jour 120. See aso *Tulsi Prasad* v. *Dip Prakash*, 1931 All 631 (632): 1931 All L J 559: 132 Ind Cas 561: 53 All 695 [Persons not interested in hypotheca but joining as executants of the mortgage deed as sureties—Personal decree under this rule can be passed against such sureties also]; *Fala Krista* v. *Jagannath*, 1932 Cal 775 (779): 36 Cal W N 709: 56 Cal L Jour 187 [No personal decree is competent against puisne encumbrancers as such]; *Chandi Dayal* v. *Ganesh Prasad*, (1917) 37 Ind Cas 449 (449): 3 Oudh L J 628 [Suit on mortgage impleading co-mortgagee as *pro forma* defendant—Payment to co-mortgagee found—No money decree can be passed against him in the suit—Suit dismissed].

(2) *Jiwandas* v. *Janki*, 1922 Nag 98 (100, 101): 5 Nag L J 49: 65 Ind Cas 53: 18 Nag L R 145.

(3) *Hari Ram* v. *Bishnath*, (1901) 22 All 408 (409, 410): 1900 All W N 158.

Note 7.

(1) *Baru Mal* v. *Sher Singh*, (1912) 14 Ind Cas 55 All; *Arura* v. *Balak Ram*, (1915) 30 Ind Cas 528 (528): 157 Pun L R 1915: 147 Pun W R 1915; *Ram Sri* v. *Narayan Singh*, 1931 All 368 (369): 129 Ind Cas 874 [In this case it was held that the property in question was not such assets]; *Ram Kishore* v. *Surajdeo*, (1909) 1 Ind Cas 442 (443): 13 C W N 138: 9 Cal L Jour 5 [Hindu joint family—Mortgage by the father—Personal liability of sons confined to assets received]. See *Krishna Prasad* v. *Ram Prasad*, 1921 Pat 357: 2 Pat L Tim 715: 64 Ind Cas 629 [Personal decree against son's share and mortgage decree against father—Decree under R 6 is necessary to proceed against father's other properties—Decree as it stands could be executed against son's shares].

against them to the extent of the *assets* of the mortgagor in their hands, the assets received by the sons by survivorship on the death of the father are liable under the decree.[2] But when the son's share is exempted from the mortgage decree against the father, it is also exempt from a decree under the present rule.[3]

8. **Personal remedy under compromise decree.**—The fact that the original decree was a compromise decree is no bar to a personal decree being passed under this rule.[1] According to the High Courts of Bombay[2] and Calcutta[3] a compromise decree in a mortgage suit may be executed against the mortgagor personally without any decree being passed under R. 6 although it does not expressly provide for personal relief. But the Patna High Court has held that a decree under this rule is necessary in such a case.[4] Where the compromise decree itself expressly provides for personal relief, a fresh decree under this rule is not necessary.[5]

9. **Right of mortgagee to attach other properties of mortgagor before date fixed for payment of mortgage money.**—After the preliminary decree in a mortgage suit and before the date fixed for the payment of the mortgage money, if there is a reasonable probability of the mortgaged property not being sufficient to satisfy the mortgage debt, the Court can order the attachment of the other properties of the mortgagor if it is satisfied as to the existence of the conditions laid down in O. 38, R. 5. The fact that under O. 34, R. 6 no personal decree can be obtained until the mortgaged properties are sold does not affect the plaintiff's rights under O. 38, R. 5.[1]

10. "**Where net proceeds of any such sale are found insufficient.**"—The opening words of the rule make it clear that a decree under the rule can only be passed after the mortgaged property has been sold and it is found that the sale proceeds are not sufficient to satisfy the mortgage debt.[1] But if a personal decree is actually passed before the sale and the mortgagor does not

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[2] *Ramlal* v. *Maharaja Paswati,* (1910) 6 Ind Cas 146 (147): 11 Cal L Jour 362.

[3] *Narain Singh* v. *Bir Bahadur,* (1903) 23 All W N 41.

Note 8.

[1] *Sundermull* v. *John Carapiet Galstaun,* (1932) 62 Mad L Jour 170 (173, 174): 36 Cal W N 109: 54 Cal L Jour 400: 1931 Notes 23 (a): 137 Ind Cas 672 P C [Confirming 1929 Cal 387 (389)]; *Lakshmi Narain Maity* v. *Gopalchandra Maity,* (1909) 3 Ind Cas 443 (444) Cal; *Sri Ram* v. *Suraj Bali,* 1926 Oudh 27 (28): 88 Ind Cas 607. See *Tribeni* v. *Mohamed Mosharuf Ali,* 1931 Oudh 422 (423, 424): 134 Ind Cas 1009: 8 Oudh W N 1121 [Compromise not contemplating personal liability—Decree embodying a clause for personal liability—Decree amended by deleting the clause].

[2] *Usafali Ibrahim* v. *Faizullahbai Sheikh Mahomedbhai,* 1930 Bom 208 (209): 32 Bom L R 489: 54 Bom 352: 125 Ind Cas 903. But see *Janardhan Shankar* v. *Krishnaji Balkrishna Bhat,* (1920) 58 Ind Cas 877 (880): 22 Bom L R 953 [In this case it was held that the compromise decree could not be executed against the mortgagor, personally].

[3] *Haripada Dutta* v. *Sashi Bhusan Basu,* 1928 Cal 668 (669): 48 Cal L Jour 102. See also *Soudhamini* v. *Satish Chandra,* 1932 Cal 414 (415, 416): 55 Cal L Jour 1: 139 Ind Cas 247.

[4] *Kariulla Shah* v. *Miza Muhammad Raza,* (1918) 48 Ind Cas 608 (608): 3 Pat L Jour 649.

[5] *Aditya Prasad* v. *Hargovind Singh.* 1928 Oudh 490 (490): 3 Luck 411: 5 Oudh W N 135: 108 Ind Cas 723.

Note 9.

[1] *Jogemaya* v. *Baidyanath,* (1919) 50 Ind Cas 924 (925): 46 Cal 245; *Shridhar Ram Chandra* v. *Lachman,* 1931 Bom 329 (329): 33 Bom L R 514. See *Muhammad Din* v. *Devi Dass,* 1929 Lah 402 (403): 118 Ind Cas 446 [Mortgage decree for sale allowing decree-holder to proceed against judgment-debtor personally if proceeds insufficient—Court can attach his other property under O 38, R 5 even before sale].

Note 10.

[1] See also Note 8 above. *Raja Ram Lal* v. *Hanuman Upadya,* (1916) 35 Ind Cas 43 (44) Pat; *Bulkee Bee* v. *Kaka Haji Muhammad Ummar Sahib,* 1926 Mad 415 (415, 416): 1926 Mad W N 143: 93 Ind Cas 99: 50 Mad L Jour 39; *Shyam Behari* v. *Mohendei,* 1930 Oudh 377 (378): 126 Ind Cas 700: 7 Oudh W N 744: *Periaswami Kone* v. *Muthia Chettiar,* (1914) 23 Ind Cas 515 (515): 38 Mad 677: 15 Mad L Tim 232; *Darbari Mal* v. *Moola Singh,* (1920)

O. 34, R. 6, Note 10.

object, he is estopped from questioning the validity of such personal decree later on.[2] If the mortgaged property, through no fault of the mortgagee, has been destroyed by fire or otherwise ceased to exist or to be available for sale, the plaintiff is not bound to go through the farce of bringing the property to sale before applying for a decree under the rule.[3] Thus, where the mortgagee is unable to sell a portion of the mortgaged properties by reason of their being situated in a Native State which will not execute the decree of a British Indian Court and the sale proceeds of the remaining portion of the properties are not sufficient to satisfy the mortgage, the decree-holder is entitled to a personal decree against the judgment-debtor.[4] Similarly, where a mortgage of joint family property by the father of a Hindu joint family is found to be not for legal necessity, it has been held by the Madras High Court that a conditional decree may be passed against the father personally and the sons' share in the joint family property for the recovery of the balance that may remain due to the mortgagee after the sale of the *father's share of the mortgaged property* (without the son's shares being put to sale).[5] Where a sale in execution of a decree on a mortgage is set aside on the ground that the mortgagor has no saleable interest in the mortgaged property, a personal decree may be passed against the mortgagor, because, the mortgagee, having been compelled to refund the entire purchase money, the net sale proceeds are *nil* and therefore insufficient to satisfy the mortgage debt.[6]

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56 Ind Cas 139 (141): 2 U P L R (All) 160: 18 All L J 628: 42 All 519; *Raj Kumar Singh* v. *Sheo Narain Sahu*, (1908) 35 Cal 431 (433): 12 Cal W N 364: 8 Cal L Jour 152; *Suri Markendeya Sastri* v. *Gottumukkala Sobhonadhracharyulu*, (1917) 42 Ind Cas 288: 6 Mad L W 692; *Gulam Abus* v. *Brighban*, (1905) 1 Nag L R 39 (43).

[2] *Teja* v. *Tika Ram*, 1924 All 225 (227): 21 All L J 754: 4 L R A (Civ) 522: 46 All 32: 77 Ind Cas 37.

[3] *Periasami Kone* v. *Muthia Chettiar*, (1914) 23 Ind Cas 515 (516): 38 Mad 677: 15 Mad L Tim 232; *Kasikrishnama Chariar* v. *Bogiammal*, (1911) 12 Ind Cas 439 (440): (1911) 2 Mad W N 355: 10 Mad L Tim 525: 22 Mad L Jour 125 [Mortgagor having no saleable interest in the mortgaged property]; *Samanta* v. *Lokenath*, 1921 Pat 49 (51): 2 Pat L Tim 736: 61 Ind Cas 635: 6 Pat L Jour 106 [Mortgagee not allowed to sell a portion of the property]; *Adhar Chandra Naskar* v. *Sarwamoyi Dasi*, 1929 Cal 121 (123): 32 Cal W N 1160: 117 Ind Cas 530; *Chand Mul Babu* v. *Ban Behari Bhose*, 1924 Cal 209 (210): 50 Cal 718: 74 Ind Cas 1021 [Portion of property sold for arrears of rent through no fault of the mortgagee]; *Hari Janardhan Limaye* v. *Krishnaji Balkrishna Bhati*, 1928 Bom 323 (328): 30 Bom L R 724 [Property destroyed by fire]; *Sahu Bisheshar Nath* v. *Chandu Lal*, 1928 All 71 (72, 73): 50 All 321: 25 All L J 1042; 108 Ind Cas 459; *Satish Ranjan Das* v. *Mercantile Bank of India*, (1918) 48 Ind Cas 322 (327): 45 Cal 702; *Brij Behari Lal* v. *Indrapal Singh*, (1920) 57 Ind Cas 967 (968): 23 Oudh Cas 145: 2 U P L R (O) 139; *Ram Ranjan* v. *Indra Narain*, (1906) 33 Cal 890 (891, 892): 10 Cal W N 862; *Adhar Chandra Nasker* v. *Swarnamoyi Dasi*, 1929 Cal 121 (123): 32 Cal W N 1160: 117 Ind Cas 530; *Ram Raghubir* v. *Imami Begam*, (1911) 9 Ind Cas 403 (406): 14 Oudh Cas 217 [No bidder forthcoming because of prior mortgages exceeding the value of the property]; *Sheo Din* v. *Bhawani Baksh*, (1911) 9 Ind Cas 752 (753): 14 Oudh Cas 62 [Application for sale dismissed on the ground of the mortgagor having no saleable interest in the property]; *Kedar Nath* v. *Chandu Mal*, (1904) 26 All 25 (27): 1903 All W N 179 [Third person establishing his right to a portion of the mortgaged property—Sale of the remaining not sufficient to pay off the mortgage—Decree may be passed under R 6]; *Mahadeo Prasad* v. *Jai Karan*, 1933 Oudh 1 (3, 4): 9 Oudh W N 1128: 141 Ind Cas 183, (Do.). Contra *Behari Lal* v. *Bisheshar Dayal*, (1912) 14 Ind Cas 591 (592): 9 All L J 569; *Pirbhu Narain Singh* v. *Baldeo Misra*, (1907) 29 All 260 (261): 4 All L J 157: 1907 All W N 69 [Mortgagor found to have no saleable interest—Yet sale must precede application for personal decree]. See also *Shyam Lal* v. *Sheo Baran Singh*, (1913) 20 Ind Cas 320 (321) All [Where the mortgagee negligently allows a third person to come in and sell a portion of the mortgaged property he cannot afterwards come in under O 34, R 6].

[4] *Samanta Jagarnata Mahapatra* v. *Lokanath Sukul*, 1921 Pat 49 (51): 6 Pat L Jour 106: 2 Pat L Tim 736: 61 Ind Cas 635.

[5] *Kandasami* v. *Kuppu Moopan*, (1920) 55 Ind Cas 320 (321): 38 Mad L Jour 208: 11 Mad L W 221: 1920 Mad W N 181: 27 Mad L Tim 96: 43 Mad 421.

[6] *Badal Singh* v. *Debi Saran*, 1927 All 395 (396): 49 All 506: 100 Ind Cas 775: 25 All L J 485. [But this rule is not applicable where there is no sale at all in consequence of the mortgage decree itself becoming inoperative at the instance of a successful claimant to the mortgaged property See *Babu Lal* v. *Raghunandan*, 1932 All 475 (476): 1932 All L J 311: 138 Ind Cas 372 [Mortgagee getting final decree but no steps for sale since mortgagor's title was negatived in a subsequent suit by third party]. And *Zia Uddin* v. *Akbar Ali*, 1932 All 358 (360): 1932 All L J 317: 136 Ind Cas 829, (Do.).

O. 34, R.6, Note 10.

A personal decree should not be passed against the mortgagor till the *entire* mortgaged property ordered to be sold has been sold and the proceeds are found insufficient to satisfy the mortgage debt.[7] But it is open to the mortgagee in the plaint to give up his claim against any portion of the mortgaged property and obtain a decree for sale in respect of the rest. If in such a case, the sale proceeds of the portion ordered to be sold are not sufficient to satisfy the mortgage debt, the plaintiff may obtain a personal decree against the mortgagor.[8]

The sale of the mortgaged property need not be necessarily a *judicial sale*. The rule covers also a private sale.[9] Where the mortgagee himself purchases the mortgaged property in execution of his mortgage decree, with the leave of the Court, the leave to bid puts him in the same position as any other purchaser and he is bound to give credit only for the amount bid by him and may apply for a personal decree for the balance of the mortgage money remaining due after deducting such amount.[10]

Where a portion of the mortgaged property was acquired by the Government under the Land Acquisition Act, it was held by the Allahabad High Court that the mortgagee's remedy was to bring to sale the rest of the property and then, if there is a balance due, to apply for a personal decree.[11] But the Calcutta High Court has held that where the mortgaged property is compulsorily acquired by the Government, the mortgage lien is transferred to the compensation money standing to the credit of the mortgagor in the collectorate and the mortgagee is entitled, in execution of a decree for the sale of the mortgaged property, to take out such money without obtaining a further decree under the present rule.[12]

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(7) *Badri Das* v. *Inayat Khan*, (1900) 22 All 404 (404): 1900 All W N 132; *Ram Ranjan* v. *Indra Narain*, (1906) 33 Cal 890 (892): 10 Cal W N 862. But see *Pirbhu* v. *Amir*, (1907) 29 All 369 (371): 1907 All W N 83 [Mortgagee Decree-holder may give up, in execution, his claim against a portion of the mortgaged property and apply for personal decree if sale of rest of property leaves a deficit].

(8) *Sheo Prasad* v. *Behari Lal*, (1903) 25 All 79 (82): 1902 All W N 203; *Gaffur Hussain Khan* v. *Muhammad Kifayat-ul-lah Khan*, (1905) 2 All L J 413 (414): 28 All 19: 1905 All W N 165 [Sale of property ordered to be sold under S 89, T P Act constitutes the only condition precedent for order under S 90 whether the order under S 89 was passed rightly or wrongly]; *Gopal* v. *Baikuntha*, (1917) 42 Ind Cas 56 (56, 57): 2 Pat L Jour 538. See *Ghafur Husain Khan* v. *Muhammad Kiffayat-ul-lah Khan*, (1906) 28 All 19 (20): 2 All L J 413: 1905 All W N 165 [Decree for sale—Mortgagee relinquishing claim to portion of mortgaged property at the time of order absolute for sale—Sale of property directed to be sold insufficient—Mortgagee may obtain personal decree]. Contra *Arunachalam Velan* v. *Venkatarama Aiyer*, (1919) 51 Ind Cas 84 (85): 9 Mad L W 588: 26 Mad L Tim 192: 38 Mad L Jour 98. Compare *Shiam Sunder Lal* v. *Ganesh Prasad*, (1906) 28 All 674 (675): 3 All L J 465: 1906 All W N 205 [Decree passed against wrong property—Such property sold—Personal decree may be passed].

(9) *Udit Narain Singh* v. *Bugar Sajjad*, (1906) 2 All L J 353 (355); *Gajadhar Lal* v. *Alliance Bank of Simla*, (1906) 28 All 660 (664): 3 All L J 445. But see *M A Srinivasa Iyengar* v. *Kandasami Naicker*, (1914) 23 Ind Cas 544 (545): 1 Mad L W 294: 15 Mad L Tim 235: 26 Mad L Jour 375: 1914 Mad W N 316 [Mortgage decree against *A* and *B*—Private sale by *A* alone—*B* can insist on judicial sale being held before personal decree is passed against him].

(10) *Sheonath* v. *Janki Prasad*, (1889) 16 Cal 132 (136): 13 Ind Jur 262; *Muhammad Hussen* v. *Dharam Singh*, (1896) 18 All 31 (33): 1895 All W N 144; *Mahabir Singh* v. *Macnaghten*, (1889) 16 Cal 682 (692): 16 Ind App 107: 5 Sar 345: 13 Ind Jur 133 P C; *Gunga Pershad* v. *Jawahir*, (1892) 19 Cal 4 (7); *Durga* v. *Bhagwan Das*, (1904) 1 All L J 486 (487) [Decree-holders failure to give the full decretal amount according to his undertaking to the Court was held to be an abuse of the process of the Court although he was not thereby disabled from applying for personal decree]. See also *Asia Bibi* v. *Malik Azir Ahmad*, 1932 All 704 (706, 707): 137 Ind Cas 50: 54 All 448: 1932 All L J 230 [Decree-holder becoming one of the heirs of one of the deceased judgment-debtor—Can get a decree under this rule after deducting proportinate amount of deceased judgment-debtor's share of liability].

(11) *Basamal* v. *Tajamul Husain*, (1894) 16 All 78 (79): 1893 All W N 223.

(12) *Chowdhurani* v. *Amir Krishna Saha*, (1904) 6 Cal L Jour 745 (748).

O. 34, R.6, Notes 11—15.

11. **"Amount due".**—The "amount due" is the amount for the recovery of which a decree for sale has been previously passed.[1] Costs awarded to the mortgagee form an integral part of the "amount due".[2] A puisne mortgagee paying off a prior encumbrance is entitled to a personal decree for the deficit due to his having paid off the prior mortgage.[3]

12. **"Legally recoverable".**—A personal decree cannot be passed in every suit for sale upon a mortgage; but only where the defendant by his contract or otherwise is under a *personal obligation* to pay the mortgage debt[1] and the plaintiff's right to enforce the personal obligation is *not barred by limitation* at the date of the suit for sale.[2]

For further information, *see* Note 17, below.

13. **"Legally recoverable otherwise than out of the property sold".**—These words mean, by way of illustration, that the balance must be a balance which the mortgagee is not precluded, by the terms of the mortgage, from realising otherwise than out of the property sold or a balance the recovery of which is not barred by limitation.[1]

14. **Prior and puisne mortgagees.**—A puisne mortgagee is not a 'defendant' against whom a *personal* decree may be passed, there being no privity of contract between him and the plaintiff.[1]

15. **Costs against puisne mortgagee.**—A prior mortgagee is not entitled to a personal decree for costs against a *puisne* mortgagee.[1] As seen

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Note 11.

(1) *Choley Lal* v. *Laiq Singh*, 1929 All 15 (16): 111 Ind Cas 221: 26 All L J 1374.

(2) *Jwala Sahay* v. *Dhanau*, (1908) 11 Oudh Cas 377 (378); *Raj Kumar Singh* v. *Sheo Narain Sahu*, (1908) 35 Cal 431 (433): 12 Cal W N 364: 8 Cal L Jour 152; *Khushal Singh* v. *Srinivasa Rao*, (1889) 2 C P L R 94 (97); *Kamalamma* v. *Komandur*, (1907) 30 Mad 464 (465): 17 Mad L Jour 317: 2 Mad L Tim 359; *Maqbul* v. *Lalta*, (1898) 20 All 523 (526, 527): 1898 All W N 157; *Damber Singh* v. *Kalyan Singh*, (1918) 43 Ind Cas 557 (559): 15 All L J 914: 40 All 109; *Komandur Kamalammal* v. *Komandur Narasimacharulu*, (1912) 17 Ind Cas 244 (245): 1913 Mad W N 139: 12 Mad L Tim 312; *Kashif Husain* v. *Sashdhar Singh*, 1930 Oudh 328 (329): 7 Oudh W N 398: 122 Ind Cas 783; *Matukdhari Singh* v. *Ramdas Singh*, (1917) 38 Ind Cas 214 (215): 2 Pat L Jour 51. But see *Rutnessur* v. *Jesoda*, (1887) 14 Cal 185 (187, 188) [Costs may be recovered personally]. And *Rajagopalaswami* v. *Palaniswami*, 1932 Mad 155 (156, 157): 34 Mad L W 961: 135 Ind Cas 578: 62 Mad L Jour 93: 55 Mad 332: 1932 Mad W N 554 [Notwithstanding amalgamation into the mortgage-money as one lump sum or heap, costs can be personally recovered if remaining due after sale of properties mortgaged]. And *Maung Po Mya* v. *M A S Chettyar Firm*, 1931 Rang 153 (158): 9 Rang 186: 133 Ind Cas 225 [Costs may be personally received though personal remedy for mortgage-money and interest is time-barred]. See also *Aina Bibi* v. *Rama Shankar Miser*, (1919) 50 Ind Cas 730 (731): 41 All 473: 17 All L J 582 [Costs of unsuccessful appeal by mortgagor may at mortgagee's option be added to mortgage-money or be recovered personally from mortgagor]; *Jaswant* v. *Sadiq*, (1910) 8 Ind Cas 32 (33) (All); *Jagannath* v. *Jhuniah*, (1914) 24 Ind Cas 63 (63, 64): 12 All L J 645.

(3) *Ali Jan* v. *Mariam*, (1904) 26 All 93 (95): 1903 All W N 202.

Note 12.

(1) *Nanchand* v. *Yenawa*, (1904) 28 Bom 630 (634): 6 Bom L R 582.

(2) *Ram Din* v. *Kalka*, (1885) 7 All 502 (505): 12 Ind App 12: 9 Ind Jur 160: 4 Sar 619 P C; *Musaheb Zaman* v. *Inayat-ul-lah*, (1892) 14 All 513 (518): 1892 All W N 80; *Bageshri Dial* v. *Muhammad Naki*, (1893) 15 All 331 (332): 1893 All W N 120; *Miller* v. *Ranga Nath*, (1886) 12 Cal 389 (395, 396); *Gulam Hossein* v. *Mahamadali*, (1910) 34 Bom 540 (545): 12 Bom L R 531: 7 Ind Cas 455; *Hanmant Timaj* v. *Ragavendra Rao*, 1922 Bom 237 (238): 46 Bom 848: 24 Bom L R 410: 67 Ind Cas 847.

Note 13.

(1) *Musaheb Zaman* v. *Inayat-ul-lah*, (1892) 14 All 513 (518): 1892 All W N 80.

Note 14.

(1) *Khazanchi Shah* v. *Nizam Din*, 1930 Lah 791 (792): 31 Pun L R 506: 126 Ind Cas 174; *Dalip Narain Singh* v. *Chait Narain Singh*, (1912) 17 Ind Cas 927 (930): 16 Cal L Jour 394.

Note 15.

(1) *Mata Amber* v. *Sri Dhar*, (1904) 26 All 507 (508, 509): 1904 All W N 73: 1 All L J 250: *Ram Lal* v. *Sil Chand*, (1901) 23 All 439 (440): 1901 All W N 131. See also *Fala Krista* v. *Jagannath*, 1932 Cal 775 (781): 59 Cal 1314: 140 Ind Cas 788: 36 Cal W N 709: 56 Cal L Jour 187 [No personal liability against puisne morgagee as such]. See however, *Maung Po Mya* v. *M A S Chettyar Firm*, 1931 Rang 153, (159): 9 Rang 186: 133 Ind Cas 225 [Prior mortgagee's priority raised and found against—Costs ordered generally against him and mortgagor held

in Note 6 above, the word 'defendant' in this rule means only the *mortgagor* defendant and not necessarily those claiming title under him.

16. Insolvency of mortgagor.—Where pending a suit by a mortgagee on his mortgage, the mortgagor is declared an insolvent the plaintiff can still proceed against the mortgaged property.[1] If the mortgaged property is not sufficient to pay the debt, and the mortgagor is personally liable under the mortgage, the mortgagee may prove for the balance in the insolvency proceedings along with the other creditors of the mortgagor, if the personal liability was not time-barred at the date of the institution of the suit on the mortgage.[2] But can the mortgagee obtain a personal decree under this rule in such a case? No, according to the Allahabad High Court.[3] Yes, according to the Lahore High Court[4] and the Oudh Chief Court.[5]

17. Limitation.—We have seen (Note 12) that a balance is not 'legally recoverable' if the personal remedy is *barred by limitation* at the date of the suit for sale. Art. 132 of the Limitation Act is confined to suits to recover the mortgage money *from the mortgaged property* and does not apply to the personal remedy under a mortgage.[1] The personal remedy is governed by the six years' period of limitation in the case of registered instruments[2] and by the three years' period in the case of unregistered instruments[3] and time runs from the date on which the mortgage amount becomes due.[4] If the right to a personal decree is not barred at the date of the institution of the suit, the plaintiff is entitled to such a decree in the case of a deficiency, though the application for the personal decree is made at a time when a suit for the

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recoverable personally]. And *C A M K Chettyar Firm* v. *P R P L S Chettyar Firm*, 1931 Rang 181 (183): 133 Ind Cas 93 [Mortgagor consenting to decree—Subsequent mortgagee contesting—Defences found against—Costs on contested scale against subsequent mortgagee and *ex parte* scale against mortgagor—Personal decree under this rule passed against mortgagor—Subsequent mortgagee is liable personally for difference of costs between contested and *ex parte* scales, since no personal decree can be passed against him].

Note 16.

(1) See *Mamraj* v. *Brijlal Chakervarthi*, (1911) 12 Ind Cas 587 (588): 8 All L J 1241: 34 All 106.

(2) *Mamraj* v. *Brij Lal*, (1911) 12 Ind Cas 587 (588): 34 All 106: 8 All L J 1241; *Babu Lal* v. *Krishna Prasad*, 1925 Pat 438 (440): 85 Ind Cas 543: 6 Pat L Tim 410: 4 Pat 128; *Sharaf Uzzaman* v. *H Hunter, Liquidator, Bank of Upper India, Ltd*, 1930 Oudh 20 (26): 6 Oudh W N 982: 121 Ind Cas 903.

(3) *Mamraj* v. *Brij Lal*, (1911) 12 Ind Cas 587 (588): 34 All 106: 8 All L J 1241. But see *Niaz Ahmad* v. *Phul Kunwar*, 1932 All 336 (337): 1932 All L J 237: 138 Ind Cas 361: 54 All 428 [Sale and right to personal decree arising after discharge in the I P—Decree-holder is entitled to personal decree].

(4) *Kishen Chand* v. *Sohan Lal*, 1921 Lah 270 (270): 2 Lah 95: 3 Lah L Jour 126: 61 Pun L R 1921: 59 Ind Cas 710.

(5) *Sharaf Uzzaman* v. *H Hunter*, 1930 Oudh 20 (26): 6 Oudh W N 982: 121 Ind Cas 903.

Note 17.

(1) *Miller, Official Assignee* v. *Runga Nath Moulick*, (1885) 12 Cal 889 (895, 896): 10 Ind Jur 376; *Ganesh Lal Pandit* v. *Khetramohan Mahapatra*, 1926 P C 56 (59): 95 Ind Cas 839: 5 Pat 585: 31 Cal W N 25: 24 All L J 615: 28 Bom L R 931: 53 Ind App 134: 43 Cal L Jour 545: 51 Mad L Jour 82: 24 Mad L W 50: 1926 Mad W N 535: 3 Oudh W N 591: 7 Pat L Tim 501 P C.

(2) *Makrand* v. *Kallu*, (1919) 50 Ind Cas 640: (640): 17 All L J 647: 1 U P L R (All) 73: 41 All 581; *Radha Krishna* v. *Tej Saroop*, 1930 All 69 (71, 72): 1929 All L J 1294: 123 Ind Cas 321: 52 All 863; *Sheo Das Pande* v. *Kunj Behari*, (1929) 114 Ind Cas 813: 1928 Notes 73 (*e*): 5 Oudh W N 1128; *Dharanidhar Ghosh* v. *Indranarayan Sinha*, (1932) 36 Cal W N 117 (118).

(3) *See* Limitation Act, Art. 115.

(4) *Sheo Charan Singh* v. *Lalji Mal*, (1896) 18 All 371 (372): 1896 All W N 107; *Vithoba Mahipati Dhabade* v. *Balkrishna Sakharam*, 1921 Bom 437 (438, 439): 45 Bom 1206: 23 Bom L R 529: 63 Ind Cas 234 [Time for suit on personal covenant in mortgage runs from expiry of mortgage term—But where mortgagee enjoys the usufruct in lieu of interest time runs from last year when he enjoys such usufruct]; *Mt Amina Bibi* v. *Kalka Singh*, 1926 Oudh 336 (336): 13 Oudh L J 147: 95 Ind Cas 486 [Two mortgages in respect of the same property in favour of the same person at different times—Amount of the second mortgage to be paid along with money due on the earlier mortgage—Limitation for claim under second mortgage runs from date when first mortgage amount becomes payable].

O. 34, R. 6, Note 17.

personal remedy would be barred.[5] If a decree is barred under this rule, it is barred in its entirety and a personal decree cannot be passed for costs alone where the right is barred as regards principal and interest.[6] But though the mortgagee's personal remedy may be barred as regards the principal, he is entitled to a personal decree for interest accrued within six years from the suit for sale, because so long as the mortgage debt is not time-barred, the personal liability for the payment of interest continues.[7] An acknowledgment by one co-mortgagor alone is not sufficient to keep alive a mortgage debt as against all the co-mortgagors.[8]

The plaintiff's application for a personal decree has to be made under Art. 181 of the Limitation Act, within three years from the date on which the right to apply for a personal decree accrues.[9] S. 6 of the Limitation Act does not apply to such an application, inasmuch as it is not an application for *execution* within that section.[10]

Where a mortgage decree provides for the sale of the mortgaged property and for realisation of any deficiency from the other properties of the mortgagor, the 12 years period under S. 48 of the Code for enforcing the *personal* liability runs from the date of the decree and not from the date of the sale of the mortgaged property.[11] A contrary view was taken in the following cases.[12]

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[5] *Malia* v. *Nachiappa*, (1895) 5 Mad L Jour 294; *Bishesher Dayal* v. *Md Ibrahim Khan*, (1903) 6 Oudh Cas 30 (33); *Basant Lal* v. *Gopal Parshad*, 1906 All W N 193 (193): 2 All L J 463 *Hamid-ud-din* v. *Kedar Nath*, (1898) 20 All 386 (387): 1898 All W N 83; *Chattar Mal* v. *Thakuri*, (1898) 20 All 512 (514): 1898 All W N 133; *Jangi Singh* v. *Chander Mol*, (1908) 30 All 388 (389): 1908 All W N 161: 5 All L J 670; *Ram Prasad* v. *Gurpatri*, 1927 Oudh 567 (568): 4 Oudh W N 1049; *Abdul Rashid* v. *Mul Chand*, 1929 Oudh 59 (60): 5 Oudh W N 1094: 114 Ind Cas 769: 4 Luck 237; *Arasalwar Peria Tiruwadi Aiyangar* v. *Muthammal Janaki*, (1915) 27 Ind Cas 770 (771): 2 Mad L W 66; *Chunni Lal* v. *Tikamdas*, (1917) 39 Ind Cas 854 (856): 13 Nag L R 76; *Sheik Rahamat* v. *Sheik Abdul*, (1907) 34 Cal 672 (675): 6 Cal L Jour 119: 11 Cal W N 674; *Ram Din* v. *Kalka Prasad*, (1885) 7 All 502 (505): 12 Ind App 12: 4 Sar P C J 619: 9 Ind Jur 160 P C: *Musaheb Zaman Khan* v. *Inayat-ul-lah*, (1892) 14 All 513 (518): 1892 All W N 80; *Bageshri Dial* v. *Muhammad Naqi*, (1893) 15 All 331 (332): 1893 All W N 120; *Miller, Official Assignee* v. *Runganath Moulick*, (1885) 12 Cal 389 (395, 396): 10 Ind Jur 376.

[6] *Panday Jagannath* v. *Mt Junian*, (1914) 21 Ind Cas 63 (63 (4): 12 All L J 645.

[7] *Ralia Ram* v. *Hira Lal*, 1924 Lah 653 (654): 111 Ind Cas 808; *Munshi Ram* v. *Puran Chand*, 1930 Lah 737 (737): 126 Ind Cas 433.

[8] *Baikunta Gui* v. *Lal Chand Samanta*, (1915) 26 Ind Cas 511 (511) Cal.

[9] *Md Iltifat Hussain* v. *Alimunnissa*, (1918) 47 Ind Cas 562 (563): 16 All L J 437: 40 All 551; *Krishnabandhu* v. *Panchkari Saha*, 1931 Cal 166 (167): 52 Cal L Jour 531: 35 Cal W N 231: 58 Cal 741: 130 Ind Cas 815; *Raj Narain* v. *Santi Lal*, 1923 All 203 (204): 79 Ind Cas 85: 21 All L J 37: 4 L R A Civ 73; *Pell* v. *Gregory*, 1925 Cal 834 (836): 29 Cal W N 678: 52 Cal 828: 89 Ind Cas 1; *Amir Chand* v. *Narsingh Narain*, (1911) 10 Ind Cas 21 (22) Oudh; *Rama Venkatasubba Ayyar* v. *Shanmugam Pillai*, (1913) 21 Ind Cas 530: 1913 M W N 867; *Chunilal* v. *Tikamdas*, (1917) 39 Ind Cas 854 (856): 13 Nag L R 76; *Chotey Lal* v. *Laiq Singh*, 1929 All 15 (16): 111 Ind Cas 221: 26 All L J 1374; *Siva Subramania Pillai* v. *Poovalingam Pillai*, 1926 Mad 941 (942): 1926 Mad W N 574: 24 Mad L W 280: 97 Ind Cas 502 [Sale under mortgage decree set aside—Time for application for personal decree runs from the date of setting aside of sale and not from date of dispossession]; *Fazl Husain Khan* v. *Shobrat Singh*, 1902 All W N 50 (51) [Under the peculiar circumstances of this case, time was held to run from the date on which, after the sale, the decree for sale was amended]; *Raj Narain Mal* v. *Santi Lal*, 1923 All 203 (204): 21 All L J 37; 4 L R A Civ 73: 79 Ind Cas 85 [Private sale of mortgaged property—Delay in execution of sale-deed—Nevertheless time for application for personal decree for balance does not begin to run till the deed of sale is executed]. But see contra *Biswambar Saha* v. *Ram Sunder Kaibarta*, (1915) 30 Ind Cas 719 (720): 42 Cal 294 [Neither Article 181 nor any period of limitation applies to application for personal decree because Limitation Act cannot apply to application to the Court to terminate a pending proceeding].

[10] *Khondkar Mohammad Saleh* v. *Chandra Kumar Mukerji* 1930 Cal 34 (35): 49 Cal L Jour 362: 33 Cal W N 519: 56 Cal 1117: 122 Ind Cas 201.

[11] *Jnanendra Nath Bose* v. *Khulna Loan Co, Ltd*, (1914) 24 Ind Cas 35 (36): 18 Cal W N 492; *Banku Behary Chatterji* v. *Narain Das Dutt*, 1927 P C 73 (75): 31 Cal W N 589: 52 Mad L Jour 565: 1927 Mad W N 386: 4 Oudh W N 474: 101 Ind Cas 24: 29 Bom L R 850: 38 Mad L Tim 90: 45 Cal L Jour 507: 54 Cal 500: 54 Ind App 129: 26 Mad L W 180; *Baranashi* v. *Bhabadeb*, 1921 Cal 456 (457): 34 Cal L Jour 167: 66 Ind Cas 758; *Khulna Loan Co, Ltd* v. *Jnanendra Nath Bose*, (1918) 45 Ind Cas 486 (487): 22 Cal W N 145: 1917 P C 85 P C.

The limitation for the execution of a personal decree runs from the date of the *drawing up of a formal decree* and not from the making of an *order* for personal decree.[13]

18. **Succession certificate.**—A personal decree cannot be passed in favour of the heirs of a mortgagee in the absence of a succession certificate produced by them.[1] But a person who has succeeded to the estate of a deceased mortgagee by the right of *survivorship* need not produce a succession certificate before he can obtain a personal decree against the mortgagor.[2]

19. **Notice.**—Where a decree-holder applies for a personal decree against the judgment-debtor under this rule, the proper procedure for the Court is to issue notice to the judgment-debtor calling upon him to show cause why the application should not be granted and to hear his objection, if any.[1] But in the absence of fraud, a suit does not lie to set aside an *ex parte* personal decree under the rule, on the ground of failure to serve notice on the judgment-debtor.[2] An order directing execution to issue against the judgment-debtor personally without a supplemental decree under this rule should not be passed without notice to the judgment-debtor.[3]

20. **Execution of personal decree.**—An executing Court cannot entertain any question as to the validity of a personal decree which has become final.[1] (*See* Notes to S. 38, *ante*.) A mortgage decree, until it reaches the stage shown by Transfer of Property Act, S. 90 (O. 34, R. 6) does not become a *money* decree to which S. 209 of the Code of 1882 (now S. 34) relates.[2]

21. **Appeal.**—An order refusing an application for a personal decree under the rule is a decree and appealable as such.[1] *Ad valorem* Court-fee is payable on an appeal from such an order as well as on an appeal from a decree

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(12) *Narayana Ayyar* v. *Singaravelu Vannian*, (1917) 42 Ind Cas 282 (283, 284): 33 Mad L Jour 543: 1917 Mad W N 845: 6 Mad L W 675; *Aiyasami Ayyar* v. *Venkatachala Mudali*, (1917) 37 Ind Cas 741 (746, 747): 31 Mad L Jour 513: (1916) 2 Mad W N 296: 20 Mad L Tim 391: 4 Mad L W 507: 40 Mad 989. See *Jadu Nath Prasad* v. *Jagmohan Das*, (1903) 25 All 541 (548): 1903 All W N 98 [Combined decree under Ss 80 and 90, T P Act cannot be treated as a decree for money within S 230 (now S 48) of the Code of 1882].

(13) *Madan Mohan Das* v. *Nobin Kishore Deb*, (1906) 3 Cal L Jour 291 (292).

Note 18.

(1) *Abdul Satar* v. *Satya Bhushan Das*, (1908) 35 Cal 767 (772); *Sahadev* v. *Sheikh Sakhawat Hossein*, (1908) 12 Cal W N 145 (147, 148): 7 Cal L Jour 658; *Nanchand* v. *Yenawa*, (1904) 28 Bom 630 (634): 6 Bom L R 582.

(2) *Shiva Prasad Singh* v. *Beni Madhab Chowdhury*, 1922 Pat 529 (531): 1 Pat 387: 4 Pat L Tim 6: 70 Ind Cas 24.

Note 19.

(1) *Bhagirath Ram* v. *Bank of Northern India*, 1930 Lah 103 (104): 31 Pun L R 143: 121 Ind Cas 293; *Badier Rahman Chowdhry* v. *M A R R M R M Chetty Firm*, (1916) 35 Ind Cas 288 (289): 8 L B R 450: 9 Bur L Tim 245.

(2) *Ramdhani Misir* v. *Parmeshwar Kurmi*, (1912) 16 Ind Cas 5 (6) All. See also *Ram Ratan* v. *Bhuri Begam*, (1915) 30 Ind Cas 792 (793): 13 All L J 901: 38 All 7 [Notice sent to the judgment-debtor—Latter not opposing application for personal decree—He cannot subsequently sue to set aside the decree].

(3) *Ilimolla* v. *Manindra Mohan*, (1920) 56 Ind Cas 801 (802): 31 Cal L Jour 382.

Note 20.

(1) *Sitaram Sonar* v. *Raj Kumar Nonia*, (1917) 38 Ind Cas 691 (692) Pat.

(2) *Hargoandas* v. *Mohanbhai*, (1900) 2 Bom L R 225.

Note 21.

(1) *Muhammad Riifat Husain* v. *Alimunnissa*, (1918) 47 Ind Cas 561 (562): 40 All 553: 16 All L J 438. See also *Niaz Ahmad* v. *Phul Kunwar*, 1932 All 336 (337): 1932 All L J 237: 138 Ind Cas 361: 54 All 428 [Appeal lies and no revision is competent].

O. 34, R. 6, Notes 21--23.

under the rule.[2] An application for a personal decree is not a 'plaint' and an order returning it for presentation to the proper Court is therefore not appealable under O. 43, R. 1.[3] Where the original mortgage suit was valued at less than Rs. 5,000, an appeal from a personal decree in the suit lies, under S. 21 of the Bengal N.W.P. (now Agra) and Assam Civil Courts Act (U.P. Act, XII of 1887) to the District Judge and not to the High Court though the personal decree be for a sum exceeding Rs. 5,000.[4]

See Notes to S. 96.

22. **Nature of proceedings under R. 6.**—Proceedings for a personal decree under this rule are not proceedings in *execution* but proceedings in suit and the provisions of O. 9 are, therefore, applicable thereto.[1]

23. **Miscellaneous.**—

(1) An application for a personal decree should be made to the Court which passed the decree for sale and not to the Court to which it was sent for execution.[1]

(2) A decree directing realisation from the other properties of the mortgagor if the mortgaged properties which are to be proceeded against first are not sufficient is not a *money* decree for purposes of Registration.[2]

(3) A simple mortgagee whose rights under the personal covenant have not been barred is a creditor of the mortgagor within S. 53 of the Transfer of Property Act and can sue to set aside an alienation of the other properties.[3]

(4) O. 20, R. 11 empowering the Court to allow payment by instalments applies to an application for a personal decree under this rule.[4]

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(2) *Muhammad Iltifat Husain* v. *Alimunnissa*, (1918) 47 Ind Cas 561 (562): 16 All L J 438: 40 All 553; *Bindhiachal Rai* v. *Sita Ram Misir*, 1924 All 292 (293): 74 Ind Cas 21; *Lakhi Narain Jagdeo* v. *Krithibas Das*, (1918) 19 Ind Cas 971 (973): 18 Cal L Jour 133; *Wasi Ali* v. *Jang Bahadur Singh*, (1915) 30 Ind Cas 497: 18 Oudh Cas 121; *Tajammal Husain* v. *Muhammad Husain Khan*, (1916) 36 Ind Cas 158 (159): 14 All L J 328.

(3) *Bhup Singh* v. *Fateh Singh*, 1931 All 192 (193): 1931 All L J 893.

(4) *Badr-un-nissa* v. *Shankar*, (1919) 49 Ind Cas 687 (687): 17 All L J 266: 41 All 384.

Note 22.

(1) *Babu Lal* v. *Raghunandan*, 1930 All 841 (843): 124 Ind Cas 729: 1930 All L J 1200: 52 All 839; *Puttoo Lal* v. *Munshi Lal*, 1932 All 466 (466): 1932 All L J 308: 140 Ind Cas 529 [Application under this rule is a proceeding in the suit]; *Dharamchand* v. *Sheoranlal*, 1930 Nag 188 (189): 26 Nag L R 154: 124 Ind Cas 249; *A K R P L A Chettiar Firm* v. *S Mehar Singh*, 1930 Rang 257 (259): 8 Rang 316: 126 Ind Cas 648; *Purna Chandra Mandal* v. *Radha Nath Das*, (1906) 33 Cal 867 (870): 4 Cal L Jour 141; *Ramdayal Surajmal* v. *Muhammad Ghouse*, (1905) 1 Nag L R 143 (145); Contra *Gurdin Pandey* v. *Rai Kokul Chand Bahadur*, (1906) 9 Oudh Cas 288. See *Abdul Sattar* v. *Satya*, (1908) 35 Cal 767 (772) [*Ex parte* decree under R 6 can be set aside under inherent power of Court]. See also *Hanuman Lal* v. *Ram Peari Koer*, 1921 Pat 491 (493): 60 Ind Cas 368: 2 Pat L Tim 251 [*Ex parte* decree passed by oversight under R 6 can be set aside].

Note 23.

(1) *Thirumalai Kondama* v. *Eastern Development Co*, (1917) 42 Ind Cas 953 (954, 955): 33 Mad L Jour 382: 22 Mad L Tim 257: 1918 Mad W N 4. See *Bhup Singh* v. *Fateh Singh*, 1931 All 192 (192, 193): 1931 All L J 893.

(2) *Heptulla* v. *Mahomed Bala*, (1909) 2 Ind Cas 511 (511): 11 Bom L R 856 [For registration purpose]. See *Venkata Reddi* v. *Dorasami*, 1933 Mad 63 (64): 36 Mad L W 644: 1932 Mad W N 1187: 63 Mad L Jour 722: 140 Ind Cas 378.

(3) *Authikesavaloo Naicker* v. *Shah Abdulla Hussain*, (1915) 29 Ind Cas 62 (63): 2 Mad L W 479: 1915 Mad W N 387.

(4) *Bidhu Sekhar Banerjee* v. *Mahtabuddin*, (1911) 11 Ind Cas 786 (786): 15 Cal W N 1083.

O.34, R.6, Note 23.

(5) A proceeding under this rule is not governed by S. 52 of the Transfer of Property Act because it is not a proceeding in which any right to *immoveable* property is directly and specifically in question.[5]

(6) An assignment of the mortgage decree includes the supplemental decree under this rule.[6]

O. 34, R.7.

Preliminary decree in redemption suit.

R. 7. [*New.* Act IV of 1882, S. 92.] (1) In a suit for redemption, if the plaintiff[16] succeeds, the Court shall pass a preliminary decree[3]—

(*a*) ordering that an account be taken[4] of what was due to the defendant at the date of such decree for—

(*i*) principal and interest[5] on the mortgage,

(*ii*) the costs[6] of suit, if any, awarded to him, and

(*iii*) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security together with interest thereon; or

(*b*) declaring the amount so due at that date; and

(*c*) directing—

(*i*) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months[9] from the date on which the Court confirms and countersigns the account taken under clause (*a*), or from the date on which such amount is declared in Court under clause (*b*), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses[7] as provided in rule 10 together with subsequent interest on such sums respectively as provided in rule 11,[8] the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents[10] in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff[11] at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and

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(5) ***Badri Singh* v. *Hazari Singh*,** 1930 Oudh 93 (95): **7 Oudh W N 128: 125 Ind Cas 163: 5 Luck 625.**

(6) ***Karimulla Shah* v. *Md Raza*,** (1920) 58 Ind Cas 40 (41): 1 Pat L Tim 612.

O. 34, R. 7, Note 1.

shall also, if necessary, put the plaintiff in possession of the property; and

(*ii*) that, if payment of the amount found or declared due under or by the preliminary decree is not made[12] on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree—

(*a*) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(*b*) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment[13] of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

[*See* Rr. 2 and 4, *ante* and R. 9, below.]

Synopsis.

1. Legislative changes.
2. Amendments after 1908.
3. Scope of the rule.
4. Mode of taking accounts—Sub-R. (1), Cl. (a).
    5. Interest.
    6. Costs.
7. Subsequent costs, charges and expenses.
    8. Subsequent interest as provided in R. 11.
    9. "Pays into Court on a day within six months."
    10. "Shall deliver up to the plaintiff . . . . . . all documents."
    11. "Shall re-transfer, the property to the plaintiff."
    12. Procedure on default of payment.
13. Exension of time fixed for payment.
14. Form of decree.
15. Second suit for redemption—See Note 40 to S. 11.
16. Who can redeem.
17. Trespass by mortgagor before redemption.
18. Court-fee.
19. Jurisdiction.
20. Appeal

Co-mortgagor's redemption—Inapplicability of the rule. See Note 3. Pt. (6).

Sub-mortgagee. See Note 4, Pt. (8).

1. Legislative changes.—

This rule corresponds to S. 93 of the Transfer of Property Act.

O. 34, R.7, Notes 2—3.

2. Amendments after 1908.—The rule has been amended by Act XXI of 1929. The general changes thus introduced are on the same lines as in the case of Rr. 2 and 4 *See* Notes under Rr. 2 and 4. Further, in case of default by the mortgagor in payment of the mortgage money within the prescribed time, the old rule provided for foreclosure except where the mortgage was simple or usufructuary and for sale except where the mortgage was one by conditional sale. The present rule has been amended to suit the changes in S. 67 of the Transfer of Property Act as amended by Act XX of 1929, *see* Notes under R. 2, *ante*.

3. **Scope of the rule.**—As this rule corresponds to Rr. 2 and 4, *ante* in most particulars, the Notes under Rr. 2 and 4 may be consulted under this rule also. The decree under this rule is *preliminary* and incapable of execution without a final decree being passed.[1] The proceedings after a preliminary decree are proceedings in suit to which the provisions of O. 22, will apply.[2] O. 34 contemplates only one preliminary decree being passed. Hence, it is irregular to first pass a decree for accounts and then again another preliminary decree for redemption. Such a decree for accounts if passed will only have the effect of an interlocutory order for accounts.[3] Where it is found that the money due to the mortgagee has already been paid, a final decree may be at once passed without any preliminary decree.[4] (*See* R. 9, *infra* which expressly provides for this.) A decree for possession on condition of the plaintiff's paying a certain sum within a certain time is not a preliminary decree within this rule.[5]

The rule applies only to a suit for redemption against a mortgagee, and not by one co-mortgagor against another who has redeemed the entire mortgage, for redemption of plaintiff's share of the mortgaged property.[6] A compromise decree in a redemption suit, which is itself capable of execution does not require a final decree.[7] No application for a final decree can be made under this rule and R. 8 where a decree had been passed under S. 92 of the Transfer of Property Act.[8]

Order 34, Rule 7—Note 3.

(1) *Maung Tun* v. *Ma Ywe*, (1920) 54 Ind Cas 507 (508): 3 U B R 183; *Nandram* v. *Babaji*, (1898) 22 Bom 771 (773); *Kushaba* v. *Budhaji*, 1922 Bom 127 (128): 46 Bom 348: 64 Ind Cas 1004: 23 Bom L R 1176; *Bal Kishen* v. *Atma Ram*, (1915) 26 Ind Cas 701 (706): 10 Nag L R 150 [Every preliminary decree in a mortgage suit must be followed by a final decree].

(2) *Muhammad Masihullah Khan* v. *Jarao Bai*, (1915) 27 Ind Cas 771 (772): 37 All 226: 13 All L J 307; *Mt Lakhpati Kuer* v. *Daulat Singh*, 1927 Oudh 156 (157): 4 Oudh W N 235: 101 Ind Cas 174: 2 Luck 464 [O 22 does not apply after a *decree* has been passed though it may be only a preliminary decree].

(3) *Naunthal Singh* v. *A G Skinner*, 1925 All 707 (708): 47 All 803: 23 All L J 691: 92 Ind Cas 63; *Vamanacharya* v. *Govind*, 1924 Bom 33 (35): 25 Bom L R 826: 76 Ind Cas 1014: *Mohkam Singh* v. *Chandra Pal Singh*, 1924 Oudh 140 (140, 141): 10 Oudh L J 374: 77 Ind Cas 346. See also *Jaimal* v. *Mohamedbhai*, 1874 Bom P J 7 (7) [Sum due to mortgagee for repairs—To be decided before decree and not left for a later stage in execution].

(4) *Roshan Lal* v. *Bhuri Singh*, 1922 All 479 (479): 70 Ind Cas 899; *Venkataratnam* v. *Sitaramayya*, 1926 Mad 305 (306): 92 Ind Cas 314.

(5) *Nihal Chand* v. *Ghulam Muhammad*, (1918) 19 Ind Cas 856 (857): 146 Pun W R 1913: 235 Pun L R 1913; *Mahabir Pershad* v. *Kartar Singh*, 1924 Lah 635 (686): 76 Ind Cas 144 [Decree is capable of execution as it is].

(6) *Ali Akbar* v. *Sultan-ul-Mulk*, 1923 Lah 129 (131): 69 Ind Cas 658.

(7) *Manikka Chetti* v. *Kuppuswami Asari*, 1926 Mad 644 (644): 1926 Mad W N 285: 97 Ind Cas 613.

(8) *Doki Khodalo Patro* v. *Lingarapi Vidya Bushano*, (1914) 22 Ind Cas 283 (283) Mad.

Ordinarily a suit for *an account* on a mortgage cannot be asked for, unless the mortgagor asks for *redemption* also.[9] The burden, in suits for redemption, is on the mortgagor of proving the existence of a mortgage[10] and the mere fact that the defendant denies the mortgage is no ground for decreeing possession without any payment by the mortgagor.[11] A conditional decree for redemption on payment of the amount due may be passed even though the Court finds that the mortgage has not been satisfied out of the mortgaged property as alleged in the plaint.[12]

A mortgagor cannot redeem by *application*, but only can do so by way of *suit*.[13]

4. Mode of taking accounts—Sub-R. (1). Cl. (a).—We have seen under R. 2, *ante* that the object of the Legislature is that complete accounts of all amounts due by either party to the other in respect of the mortgage transaction should be taken in a mortgage suit, so as to avoid unnecessary litigation. A mortgagee in possession is bound to account for the rents and profits of the property (*see* Transfer of Property Act, S. 76), and the mortgagor is entitled to deduct from the mortgage money all sums thus owed by the mortgagee.[1] Where the mortgagee has been in possession of the mortgaged property, the burden is on him to prove that the mortgage has not been satisfied out of the usufruct of the property.[2] In a suit to redeem a puisne mort-

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(9) *Hari* v. *Lakshman*, (1880-81) 5 Bom 614 (616); *Shankarappa* v. *Danapa*, (1880-81) 5 Bom 604 (607).

(10) *Dai Bahadur Singh* v. *Sarabjit Tewari*, 1931 Oudh 378 (379): 132 Ind Cas 793: 8 Oudh W N 782; *Bala* v. *Shiva*, (1903) 27 Bom 271 (276): 5 Bom L R 85; *Musafir* v. *Lagan*, (1905) 2 All L J 62 (64): 1905 All W N 14. See also *Rama* v. *Baburao*, 1874 Bom P J 28 [Plaintiff need establish only a *prima facie* case—Then *onus* is shifted to defendant (5 Bom H C R 159, foll)]. And *Chinto* v. *Suga*, 1886 Bom P J 247, (Do.).

(11) *Dada* v. *Bavasha*, (1869) 6 Bom H C R A C J 9.

(12) *Sahib Zadah* v. *Parameshar Das*, (1875-78) 1 All 524 (525); *Butchanna* v. *Varahalu*, (1901) 24 Mad 408 (411) [A mortgagor may plead in the alternative that the mortgage money has been paid or that he is prepared to pay any sum that may still be found due].

(13) *Ravji Shivram Joshi* v. *Kaluram*, (1875) 12 Bom H C R 160; *Ram Chandra* v. *Baba*, (1875) 12 Bom H C R 168.

Note 4.

(1) *Raghonath* v. *Luchman Singh*, (1866) 1 Agra 132 [Mortgagee not to be charged interest on income from property—But the income should be deducted from the interest due]; *Kadir Moidin* v. *Nepean*, (1899) 26 Cal 1 (7): 2 Cal W N 665: 25 Ind App 241: 7 Sar 394 P C [Mortgagee entitled to deduct from the income sums spent properly for repair, etc]; *Radhabenode* v. *Kripamoyee*, (1870-72) 14 Moo Ind App 443 (451) [Income from property to be first deducted from interest due to mortgagee]; *Muttra Doss* v. *Magh Singh*, (1869) 2 N W P 207; *Goluck Chunder* v. *Mohun Lal*, (1866) 5 Suth W R 271 (276) [The accounts should show the collections and the expenses]; *Kallyan Das* v. *Sheo Nundun*, (1872) 18 Suth W R 65 (67) [Surplus of income after deducting interest should be deducted from principal]; *Naipal* v. *Bans Gopal*, 1927 All 718 (713): 25 All L J 791: 103 Ind Cas 289 [Rent payable by mortgagee but paid by mortgagor must be deducted from the mortgage money]; *Parasurama Pattar* v. *Venkatachalam Pattar*, (1913) 21 Ind Cas 701 (702): 1914 Mad W N 198: 25 Mad L Jour 561 [Mortgagee is bound to give credit to the mortgagor for all sums agreed to be paid by him but which he did not pay]. See *Kundanmal* v. *Kashibai*, (1902) 26 Bom 363 (372): 4 Bom L R 42 [Judge has to decide on the accuracy of the accounts presented by the parties]; *Papla Chakripani* v. *Ramaswami*, (1917) 42 Ind Cas 230 (231) Mad [Mortgagee in possession liable to account for rents and profits, even after preliminary decree]; *Muhammad Hussain* v. *Imtiazunnissa*, (1910) 5 Ind Cas 444 (445): 13 Oudh Cas 32 [Accounts should be settled though not claimed by plaintiff]; *Zaki-ul-din* v. *Chunnilal*, 1927 Nag 302 (302): 10 Nag L J 142: 103 Ind Cas 290. See also *Mahabal Singh* v. *Rajeswari Prashad Singh*, 1927 Oudh 208 (208): 101 Ind Cas 200 [Mortgagee to take part of usufruct for interest and pay the balance to mortgagor under the terms of the deed—Such balance can be claimed in the redemption suit]. See also *Said Ahmad* v. *Raja Barkhandimahesh Pratap Narain Singh*, 1932 Oudh 255 (260): 9 Oudh W N 253: 139 Ind Cas 64 [Mortgagee getting possession also of properties exempt from mortgage—Obtaining decrees for past rents against mortgagor as tenant—Mortgagee liable to account therefore in suit for redemption]. But a separate suit for mesne profits accruing after date fixed for payment and before delivery of possession is not barred. *See* S 11, N 40, Pt (5); R 9, N 3 Pts (2) and (3) below; and also the following cases:—*Abu Jafar* v. *Raghotndra*, 1926 Oudh 113 (118): 2 Oudh W N 826: 91 Ind Cas 258. And *Sakari Dutta* v. *Sheikh Ainuddy*, (1910) 6 Ind Cas 336 (338): 14 Cal W N 1001: 12 Cal L Jour 620.

(2) *Abdul Ghani* v. *Durga Prasad*, 1883 All W N 90 (91).

O.34, R. 7, Notes 4—6.

gagee who has redeemed a prior mortgage, the mortgagor is liable to pay the amounts of both the mortgages.[3]

Where a prior mortgagee sues on his mortgage without impleading the puisne mortgagee, and purchases the property in execution of his decree, the puisne mortgagee subsequently suing for redemption, is bound to pay, not the sum for which the property was *sold*, but the amount due on the mortgage up to the date on which the prior mortgagee *obtained possession* after the purchase.[4] A Court can investigate accounts with a view to seeing whether the mortgage has been satisfied out of the usufruct, even though, in doing so, it has to deal with questions relating to properties lying outside its jurisdiction.[5] In a suit for the redemption of two distinct mortgages, the accounts should be taken separately in respect of each mortgage.[6] A mortgagee who refused a valid tender of the mortgage money does not thereby cease to be a mortgagee and the subsequent accounts between him and the mortgagor should be included in the suit for redemption.[7] In a suit for redemption of a mortgage to which the sub-mortgagee also is joined as a party, the decree should direct accounts to be taken of the mortgage as well as of the sub-mortgage and should provide that out of the mortgage money, the sub-mortgagee should be paid the amount due to him and the balance, if any, should be paid to the mortgagee.[8]

In suits for redemption the accounts should be taken up to the date of actual redemption or sale as the case may be.[9]

5. **Interest.**—In a suit for redemption, the mortgagee's right to interest is not limited to that accruing during the six years preceding the suit.[1] Where a mortgagee who is entitled to possession obtains a decree for possession, he is not entitled to any interest between the date of the decree and the date of the delivery of possession.[2]

6. **Costs.**—In a suit for redemption, the mortgagee defendant is entitled to all costs unless he has refused a valid tender of the mortgage money or has otherwise been guilty of misconduct.[1] Such costs are part of the mort-

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(3) *Kirat* v. *Debi Singh*, (1905) 27 All 308 (310): 1904 All W N 268.

(4) *Delhi and London Bank* v. *Bhikari*, (1902) 24 All 185 (187): 1902 All W N 7; *Raghunath Kunwar* v. *Sankar Singh*, (1914) 22 Ind Cas 387 (388): 12 All L J 41: 36 All 123.

(5) *Girdhari* v. *Sheoraj*, (1875-78) 1 All 431 (432, 433): 2 Ind Jur 146.

(6) *Ramachandra Baba Sathe* v. *Janardhan Apaji*, (1890) 14 Bom 19 (24).

(7) *Satyabadi Behara* v. *Harabati*, (1907) 34 Cal 223 (228, 229): 5 Cal L Jour 192.

(8) *Narayan* v. *Ganoji*, (1891) 15 Bom 692 (698); *Sukh Deo Prasad* v. *Ram Autar*, (1917) 42 Ind Cas 66 (67): 4 Oudh L J 475; *Gokul Das* v. *Debi Prasad*, (1906) 28 All 638 (641): 3 All L J 548: 1906 All W N 162.

(9) *Kashi* v. *Bajrang*, (1908) 30 All 36 (37): 4 All L J 763: 1907 All W N 281; *Papla Chakrapani Chettiar* v. *Ramasami Thenkondan*, (1917) 42 Ind Cas 230 (231) Mad; *Thirumathur* v. *Swaminatha Pattar Karufakar*, (1912) 16 Ind Cas 184 (185) Mad.

Note 5.

(1) *Joti Pershad* v. *Hakim Ali*, (1914) 22 Ind Cas 528 (529): 73 Pun L R 1914: 41 Pun W R 1914; *Daudhbhai* v. *Daudhbhai*, (1890) 14 Bom 113 (115).

(2) *Bansidhar* v. *Hadi Ali*, 1889 All W N 177.

Note 6.

(1) *Dhondo Ramchandra* v. *Balkrishna Govind*, (1884) 8 Bom 190 (193); *Carvalho* v. *Nurbibi*, (1878-79) 3 Bom 202 (203): 4 Ind Jur 32; *Subbana* v. *Krishna*, (1891) 15 Bom 644 (646); *Ganesh Harbaji* v. *Sidhakaran*, (1900) 13 C P L R 74 (77): *Harihara Mangalath* v. *Katapratha Kath*, (1917) 38 Ind Cas 655 (657): 1917 Mad W N 275; *Khuda Baksh* v. *Alimunnissa*, (1905) 27 All 313 (317, 320): 1904 All W N 273: 1 All L J 715; *Vastera Holla* v. *P Mahabala Rao*, 1926 Mad 405 (406): 91 Ind Cas 943 [Costs of mortgagee in redemption suit are discretionary where he raises questions denying mortgagor's right to redeem]; *Shiv Basappa* v. *Balapa Basapa*, 1924 Bom 172 (173): 25 Bom L R 1209: 81 Ind Cas 673 [Mortgagee contesting

gage money and in the absence of any express provision in the decree to the contrary, are not personally recoverable from the mortgagor.[2] Where the *plaintiff* mortgagor has been awarded costs in such a suit, he is entitled to set off the amount of his costs against the mortgage money payable by him.[3]

7. **Subsequent costs, charges and expenses.**—The amendments introduced by the Transfer of Property Act (Amendment) Supplementary Act, XXI of 1929, have made clear that the mortgagee is entitled to charges and expenses properly incurred by him in respect of the mortgage security even *subsequent* to the preliminary decree. Although the rules were not so explicit before the above amendments as they are now, on this point, the law was recognised to be the same even under the old rules.[1]

8. **Subsequent interest as provided in R. 11.**—R. 7, sub-R. (1), Cl. (*c*) (*i*) provides for the payment, by the mortgagor, of interest subsequent to the date fixed for payment under the preliminary decree up to the date of the actual realisation of the mortgage money. This point was not conceded under the old rules.[1]

9. **"Pays into Court on a day within six months".**—A decree under this rule should state a period within which the mortgage money should be paid.[1] This period may be *less* than six months.[2] In computing the period so fixed, the date of the decree should be excluded.[3]

If the decree for redemption fixes no period for payment it must be taken as an ordinary decree to which Art. 182 of the Limitation Act would apply.[3-a] But where in a suit for sale by a puisne mortgagee, the preliminary decree directed the plaintiff to pay off the prior mortgage before bringing the mortgaged property to sale, but fixed no period within which the prior mortgage was to be paid off, it was *held* that, in this respect, the decree was a decree for redemption and the period allowable for payment of the prior mortgage amount could not exceed six months.[4] The rule requires the payment to be made *into the Court*. As to whether a payment made out of Court can be recognised by the Court, *see* Note 14 to R. 5 and O. 23, R. 3.

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suit on the ground of transaction being sale and not mortgage—Mortgagee refused costs]. See also *Jamal* v. *Mohamedbhai*, 1874 Bom P J 7 (7) [Mortgagee setting up fabricated mortgage—Costs refused].

(2) *Sheo Darshan Singh* v. *Beni Chaudhri*, 1926 All 424 (425): 24 All L J 424: 94 Ind Cas 872: 48 All 425; *Sheo Darshan Singh* v. *Beni Chowdhri*, 1925 All 492 (494): L R 6 All 225: 87 Ind Cas 585.

(3) *Sidu* v. *Ball*, (1893) 17 Bom 82 (84); *Brijnath Das* v. *Juggernath Das*, (1879) 4 Cal 742 (744): 4 Cal L Rep 122 [Notwithstanding any claim that the defendant's attorney might have against the defendant in respect of the defendant's costs of the suit].

Note 7.

(1) *Allahabad Bank, Ltd* v. *Moti Lal Barman*, (1916) 35 Ind Cas 95 (96, 97): 44 Cal 448: 22 Cal W N 374.

Note 8.

(1) *Chandrika Prasad* v. *Nazir Husain*, 1926 Oudh 306 (307): 92 Ind Cas 681: 13 Oudh L J 396.

Note 9.

(1) *Krishna Chandra Mandal* v. *Jakerlol Haq*, (1909) 1 Ind Cas 71 (72): 10 Cal L Jour 115; *Narain Das* v. *Udham Singh*, (1913) 18 Ind Cas 48 (49): 44 Pun L R 1913: 53 Pun W R 1913: 68 Pun Re 1913. See also *Jamal* v. *Mohamedbhai*, 1874 Bom P J 7 (7).

(2) *Pathumma Ammal* v. *Rajagopala*, 1927 P C 17 (17): 1927 Mad W N 147: 25 Mad L W 346: 100 Ind Cas 91: 52 Mad L Jour 407: 45 Cal L Jour 300: 29 Bom L R 777: 31 Cal W N 804: 39 Mad L Tim 453 P C.

(3) *Hindu Singh* v. *Sardar Singh*, 1888 All W N 80.

(3-a) *Narain Das* v. *Udham Singh*, (1913) 18 Ind Cas 48 (49): 1913 Pun Re No 68: 1913 Pun L R 44: 53 Pun W R 1913; *Krishna* v. *Jakeral*, (1909) 1 Ind Cas 71 (72): 10 Cal L Jour 115; *Elyait* v. *Matalakat*, (1905) 28 Mad 211 (213); *Maruti* v. *Krishna*, (1896) 23 Bom 592 (594): 1 Bom L R 31. See also *Malogi* v. *Sagaji*, (1889) 13 Bom 567 (570, 571) [Redemption decree—No time fixed—Payment within 3 years open].

(4) *Gayan Singh* v. *Ata Husain*, 1921 All 56 (58): 43 All 320: 19 All L J 88: 60 Ind Cas 817.

10. **"Shall deliver up to the plaintiff....the documents."**—On payment of the mortgage money, the mortgagor is entitled to the return of the mortgage bond,[1] and other documents relating to the title to the land. But where the mortgagee-defendant has lost the title-deeds, the *executing Court* cannot, in the absence of any express provision in the decree to that effect compel him to give security for the value of the property.[2]

11. **"Shall re-transfer the property to the plaintiff".**—The mortgagee is bound, on redemption, to re-transfer the property to the mortgagor, free from the mortgage and from all encumbrances created by him. Thus, if he has leased the property to another, the lease is not binding on the mortgagor who can, therefore, eject the lessee as a trespasser.[1] The property must be transferred along with the *accretions*, if any, to the property. Thus, where the mortgagee taking advantage of his position as such, has taken a mortgage of the holding of a tenant, the mortgagor is entitled, on redemption, to the possession of the holding, provided he pays the amount due on its mortgage.[2] The rule requires that a mortgagee with possession should, on redemption, put back the mortgagor in possession.[3]

12. **Procedure on default of payment.**—The rule provides that on default by the mortgagor in the payment of the mortgage money within the time allowed by the Court, the mortgagee is entitled to apply for a final decree for sale or foreclosure.[1] The present rule provides for a *decree for sale* in the case of any mortgage other than a usufructuary mortgage, a mortgage by conditional sale or an anomalous mortgage which provides only for foreclosure. It provides for a *decree for foreclosure* in the case of a mortgage by conditional sale or an anomalous mortgage which provides only for foreclosure. Under the rule, as it was, before Act XXI of 1929, a decree for sale was provided for in the case of any mortgage other than one by *conditional sale*. And a decree for foreclosure was provided for in the case of any mortgage other than a simple or usufructuary one. These changes are in conformity with the changes in S. 67 of the Transfer of Property Act made by Act XX of 1929. *See* Notes under R. 3, *ante* for further information. The undermentioned cases decided under the old rule are now only of academic interest.[2]

Note 10.

(1) *Md Zafar* v. *Zahur Husain*, 1926 All 741 (743): 97 Ind Cas 82: 24 All L J 964.

(2) *Subbaraya Iyen* v. *Padmanabha Vadiyar*, (1901) 12 Mad L Jour 63 (64).

Note 11.

(1) *Ramchand* v. *Raj Hans*, (1906) 3 All L J 517 (519): 1906 All W N 241.

(2) *Ketki* v. *Dinabandhu*, (1909) 3 Ind Cas 395 (396): 10 Cal L Jour 83.

(3) *Shiva Chidambara* v. *Kamakshi*, (1910) 33 Mad 71 (73): 6 Mad L Tim 239: 19 Mad L Jour 498: 3 Ind Cas 433. See also *Sakari Dutta* v. *Sheikh Ainuddy*, (1910) 6 Ind Cas 336 (338): 14 Cal W N 1001: 12 Cal L Jour 620 [Mortgagor entitled to possession on payment as per decree—Subsequent possession by mortgagee renders him liable for mesne profits in subsequent suit by mortgagor].

Note 12.

(1) See *Murlidhar* v. *Parsharam*, (1901) 25 Bom 101 (103): 2 Bom L R 633 [Omission to draw up proper decree under S 92 of the Transfer of Property Act did not deprive mortgagee of his right to relief under S 93]. See also *Jamal* v. *Mohamedbhai*, 1874 Bom P J 7 (7) [Procedure on default—To be provided for in the decree]. And *Adari Sanyasi* v. *Nookalamma*, 1931 Mad 592 (595): 131 Ind Cas 487: 54 Mad 708: 34 Mad L W 556 [Subsequent mortgagee's redemption suit—Prior mortgagee defendant is a decree-holder and his transferee of the decree can apply for final decree on default of payment].

(2) *Zohra Bibi* v. *Sheikh Musi Raza*, (1899) 2 Oudh Cas 196 (198); *Maung Shwe Bin* v. *Maung Chan Mya*, (1897-1901) 2 U B R 514; *Maung Aung* v. *Ma Thien*, (1915) 27 Ind Cas 706 (706): 8 Bur L Tim 92; *Rango* v. *Bhomshetti*, (1902) 26 Bom 121 (127): 3 Bom L R 554; *Atma Ram* v. *Surjan*, 1928 Lah 355 (357): 10 Lah L Jour 198: 110 Ind Cas 81.

O. 34. R. 7, Note 13.

13. Extension of time fixed for payment.—The amendments in this rule and in R. 8 made by Act, XXI of 1929 make it clear that the Court can extend the time fixed for payment from time to time and that, till a decree for foreclosure is actually passed, or till the sale is *confirmed,* the mortgagor can redeem the property. The undermentioned cases[1] decided under the old rules have only an academic interest now. Time for payment may be extended though the period originally fixed may have expired.[2] The use of the expression "extend the time" in the new rule instead of the expression "postpone the day" which occurred in the proviso to old R. 8 makes this clear.[3] Extension of time may be granted irrespective of the *nature of the mortgage* in question.[4] Even though a decree for redemption may have been passed by the appellate Court, an application for extension of time should be made to the Court of *first instance* and not to the appellate Court.[5] Where, in a partition suit, the alienation of a certain property belonging to the joint family was found to be binding only to a limited extent and a decree was passed for possession thereof on condition of a certain amount being paid to the alienee within a fixed date, it was held that this was in effect a decree for redemption and that the Court could extend the time fixed for payment.[6] Time fixed by a compromise decree cannot be extended by the Court.[7] S. 148 of the Code does not apply to the extension of time fixed by a decree for redemption.[8] The limitation for an application for a final decree for redemption runs from *the date of payment* although the Court may have extended the period for payment originally fixed.[9] Where a preliminary decree is *simply confirmed* in appeal, the period fixed runs only from the decree of the Court of first instance unless the appellate Court extends the period.[10] *See* Note 9 to S. 148.

Note 13.

(1) *Maung Lu Tha* v. *Maung Hman,* (1897-1901) 2 U B R 582; *Maung Kya Gaing* v. *Ma Nyein Tha,* 1893-1900 L B R 174; *Hardeo Bakhsh* v. *Sajjad Husain,* (1902) 5 Oudh Cas 82; *Bandhu* v. *Shah Muhammad Taki,* 1888 All W N 119; *Khramat Ali* v. *Inayat Husain,* 1884 All W N 329; *Saudagar Mal* v. *Jan Ali,* (1904) 1 All L J 300; *Kanara Kurup* v. *Govinda Kurup,* (1893) 16 Mad 214 (219): 3 Mad L Jour 89; *Mohamad Baqar Khan* v. *Jagat Narain Lal,* 1925 Oudh 255 (256): 80 Ind Cas 706: 28 Oudh Cas 46: 1 Oudh W N 500; *Balgobind* v. *Sheokumar,* 1924 All 818 (824): 22 All L J 791: 5 L R All (Civ) 545: 82 Ind Cas 184: 46 All 864; *Ramji* v. *Ziblaji,* 1924 Nag 258 (259): 20 Nag L R 93: 7 Nag L J 130: 80 Ind Cas 49;; *Ram Lal Dube* v. *Har Narain,* (1891) 13 All 400 (403): 11 All W N 150; *Sheikh Wazir* v. *Dhuman Khan,* (1894) 16 All 65 (68): 13 All W N 222; *Mahant Ishwargar* v. *Chudasama Manabhai,* (1889) 13 Bom 106 (108, 109); *Elayadath* v. *Krishna,* (1890) 13 Mad 267 (268, 269); *Vallabha Valiya Rajah* v. *Vedapuratti,* (1896) 19 Mad 40 (52): 5 Mad L Jour 282 F B; *Subbana* v. *Krishna,* (1891) 15 Bom 644 (646).

(2) *Debi Prasad* v. *Jai Karan Singh,* (1902) 24 All 479 (481); *Nand Lal* v. *Ram Rutan Lodhi,* (1906) 2 Nag L R 137 (143, 144); *Rambrichu Rai* v. *Surbamand Rai,* (1909) 2 Ind Cas 466 (466); 6 All L J 537: 5 Mad L Tim 390; *Rango* v. *Bhomshetti,* (1902) 26 Bom 121 (126): 3 Bom L R 554; *Ambika Pershad* v. *Salamat Khan* (1915) 29 Ind Cas 438 (439) All; *Chatur Bawa Mulji* v. *Popatlal Narandas,* 1927 Bom 175 (176): 29 Bom L R 228: 100 Ind Cas 1039.

(3) *Ladu* v. *Babaji,* (1883) 7 Bom 532 (534) [The contrary view taken in this case is not tenable under the present rule].

(4) *Narsing* v. *Partap,* 1928 All 480 (481): 50 All 882: 111 Ind Cas 242: 26 All L J 1209 [Mortgage by conditional sale].

(5) *Ram Dhani* v. *Lalit Singh,* (1909) 2 Ind Cas 220 (221): 6 All L J 251: 31 All 328; *Beni Prasad* v. *Harnam Das,* (1917) 39 Ind Cas 630 (631): 15 All L J 288: 39 All 396; *Dharmaraja* v. *Srinivasa,* (1916) 31 Ind Cas 240 (240): 2 Mad L W 1074: 29 Mad L Jour 708: 18 Mad L Tim 486: 39 Mad 876; *Sheonarain* v. *Chunni Lal,* (1901) 23 All 88 (89): 20 All W N 209.

(6) *Idumbu Parayan* v. *Pethu Reddi,* (1920) 54 Ind Cas 451 (452, 453): 37 Mad L Jour 695: 11 Mad L W 25: 43 Mad 357: 27 Mad L Tim 216. But compare *Niranjan Singh* v. *Jagan Nath,* (1915) 28 Ind Cas 862 (863): 18 Oudh Cas 58 [Power to enlarge time can be exercised only in cases to which rule strictly applies].

(7) *Dawlat* v. *Kashirao,* 1926 Nag 280 (281): 92 Ind Cas 822.

(8) *Het Singh* v. *Tika Ram,* (1912) 14 Ind Cas 240 (241): 9 All L J 881: 34 All 388.

(9) *Moru Narsushet* v. *Gangabai,* 1927 Bom 32 (34): 50 Bom 780: 28 Bom L R 1325: 98 Ind Cas 948.

(10) *Manavikraman* v. *Unniappan,* (1892) 15 Mad 170 (178): 2 Mad L Jour 23; *Tukaram* v. *Laxminarayan,* 1926 Nag 207 (208): 89 Ind

O. 34, R. 7,
Notes
14—20.

14. **Form of decree.**—For the form of a preliminary decree under this rule, *see* Appendix D, Forms 7, 7-A, 7-B and 7-C. The decree ought not to contain unnecessary declarations.[1] It should not direct that the defendant should not be evicted till he has cut the crops sown by him.[2]

15. **Second suit for redemption.**—*See* Note 40 to S. 11.

16. **Who can redeem.**—*See* S. 91 of the Transfer of Property Act.

If a party, whose title is to some extent imperfect at the date of the institution of the suit, seeks to redeem and is able to prove a perfect title at the hearing of the case, he should have a decree for redemption. Thus if a purchaser in execution sale of the equity of redemption sues for redemption before he has obtained a certificate of sale, but obtains such certificate before the hearing, he should have a decree for redemption.[1] In a suit, by a purchaser of the equity of redemption, for redemption, the mortgagee cannot question the adequacy of the consideration for the sale.[2]

17. **Trespass by mortgagor before redemption.**—Where a redemption decree was made but the mortgagor, without having made any payment, unlawfully trespasses upon the property and dispossesses the mortgagee in possession, the latter can sue to recover back possession.[1]

18. **Court-fee.**—*See* S. 7, Cl. (*ix*) of the Court-Fees Act. No Court-fee is payable on surplus profits decreed in favour of a mortgagor in a redemption suit.[1]

19. **Jurisdiction.**—In suits for redemption, the value of the suit for purposes of jurisdiction is the amount of the *principal money* secured by the mortgage, and not the value of the *property* mortgaged.[1]

20. **Appeal.**—*See* Notes under Rr. 2 to 6, *supra* and *also* under S. 97.

O. 34, R. 8.

Final decree in redemption suits.

R. 8. [*New.* Act IV of 1882, S. 93.] (1) *Where*, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this

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Cas 987; *Chiranji Lal* v. *Dharam Singh*, (1896) 18 All 455 (457): 16 All W N 130; *Jaggar Nath Pande* v. *Jokhu Tewari*, (1896) 18 All 223 (224, 227): 16 All W N 43. But see *Daulat and Jagjivan* v. *Bhukandas Manekchand*, (1885) 11 Bom 172 (173).

Note 14.

(1) *Chooramun Singh* v. *Mahomed Ali*, (1881-82) 9 Ind App 21 (26): 11 Cal L Rep 1 P C. As to form and contents of a redemption decree, see *Maung Mo Gale* v. *Ma Sa U*, (1902) 1 L B R 186 (187 to 189).

(2) *Deodat* v. *Ram Autar*, (1886) 8 All 502 (508, 509): 6 All W N 149.

Note 16.

(1) *Krishnaji* v. *Ganesh*, (1881-1882) 6 Bom 139 (142, 143). See also *Krishnaji Vinayak* v. *Motilal Mangandas*, 1929 Bom 337 (338): 31 Bom L R 476 [Court can take note of events happening subsequent to suit and of moulding decree accordingly].

(2) *Heera* v. *Raghu*, (1868) 3 Agra 30; *Kondo* v. *Gangadharbat*, 1888 Bom P J 91 (91).

Note 17.

(1) *Mohammad Baqar Khan* v. *Jagat Narain Lal*, 1925 Oudh 255 (255, 256): 80 Ind Cas 706: 28 Oudh Cas 46: 1 Oudh W N 500.

Note 18.

(1) *Wajdibegum* v. *Abdul Gani*, 1929 Nag 1 (2): 24 Nag L R 197: 11 Nag L J 232: 113 Ind Cas 34.

Note 19.

(1) *Mohan Lal* v. *Mohan Lal*, 1926 Oudh 346 (347): 3 Oudh W N 467: 94 Ind Cas 784: 13 Oudh L J 622.

O. 34. R. 8. rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

(*a*) ordering the defendant to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(*b*) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree,

and, also, if necessary,—

(*c*) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for re-payment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,—

(*a*) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(*b*) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the

O. 34, R.8. Notes 1—4.

sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same.

[*See* Rr. 3, 5 & 7. *See also* O. 21, R. 89.]

Synopsis.

1. Legislative changes.
2. Amendments after 1908.
3. Scope of the rule.
4. Decree for redemption.
5. Redemption after due date.
6. Final decree for foreclosure or sale—Sub-R. (3).
7. Power to enlarge time.
8. Limitation.
9. Appeal.

Court to which application is to be made. See Note 6, Pt. (5); Note 7, Pts. (8) and (9).

Final decree for sale at instance of mortgagor himself. See Note 6, Pt. (6).

Personal decree in redemption suits. See R. 8-A, below.

Redemption—By person interested in part. See R. 1, Note 6, F.-N. (20-a).

Redemption—Partial. See R. 1, Note 6, Pt. (20-a).

Subsequent suit for redemption. See R. 7, Note 15 and S. 11; Note 40.

1. Legislative changes.—

The rule corresponds to S. 93 of the Transfer of Property Act.

2. Amendments after 1908.—The rule was amended by the Transfer of Property Act (Amendment) Supplementary Act, XXI of 1929, on the same lines as Rr. 3 and 5, *ante*. The provision as to extension of time has been transferred to R. 7. *Vide* Notes under Rr. 3, 5 and 7, *ante*. Under the old rule, a decree for sale could not be passed only in the case of a mortgage by *conditional sale*. Under the present rule, no decree for sale could be passed even in the case of *usufructuary* mortgages.

3. Scope of the rule.—The decree under R. 7 is only a preliminary decree and a final decree under the present rule is necessary to terminate a suit for redemption.[1] As has been seen already in Note 4 to R. 7, in a redemption suit, there should be a complete settlement of all accounts between the parties in relation to the mortgage.[2] (*See also* Rr. 9 and 10, *infra* which show that accounts should be taken right up to the date of actual payment of mortgage money and re-transfer of possession.)

4. Decree for redemption.—On payment of the mortgage money before a final decree for sale or foreclosure is passed, the mortgagor is entitled to a final decree for redemption. A mortgagor, can, however, exercise the right of redemption, in the case of a decree for sale, at any time before the sale is confirmed though the final decree for sale may have been passed in the meanwhile. If the redemption is *after the final decree* for sale, the mortgagor will get an *order* for the delivery of the title-deeds, etc., as indicated in sub-R. (1). If the mortgagor seeks to redeem the property *after the sale* and

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Order 34, Rule 8—Note 3.

[1] *Kushaba Ramji Thoke v. Budhaji Sankharam Thorat*, 1922 Bom 127 (128): 46 Bom 348: 64 Ind Cas 1004: 23 Bom L R 1176; *Sir Jehangir v. The Hope Mills, Ltd*, (1908) 33 Bom 273 (277): 10 Bom L R 1057: 2 Ind Cas 296.

[2] *Ameenammal v. Meenakshi*, (1921) 60 Ind Cas 226 (228, 229): 12 Mad L W 173.

O. 34, R. 8, Notes 4—6.

before it is confirmed he must deposit for payment to the auction purchaser, 5 per cent. of the purchase money in addition to the mortgage money. Under sub-R. (1), all rights acquired by the mortgagee under the mortgage must, on redemption, be re-transferred to the mortgagor.[1] The mortgagee in possession need not vacate possession till he has received the *full* mortgage money.[2]

A mortgagor is not disentitled to a decree for redemption simply because he has attached under his decree for costs against the mortgagee, the mortgage money deposited by himself in Court to the mortgagee's credit, and withdrawn a portion of it.[3]

The mortgagee is not entitled to notice of payment into the Court of the mortgage money under the preliminary decree.[4] Nor is the mortgagor required to make an application to the Court before paying in the money.[5] The refusal of the treasury Officer to accept the mortgage money though paid within the proper time does not amount to default by the judgment-debtor.[6] Where the mortgagor has paid into the Court the sum ascertained by the first Court, pending an appeal by the mortgagee as to the amount due, the mortgagor is entitled to credit for the amount paid though it *lapsed* to the Government through the failure of the mortgagee to take the money out of Court.[7] Payment to an unauthorised person does not discharge a mortgage.[8]

5. **Redemption after due date.**—The present rule makes it clear that though a mortgagor has failed to redeem the mortgaged property within the time allowed by the Court, he is entitled to do so at any time before a final decree for foreclosure is passed or a sale of the mortgaged property under a final decree for sale is confirmed. *See* Note 8, *infra.*

6. **Final decree for foreclosure or sale—Sub-R. (3).**—The provision as to the passing of a final decree for foreclosure under the circumstances indicated in the rule is imperative.[1] A final decree for foreclosure or sale can only be passed on application by the mortgagee.[2] A final decree for *foreclosure* cannot be passed in the case of a *simple* mortgage.[3] The absence of any provision in the preliminary decree, for the passing of a final decree for sale or foreclosure, is no bar to the passing of such a decree.[4] An application for

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Note 4.

[1] *Mahman Singh* v. *Nihal,* (1920) 57 Ind Cas 763 (763): 2 U P L R (Lah) 152.

[2] *Mansab Ali* v. *Sakhawat Hasain,* (1920) 55 Ind Cas 508 (504): 7 Oudh L J 24: 2 U P L R (Oudh) 33.

[3] *Parmanand* v. *Lokman Das,* (1904) 27 All 392 (394, 395): 2 All L J 10: 24 All W N 283.

[4] *Ambi* v. *Vala Thamburatti,* 1924 Mad 102 (102): 45 Mad L Jour 687: 1923 Mad W N 753: 75 Ind Cas 566: 18 Mad L W 686: 33 Mad L Tim 101.

[5] *Md Baqar Khan* v. *Jagat Narain Lal,* 1925 Oudh 255 (256): 80 Ind Cas 706: 28 Oudh Cas 46: 1 Oudh W N 500.

[6] *Mahomed Unis* v. *Janeshar Das,* 1929 All 881 (882).

[7] *Champat Singh* v. *Jangu Singh,* (1912) 16 Ind Cas 830 (831): 16 Cal W N 793: 12 Mad L Tim 482: 10 All L J 879: 1912 Mad W N 1150: 28 Mad L Jour 738: 14 Bom L R 1223: 17 Cal L Jour 14 P C.

[8] *Ragho* v. *Dwarka Das,* 1924 Lab 738 (740): 10 Pun W R 1923: 79 Ind Cas 687.

Note 6.

[1] *Abdul Karim* v. *Durga Prasad,* 1927 All 305 (305): 100 Ind Cas 324.

[2] *Nihalchand* v. *Gulam Muhammad,* (1913) 19 Ind Cas 856 (857): 235 Pun L R 1913: 146 Pun W R 1913.

[3] *Mg Aung Gyi* v. *Ma Thein Mya,* (1915) 27 Ind Cas 706 (706): 8 Bur L Tim 92.

[4] *Murlidhar* v. *Parsharam,* (1901) 25 Bom 101 (103); *Mufassil Bank, Ltd* v. *Molvi Subhan Ullah,* 1931 All 427 (428): 132 Ind Cas 562 [Subsequent mortgagee's suit for redemption—Prior mortgagee defendant can get final decree for sale though preliminary decree does not provide therefor].

final decree should be made to the Court of first instance though the preliminary decree was modified in appeal.[5] In the undermentioned case, it was held that the *mortgagor himself* was entitled to apply for a final decree for sale, if he was not able to pay the mortgage money.[6]

7. **Power to enlarge time.**—The provision as to the enlargement of time contained in the proviso to the old R. 8 has now been transferred to the present R. 7 by Act XXI of 1929. A payment of the amount due within the time fixed entitles the mortgagor to a final decree for redemption.[1] But the time can be extended by the Court for making such payment under this rule. The principles discussed in Note 18 of R. 2 and in Note 9 to S. 148 apply in general to an extension of time under this rule. Thus the time can be extended even though the time originally fixed has expired.[2] But no extension can be granted unless "good cause" is shown therefor.[3] Nor is the mortgagor entitled to an extension as a matter of *right*.[4]

The power to extend time applies to all kinds of mortgages.[5] Ordinarily a mortgagor who seeks to pay the money after the time fixed, must *apply* for extension.[6] The application need not, however, be in any prescribed form and even an application to pay the money may itself be treated as an application for extension.[7] But the application must be made to the Court of *first instance*,[8] even though the decree may have been confirmed on appeal.[9]

It was held in the undermentioned cases[10] that the power to enlarge time under this rule applies to what are strictly suits for redemption. But where, in a partition suit, it was found that an alienation of joint family property was partially binding on the plaintiff and a decree was passed for possession against the alienee conditional on the payment of a certain sum of money to him within a certain time, it was held by the High Court of Madras that the

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(5) *Venkatakrishna Iyer* v. *Thiagaraya Chetti*, (1900) 23 Mad 521 (522, 523): 10 Mad L Jour 145.

(6) *Govinda* v. *Veeran*, (1911) 12 Ind Cas 482 (488): (1911) 2 Mad W N 823: 10 Mad L Tim 322: 21 Mad L Jour 941: 36 Mad 32.

Note 7.

(1) *Moru* v. *Gangabai*, 1927 Bom 32 (34): 50 Bom 730: 28 Bom L R 1325: 98 Ind Cas 943.

(2) *Ramrich Rai* v. *Sarbanand Rai*, (1909) 2 Ind Cas 466 (466): 6 All L J 537: 5 Mad L Tim 390; *Rango* v. *Bohmshetti*, (1902) 26 Bom 121 (126): 8 Bom L R 564; *Ishwar Lingo* v. *Gopal Jivaji*, (1904) 28 Bom 102 (104): 5 Bom L R 719; *Chatur Bawa* v. *Popatlal*, 1927 Bom 175 (175, 176): 29 Bom L R 228: 100 Ind Cas 1039; *Nand Lal* v. *Ram Ratan Lodhi*, (1906) 2 Nag L R 187 (143).

(3) *Ram Lal* v. *Tulsa Kuar*, (1896) 19 All 180 (185): (1897) 17 All W N 11; *Jawahir* v. *Badal*, 1927 Oudh 586 (588): 13 Oudh L J 828: 101 Ind Cas 734 [Fact that mortgagee loses nothing by extension is "good cause"]; *Sabapathy Patter* v. *Murukhan*, (1903) 13 Mad L Jour 266 (267) [*Bona fide* mistake is "Good cause"]; *Het Singh* v. *Tika Ram*, (1912) 14 Ind Cas 240 (241): 9 All L J 381: 34 All 388, (Do.); *Kalian* v. *Sadho Lal*, (1912) 18 Ind Cas 14 (15): 11 All L J 62: 35 All 116, (Do.): *Jokhan Singh* v. *Debisingh*, (1919) 50 Ind Cas 201 (201): 6 Oudh L J 94 [Mortgagee losing nothing by extension is "Good cause"].

(4) *Batuknath* v. *Munni*, (1910) 7 Ind Cas 36 (38) All; *Murugesa Mudaly* v. *Ramasami*, (1915) 31 Ind Cas 200 (201): 18 Mad L Tim 495: 1916 Mad W N 126: 39 Mad 882.

(5) *Narsingh Prasad Singh* v. *Partab Singh*, 1928 All 480 (481): 50 All 882: 26 All L J 1209: 111 Ind Cas 242 [Time can be extended even in case of mortgage by conditional sale].

(6) *Maung Tun Maung* v. *Ma Ywe*, (1920) 54 Ind Cas 507 (508): 3 U B R 183.

(7) *Maung Tun Maung* v. *Ma Ywe*, (1920) 54 Ind Cas 507 (508): 3 U B R 183.

(8) *Ramdhani* v. *Lalit Singh*, (1909) 2 Ind Cas 220 (221): 6 All L J 251: 31 All 328; *Dharmaraja* v. *Srinivasa Mudaliar*, (1915) 31 Ind Cas 240 (240): 2 Mad L W 1074: 29 Mad L Jour 708: 18 Mad L Tim 486: 39 Mad 876.

(9) *Beni Prasad* v. *Harnam Das*, (1917) 39 Ind Cas 630 (631): 15 All L J 288: 39 All 396; *Babu Prasad* v. *Khiali*, (1906) 3 All L J 828 (830): 1906 All W N 203.

(10) *Nandkunwar* v. *Sujan Singh*, 1921 All 304 (306): 43 All 25: 57 Ind Cas 1006: 18 All L J 771; *Niranjan Singh* v. *Jagannath*, (1915) 28 Ind Cas 862 (863): 18 Oudh Cas 58.

O. 34, R. 8, Notes 7—8.

decree was *in effect* one for redemption, and that the time fixed by it could be extended under this rule.[11]

Even if the time is not extended, the mortgagor, as has been made clear by this rule, can redeem the property at any time before a final decree for foreclosure is passed, or a sale of the property is confirmed by the Court. And this was the practice followed even before the amendment under Act XXI of 1929 was made.[12] As to the decrees passed before the Transfer of Property Act, *see* the undermentioned case.[13]

It has been held by the Chief Court of Oudh that even in the case of a *compromise decree* for redemption, the Court, is entitled under this rule to extend the time in proper cases.[14]

8. **Limitation.**—Art. 181 of the Limitation Act applies to an application by the mortgagee for a final decree under this rule and time runs from the expiry of the period fixed for payment by the mortgagor.[1] But a mortgagor being entitled to pay the mortgage money at any time before the final decree for foreclosure is passed or before the sale of the mortgaged property is confirmed by the Court, there is no period of limitation applicable to a payment by him of the mortgage money.[2] It has even been held that there is no period of limitation applicable to an application by the mortgagor for a final decree for redemption, it being the duty of the Court to pass such a decree.[3] But under the amendments of the rule made by Act XXI of 1929 even a mortgagor has to *apply* for a final decree for redemption. Hence, the view taken in the above decision requires reconsideration. Where there has been an appeal against the preliminary decree, the period of limitation for an application for final decree commences not from the expiry of the time fixed for payment but from the date of the appellate decree.[4] An application for

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(11) *Idumbu Parayan* v. *Pethu Reddi*, (1920) 54 Ind Cas 451 (453): 37 Mad L Jour 695: 11 Mad L W 25: 43 Mad 357: 27 Mad L Tim 216.

(12) *Bandhu Bhagat* v. *Shah Muhammad*, (1892) 14 All 350 (354): 1892 All W N 40; *Bepin Behary* v. *Mokanda*, (1909) 1 Ind Cas 780 (782): 36 Cal 122: 8 Cal L Jour 547; *Maung Kya Gaing* v. *Ma Nyein Tha*, 1893-1900 L B R 174; *Salig Ram* v. *Muradan*, (1903) 25 All 231 (233): 23 All W N 20: *Nihali* v. *Mittar Sen*, (1898) 20 All 446 (447): 18 All W N 112; *Hardeo Baksh* v. *Sajjad Husain*, (1902) 5 Oudh Cas 82 (86); *Desu Chetty* v. *Ghansham Dass*, (1909) 2 Ind Cas 616 (616): 5 Mad L Tim 76; *Alimea Chowdhuri* v. *Roshun Ali Matbar*, (1906) 3 Cal L Jour 533 (536); *Somesh* v. *Ram Krishna Chowdhry*, (1900) 27 Cal 705 (708): 4 Cal W N 699; *Moru* v. *Gangabai*, 1927 Bom 82 (34): 50 Bom 730: 28 Bom L R 1325: 98 Ind Cas 943; *Bhawani Prasad Singh* v. *Ram Rati Kanwar*, 1925 Oudh 649 (650): 28 Oudh Cas 261: 90 Ind Cas 418; *Jageshar Singh* v. *Bhagwan Baksh Singh*, (1911) 9 Ind Cas 337 (338): 14 Oudh Cas 10; *Ambika Prasad* v. *Salamat Khan*, (1915) 29 Ind Cas 438 (439) All; *Bisheshar Singh* v. *Bekramjit*, (1916) 34 Ind Cas 349 (350): 3 Oudh L J 189: 19 Oudh Cas 30; *Saudagarmal* v. *Jan Ali*, (1904) 1 All L J 300 (301); *Hayat Mohammad* v. *Nageswari Prasad*, 1923 Oudh 236 (237): 26 Oudh Cas 306: 72 Ind Cas 390: 9 O & A L R 315: 11 Oudh L J 130 [Property can be redeemed even after final decree]; *Raja Ram Singhji* v. *Chunni Lal*, (1897) 19 All 205 (208): 17 All W N 47 [Sale could be avoided by payment under S 291 of Code of 1882 (now O 21, R 69)]; *Behari Lal* v. *Ganpat Rai*, (1887) 10 All 1 (4): 7 All W N 238; *Adipuranam Pillai* v. *Gopalasami Mudali*, (1908) 31 Mad 354. (358): 3 Mad L Tim 281: 18 Mad L Jour 259 [Sale could be set aside by deposit under S 310-A of Code of 1882 (Now Order 21, Rule 89)]. But see *Elayadoth* v. *Krishna*, (1890) 13 Mad 267 (268, 269) [Decree for redemption—Payment cannot be made after the period fixed].

(13) *Chennaya* v. *Malkapa*, (1896) 20 Bom 279 (280).

(14) *Jawahir* v. *Badal*, 1927 Oudh 586 (588): 13 Oudh L J 828: 101 Ind Cas 734.

Note 8.

(1) *Mt Baqar Khan* v. *Jagatnarain Lal*, 1925 Oudh 255 (256): 28 Oudh Cas 46: 80 Ind Cas 706: 1 Oudh W N 500.

(2) *Bhawani Prasad Singh* v. *Ram Rati Kunwar*, 1925 Oudh 649 (650): 28 Oudh Cas 261: 90 Cas 418.

(3) *Doki Khodalo Patro* v. *Lingarapi Vidya Buskano*, (1913) 22 Ind Cas 283 (283) Mad.

(4) *Duvoor Venkatarama Reddi* v. *Gomatam Doddachariar*, 1930 Mad 353 (354): 58 Mad L

extension of time by a decree-holder is a "step-in-aid of execution" within the meaning of Limitation Act, Art. 182 in respect of a subsequent application for sale by him.[5]

9. **Appeal.**—An order refusing to extend time is appealable under O. 43, R. 1 (*o*).[1] But no appeal lies against an order *granting* an extension of time.[2] It is doubtful whether an order merely refusing to pass a final decree but leaving it open to the mortgagee to apply again for such a decree is appealable as a decree.[3]

Recovery of balance due on mortgage in suit for redemption.

R. 8-A. [*New.*] *Where* the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the defendant, the Court, on application by him, may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass a decree for such balance.

[*Cf.* R. 6 above.]

Synopsis.

1. **Scope of the rule.**

1. **Scope of the rule.**—This rule is new and was inserted by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929. The rule provides for a personal decree being passed in a *suit for redemption* against the mortgagor where the proceeds of a sale held on the default of the mortgagor to pay the mortgage money in time under a decree for redemption are not sufficient to satisfy the mortgage debt. The rule corresponds to R. 6, *ante* which provides for a personal decree being passed in a *suit for sale* by the mortgagee.

The words "the last preceding rule" refer to R. 8 *as amended* by Act, XXI of 1929 under which no decree for sale could be passed in the case of a *usufructuary* mortgage as was possible under the old rule. Where, therefore, a decree for sale was passed in respect of a *usufructuary* mortgage under the old rule and a sale is held in pursuance thereof, it was held that such a sale could not be said to have been held "under the last preceding rule" within the meaning of this rule, and that consequently no personal decree for the balance remaining due could be passed under this rule.[1]

Jour 207: 31 Mad L W 207: 1930 Mad W N 104: 125 Ind Cas 95; *Nimmala Mahankali* v. *Kallakuri Subha Rao,* (1917) 41 Ind Cas 268 (269): 32 Mad L Jour 455.

[5] *Sankara Narayana Pillai* v. *Thangamma,* 1922 Mad 247 (248): 45 Mad 202: 30 Mad L Tim 252: 70 Ind Cas 333: 41 Mad L Jour 374: 1921 Mad W N 391. See also *Narayan* v. *Anandaram,* (1892) 16 Bom 480 (484).

Note 9.

[1] *Dattatraya Vithal Garware* v. *Vasudev Anant Gargate,* 1924 Bom 98 (98): 47 Bom 956: 25 Bom L R 990: 76 Ind Cas 1023.

[2] *Dharmaraja* v. *Srinivasa,* (1915) 31 Ind Cas 240 (240): 2 Mad L W 1074: 29 Mad L Jour 708: 18 Mad L Tim 486: 39 Mad 876.

[3] *Atma Ram* v. *Surjan,* 1928 Lah 355 (356): 10 Lah L Jour 198: 110 Ind Cas 81.

Order 34, Rule 8-A—Note 1.

[1] *Raghubar Dayal* v. *Khuman Singh,* 1933 Oudh 40 (41): 9 Oudh W N 1059: 141 Ind Cas 428.

O. 34, R. 9, Notes 1—2.

Decree where nothing is found due or where mortgagee has been overpaid.

R. 9. [New.] *Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him: and the plaintiff shall, if necessary, be put in possession of the mortgaged property.*

Synopsis.

1. **Scope of the rule.**
2. **Deduction of costs payable to mortgagor.**
3. **Claim for over-payments—Suit for, if lies.**

Discharge of mortgage—No need for preliminary and final decrees. See Note 1, Pt. (3).

Limitation. See Note 1, Pt. (6).

Previous Law and Practice. See Note 1, Pts. (1) and (2).

1. **Scope of the rule.**—This rule is new and gives effect to the practice followed in cases arising under the Transfer of Property Act[1] and in cases arising even previous thereto.[2]

If the Court finds that the mortgage has been discharged a decree for redemption can be passed at once without the formality of a preliminary and final decree.[3] A mortgagee who continues in possession of the mortgaged property after the mortgage has been satisfied is liable for all the receipts from the property with interest from the time when the debt was fully paid off.[4] Extra Court-fee in addition to the Court-fee paid on the principal sum due need not be paid on the surplus profits that may be decreed to a mortgagor in a redemption suit.[5] A claim by a mortgagor for recovery of over-payment received by the mortgagee is a relief included in a suit for redemption to which Art. 148 of the Limitation Act applies.[6]

2. **Deduction of costs payable to mortgagor.**—The mortgagor is entitled to set-off the costs awarded to him against the mortgage money[1] in

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Order 34, Rule 9—Note 1.

[1] *Satyabadi Behara* v. *Hara Bati*, (1907) 34 Cal 223 (233): 5 Cal L Jour 192; *Kachu* v. *Lakshmansingh*, (1901) 25 Bom 115 (119); *Vinayak* v. *Dattatraya*, (1902) 26 Bom 661 (667): 4 Bom L R 492; *Ramchandra Baba* v. *Janardhan Apaji*, (1890) 14 Bom 19 (24); *Sita Ram* v. *Madho*, (1902) 24 All 44 (55): 1901 All W N 194; *Jaijit Rai* v. *Govind Tewari*, (1884) 6 All 303 (311): 1884 All W N 92; *Madari* v. *Baldeo*, (1905) 27 All 351 (355): 1904 All W N 270 F B; *Janoji* v. *Janoji*, (1883) 7 Bom 185 (187). See also *Ganda Mal* v. *Thakur Harkishen*, 1900 Pun Re No 3.

[2] *Doolee Chand* v. *Omda Khanum*, (1881) 6 Cal 377 (379): 7 Cal L Rep 375; *Kullyan Das* v. *Sheo Nundun*, (1872) 18 Suth W R 65 (66).

[3] *Roshan Lal* v. *Bhuri Singh*, 1922 All 479 (479): 70 Ind Cas 899.

[4] *Krishnaji* v. *Motilal*, 1929 Bom 387 (389): 21 Bom L R 476. See also *Bechoo Singh* v. *Rai Sheo Sahoy*, (1869) 1 N W P H C 111 [Mortgagor entitled to excess profits with interest at the rate provided for mortgage-money].

[5] *Pothanna* v. *Satyananda*, 1931 Mad 479 (479): 60 Mad L Jour 698: 132 Ind Cas 317: 33 Mad L W 785; *Chiddu Singh* v. *Jhanjhan Rai*, 1923 All 261 (262): 45 All 154: 79 Ind Cas 306: 80 Ind Cas 1021.

[6] *Prasanno Kumar Mandal* v. *Nilambar Mandal*, 1922 Cal 189 (190, 191): 26 Cal W N 123: 64 Ind Cas 75.

Note 2.

[1] *Sidu* v. *Bali*, (1893) 17 Bom 32 (34).

O. 34, R.9, Notes 2—3.

preference to the claim of the defendant mortgagee's attorney for his costs of the suit.[2]

3. **Claim for overpayments—Suit for, if lies.**—The intention of the legislature being that a suit for redemption should include the *entire accounts* between the parties in relation to the mortgage, a separate suit for overpayments is barred under S. 11 and O. 2, R. 2.[1] (*See* Note 40 to S. 11.) But mesne profits accruing *after* the date fixed for payment under the preliminary decree[2] or after the date of payment under the decree,[3] have been held to be recoverable by a separate suit. No such suit can, however, be brought for the profits accruing *before* such date.[4]

O.34, R.10.

Costs of mortgagee subsequent to decree.

R. 10. [*New*: Act IV of 1882, S. 94.] In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption, the Court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment.

[*See* Rr. 2 to 8-A. and S. 35.]

Synopsis.

1. **Legislative changes.**
2. **Amendments after 1908.**
3. **Mortgagee is ordinarily entitled to his costs.**
4. **"Such costs of suit as have been properly incurred."**
5. **Costs of appeal.**
6. **"Other costs, charges and expenses."**
7. **Power of executing Court to add costs.**
8. **Costs awarded by decree, mode of realisation.**

Mortgagee's conduct disentitling him to costs. See Note 3, Pt. (1).

Subsequent suit for sums or accounts payable in mortgage suits. See R. 9, Note 3, also see S. 11, Note 40 and R. 7, Note 4, F.-N. (1).

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(2) ***Brijnath* v. *Juggernath*, (1879) 4 Cal 742 (743, 744): 4 Cal L Rep 122.**

Note 3.

(1) ***Kashi Prasad* v. *Bajrang Prasad*,** (1905) 30 All 36 (37): 4 All L J 763: 1907 All W N 281; ***Kachu* v. *Lakshman Singh*,** (1901) 25 Bom 115 (119): 2 Bom L R 781; *Rukhminibai* v. *Venkatesh*, (1907) 81 Bom 527 (533, 534): 9 Bom L R 958; *Mahabir Prasad* v. *Macnaghten*, (1889) 16 Cal 682 (692): 16 Ind App 107: 5 Sar 845: 13 Ind Jur 133 P C; *Satyabadi* v. *Harabati*, (1904) 34 Cal 223 (233): 5 Cal L Jour 192; *Ameenammal* v. *Meenakshi*, (1921) 60 Ind Cas 226 (229): 12 Mad L W 178; *Ram* v. *Bhup*, (1908) 30 All 225 (227): 5 All L J 192: 1908 All W N 96; *Baloji* v. *Taman*, (1869) 6 Bom H C R (A C) 97. See also *Vinayak* v. *Dattatraya*, (1902) 26 Bom 661 (667): 4 Bom L R 492 [Separate suit for mesne profit by mortgagee—Was held barred].

(2) *Sakari Datta* v. *Sheikh Ainuddy*, (1910) 6 Ind Cas 336 (337): 14 Cal W N 1001: 12 Cal L Jour 620; *Tarachand Marwari* v. *Brojo Gopal Mukherjee*, (1920) 58 Ind Cas 180 (181): 1 Pat L Tim 614: 5 Pat L Jour 595.

(3) *Abu Jafar* v. *Babu Raghoindra Partab Sahai*, 1926 Oudh 113 (114): 2 Oudh W N 826: 91 Ind Cas 258 [Mesne profits accruing due after the date of payment can be the subject of a separate suit]; *Vairappa Theran* v. *Subbiah Theran*, (1918) 44 Ind Cas 251 (252): 23 Mad L Tim 158: 7 Mad L W 269: 1918 Mad W N 207.

(4) *Sheo Nath* v. *Gayaprasad*, (1905) 8 Oudh Cas 302 (303).

O.34, R.10, Notes 1—5.

1. **Legislative changes:—**

The rule corresponds to S. 94 of the Transfer of Property Act.

2. **Amendments after 1908.**—The rule was amended by Act, XXI of 1929. The provision as to the payment of "other costs, charges and expenses" is new.

3. **Mortgagee is ordinarily entitled to his costs.**—In a suit for sale, foreclosure or redemption, the mortgagee is ordinarily entitled to his costs unless his "conduct has been such as to disentitle him thereto".[1] For the scale on which costs are awarded, *see* the undermentioned cases.[2]

4. **"Such costs of suit as have been properly incurred."**—The mortgagor's liability in a mortgage suit cannot be enhanced by a final decree beyond the point indicated in the preliminary decree, except in so far as is provided for by the present rule.[1] It has been held by the Allahabad High Court that the rule refers only to costs incurred between the preliminary decree and the final decree and not to the costs incurred *subsequent to the final decree,* in execution proceedings.[2] The Chief Court of Oudh, on the other hand, has dissented from this view and held that the rule applies to all costs incurred in connection with the suit up to the time of *actual payment* whether before or after the final decree.[3] It is submitted that the Oudh view accords more with the language of the rule, than the Allahabad view.

5. **Costs of appeal.**—There is a conflict of decisions as to whether the costs of an unsuccessful appeal by the mortgagor from the preliminary decree in a mortgage suit can be added to the mortgage money or should be recovered from the mortgagor personally. In some cases, it has been held that such costs can be added to the mortgage money.[1] while, in other cases, that

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Order 34, Rule 10—Note 3.

[1] *Lakshmi Narain* v. *Mt Mohamadi Begam,* 1932 Oudh 123 (134): 9 Oudh W N 60: 137 Ind Cas 102 [Costs disallowed in this case]; *Anghore Kumar Ganguli* v. *Mahomed Mussa,* (1909) 2 Ind Cas 662 (669) Cal; *Mirtunjoy* v. *Kameenee Dassee,* 1 Ind Jur (N S) 95; *Immadipattam Thirugnana* v. *Periya Dorasami,* (1901) 24 Mad 377 (386): 28 Ind App 46: 5 Cal W N 217: 7 Sar 811 P C; *Vadalamaunati Bala Tirupura* v. *Dada Sahib,* (1913) 19 Ind Cas 474 (474): 1913 Mad W N 334; *Krishnaswami* v. *Ramasami,* (1921) 35 Mad 44 (46): 9 Mad L Tim 131: 8 Ind Cas 763: (1911) 1 Mad W N 89 [Improper defence to a redemption suit is a ground for refusing costs]. See also *Ratnam Pillai* v. *Komalambal Ammal,* 1925 Mad 778 (779): 48 Mad L Jour 213: 21 Mad L W 252: 86 Ind Cas 793 [Redemption suit—Decreed—Costs claimed in second appeal by mortgagee on ground of want of misconduct—Not raised in Lower Appellate Court—Costs in Trial Court alone allowed]; *Vastera Holla* v. *Mahabala Rao,* 1926 Mad 405 (406): 91 Ind Cas 943 [Redemption suit—Unsustainable defences such as denial of right to redeem or claim for excess in improvement, etc—Costs in Court's discretion]; *Carvalho* v. *Nurbibi,* (1878) 3 Bom 202 (203): 4 Ind Jur 32 [Where the bargain is usurious, the Court would decline to award costs].

[2] *Sarat Chandra Roy* v. *Nahapiet,* (1910) 37 Cal 907 (913): 8 Ind Cas 1142 [Costs on scale No 2 against mortgagor who does not appear]; *Chunder Coomar* v. *Essen Chunder,* 1 Ind Jur N S 222 [Mortgage deed providing for costs as between attorney and client—Such costs were awarded]; *Obhoy Churn* v. *Debendra Nath,* (1881) 8 Cal L Rep 437 (438) [Ordinarily costs between party and party awarded].

Note 4.

[1] *Kashi Prasad* v. *Sheo Sahai,* (1897) 19 All 186 (188): 1897 All W N 12.

[2] *Het Ram* v. *Raja Dut Prasad Singh,* 1926 All 68 (69): 6 L R A Civ 530: 88 Ind Cas 829; *Het Ram* v. *Raja Dutt Prasad,* 1926 All 722 (722): 48 All 682: 96 Ind Cas 592.

[3] *Hashif Husain* v. *Sashdhar Singh,* 1930 Oudh 328 (328): 7 Oudh W N 398: 122 Ind Cas 783.

Note 5.

[1] *Amina Bibi* v. *Rama Shankar Miser,* (1919) 50 Ind Cas 730 (731): 41 All 473: 17 All L J 582; *Sadiq Husain Khan* v. *Ummatulfatima,* (1918) 48 Ind Cas 329 (329) Oudh; *Mahomed Ifti Khar Ullah* v. *Banke Lal,* 1924 All 104 (104): 45 All 630: 4 L R All (Civ) 801: 21 All L J 617: 73 Ind Cas 950; *Wahid Ali* v. *Durga Shankar,* 1926 All 343 (343): 93 Ind Cas 223 [Though the final decree had been passed before the dismissal of the appeal].

O.34, R.10, Notes 5—8.

the rule refers primarily to costs incurred in the Court which prepares the final decree and that therefore the costs of appeal cannot be added to the mortgage money but should be recovered personally from the mortgagor.[2] According to the undermentioned cases,[3] however, the question is one of *construction* of the appellate decree dismissing the appeal.

6. **"Other costs, charges and expenses."**—This expression has been newly inserted by Act, XXI of 1929 and gives effect to the practice followed before the Act, of adding such "costs, charges and expenses", incurred after the preliminary decree, to the mortgage money.[1]

7. **Power of executing Court to add costs.**—Costs which should have been but have not been excluded in a final decree cannot be claimed in execution.[1]

8. **Costs awarded by decree, mode of realisation.**—*Prima facie,* the costs awarded in a mortgage suit, against the mortgagor, should be added to the mortgage money and the mortgagor is not personally liable for them except when a decree can be passed against him under R. 6 *ante.*[1] But under S. 35 of the Code, the Court has the power to make the mortgagor personally liable for the costs even in the first instance, in which case, the mortgagor would be personally liable for the costs.[2]

O.34. R.11.

Payment of Interest.

R. **11.** [*New.*] In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:—

(*a*) interest up to the date on or before which payment of the amount found or declared due is under the preliminary

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(2) *Muhammad Sadiq* v. *Ghasus Muhammad,* (1914) 22 Ind Cas 42 (44): 11 All L J 975; *Bansgopal Singh* v. *Rup Narain Singh,* (1913) 19 Ind Cas 384 (385) All; *Mahommad Sadiq* v. *Jaigopal,* (1914) 24 Ind Cas 873 (All) [Especially where the final decree had been passed before the dismissal of the appeal].

(3) *Bans Gopal Singh* v. *Rup Narain Singh,* (1918) 19 Ind Cas 384 (385) All; *Amba Sahai* v. *Bhagwan Din,* (1913) 19 Ind Cas 729 (730) (All); *Sheodarshan Singh* v. *Beni,* 1925 All 492 (493): 87 Ind Cas 585: 6 L R A Civ 225.

Note 6.

(1) *Ma Pwa Kin* v. *K P S A R P Firm,* (1918) 43 Ind Cas 190 (191, 192): 12 Bur L Tim 96 [Arrears of Government revenue paid by the mortgagee after preliminary decree, to prevent sale of mortgaged property, can be added to mortgage money]; *Ambika Charan Dutt* v. *Ramgati Guha,* (1915) 28 Ind Cas 571 (572): 21 Cal L Jour 284 [Deposit made by mortgagee to set aside execution sale amount can be added to mortgage money]; *Allahabad Bank* v. *Motilal Barman,* (1916) 35 Ind Cas 95 (97): 44 Cal 448: 22 Cal W N 374; *Ganesh Dharanidar* v. *Keshav Rav Govind,* (1891) 15 Bom 625 (639) [Ordinarily, there is no personal liability for such costs and charges].

Note 7.

(1) *Dambar Singh* v. *Kallyan Singh,* 1922 All 27 (28): 3 L R A 164: 4 All 350: 20 All L J 170: 65 Ind Cas 799.

Note 8.

(1) *Kamalamma* v. *Narasimha,* (1907) 30 Mad 464 (465, 466): 17 Mad L Jour 317: 2 Mad L Tim 359; *Panday Jagannath* v. *Juman,* (1914) 24 Ind Cas 63 (63, 64): 12 All L J 645; *Dambar Singh* v. *Kalyan Singh,* (1918) 43 Ind Cas 557 (559): 40 All 109: 15 All L J 914; *Rajkumar* v. *Sheo Narain,* (1908) 35 Cal 431 (433): 12 Cal W N 364: 8 Cal L Jour 152; *Maqbul Fatima* v. *Lalta Prasad,* (1898) 20 All 523 (528): 1898 All W N 157; *Sakina Bibi* v. *Abdul Hafiz,* (1899) 2 Oudh Cas 103 (109); *Kushal Singh* v. *Shriniwas Rao,* (1889) 2 C P L R 94 (96, 98) [Upon final decree for foreclosure mortgagor's liability for costs also ceases].

(2) *Rutnessur Sein* v. *Jusoda,* (1887) 14 Cal 185 (188); *Dhondu Pandit* v. *Mahant Daulatpuri,* (1907) 3 Nag L R 97 (100, 101); *Damodar Das* v. *Budh Kuar,* (1888) 10 All 179 (181): 1888 All W N 68; *Prankuar* v. *Durga Prasad,* (1888) 10 All 127 (129): 1888 All W N 21; *Amba Sahai* v. *Bhagwan Din,* (1913) 19 Ind Cas 729 (730) All [*Held* on construction of decree that the costs were recoverable personally].

O.34, R.11, Notes 1—2.

decree to be made by the mortgagor or other person redeeming the mortgage—

(*i*) on the principal amount found or declared due on the mortgage,—at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,

(*ii*) on the amount of the costs of the suit awarded to the mortgagee,—at such rate as the Court deems reasonable from the date of the preliminary decree, and

(*iii*) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage-money,—at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent., per annum; and

(*b*) subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—

(*i*) on the aggregate of the principal sums specified in clause (*a*) and of the interest thereon as calculated in accordance with that clause; and

(*ii*) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10.

[*See* S. 34.]

Synopsis.

1. **Amendments after 1908.**
2. **Interest in mortgage suits.**
3. **Rule of damdupet.**

1. **Amendments after 1908.**—The present rule is new. It was substituted for the old R. 11 which was repealed by Act, XXI of 1929 and re-enacted as S 94 of the Transfer of Property Act. Prior to Act, XXI of 1929 there was no special statutory provision regarding interest in mortgage suits corresponding to the present rule.

2. **Interest in mortgage suits.**—This rule which was inserted in the Code by Act, XXI of 1929 gives effect to the previous case-law bearing on the subject. This case-law may be summarised as follows:—

Interest prior to the suit.—Interest could not be claimed in every case as a matter of course. No interest was recoverable unless there was an express or implied *agreement* to pay interest[1] or unless it was recoverable under mer-

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Order 34, Rule 11—Note 2.

[1] *Mukbul Ali v. Ali Ahmed*, (1913) 40 Cal 514 (516): 18 Ind Cas 80; *Manambath Pettiyath v. Cheria Uthalamma*, (1912) 16 Ind Cas 560

cantile usage or under some statutory provision, such as the Interest Act, 1839, (*See* Notes under S. 34.) Where there was an agreement to pay interest, the Court should decree it at the *agreed rate*, however high it might be,[2] unless it was penal,[3] or the rate of interest was excessive *and* the transaction was substantially unfair, *see* Usurious Loans Act, 1918), in either of which cases, the Court might decree what it considered a reasonable rate of interest.[3-a] A stipulation for the payment of compound interest was held to be not necessarily penal.[4] Nor did the mere fact that the rate of interest was excessive give rise to a presumption of undue influence where it was not proved that the lender was in a position to dominate the will of the debtor.[5] The interest decreed was a charge on the mortgaged property.[6]

Where the mortgagee was in possession of the mortgaged property, the income from the property should be applied in discharge of the interest pay-

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(561) Mad [*Held* on construction that *rent* and *not* interest was agreed to be paid]; *Wezarat Husain* v. *Mohan Lal*, (1920) 58 Ind Cas 7 (9, 10): 18 All L J 776: 1921 All 318: 2 U P L R (A) 357: 43 All 88 [Interest payable on default in paying stipulated instalments—Waiver]; *Mohammad Ali Mohammad Khan Bahadur* v. *Qazi Ramzan Ali*, (1921) 58 Ind Cas 891 (892): 7 Oudh L J 350: 23 Oudh Cas 150: 24 Cal W N 977 P C [*Held* on construction that interest became payable only after the period fixed for redemption]; *Sockhram* v. *Hoolasse*, 1866 Pun Re No. 64 [Right to interest—Waiver may be proved by non-payment]; *Muhammad* v. *Ezekiel*, (1905) 7 Bom L R 772 (790) [Bond providing for simple interest only and no rests—Only simple interest can be awarded]; *Raghub Prusti* v. *Bhobui Sahoo*, (1904) 8 Cal W N 216 (218) [Mortgagee not entitled to interest for the day on which the money was advanced as also for the day on which the money was repaid]; *Radhanath Sein* v. *Bungo Chunder Sein*, (1864) Suth W R 157 (157) [In absence of express provision for interest, interest need not be paid]; *Jaleshwar Rai* v. *Anrut Rai*, (1913) 35 All 302 (306): 11 All L J 402: 18 Ind Cas 904 [Liability of Hindu son]. See *Ram Adhin* v. *Shameshur Datt*, (1901) 4 Oudh Cas 93 (95) [Liability of Hindu son under decree on mortgage against father]; *Chuni Lal* v. *Bali Ram*, 58 Pun Re 1915: 166 Pun W R 1915: 58 Pun L R 1916: 30 Ind Cas 104 (105) [Decree for redemption allowed to become barred—Fresh suit for redemption—Interest should be calculated on basis of original mortgage deeds and not on the previous decree].

(2) *Chhab Nath* v. *Kamta Prasad*, (1885) 7 All 333 (336): 1885 All W N 27 (27); *Chaturbhai Karsan* v. *Harbhamji*, (1896) 20 Bom 744 (745); *Daudbhai* v. *Daudbhai*, (1890) 14 Bom 118 (115); *Chaturbhai* v. *Harbhamji*, (1896) 20 Bom 744 (745); *Futtehma Begum* v. *Mohammad Ausur*, (1883) 9 Cal 309 (314); *Umes Chunder* v. *Zahur Fatima*, (1896) 18 Cal 164 (180): 17 Ind App 201: 5 Sar 507 P C; *Surya Narain* v. *Jogendra Narain*, (1893) 20 Cal 360 (364); *Mangni Ram* v. *Raj Pati Koeri*, (1893) 20 Cal 366 (369) Note; *Ganga Pershad* v. *Land Mortgage Bank*, (1894) 21 Cal 366 (374): 21 Ind App 1: 6 Sar 383 P C; *Moti Singh* v. *Ramo Hari*, (1891) 24 Cal 699 (703): 1 Cal W N 437 F B; *Umesh Chandra* v. *Golap*, (1904) 31 Cal 233 (240): 7 Cal W N 876; *Kedar Lal* v. *Bishen Pershad*, (1904) 31 Cal 332 (338): 31 Ind App 57: 8 Cal W N 609: 8 Sar 599 P C; *Bandaru Swami Naidu* v. *Atchayamma*, (1881) 3 Mad 125 (126); *Venkatasawmy* v. *Ramanathan*, (1910) 5 Ind Cas 916. 7 Mad L Tim 194; *Bhoramal* v. *Devi Din*, 40 Pun Re 1882: *Hemraj* v. *Mulik*, 1889 Pun Re No. 135; *Raghu* v. *Bandu*, 1908 Pun Re No. 110; *Khaga Ram* v. *Ramsankar*, (1915) 42 Cal 652 (664, 666): 21 Cal L Jour 79: 27 Ind Cas 815: 19 Cal W N 775; *Hari* v. *Ramji*, (1904) 28 Bom 371 (377): 6 Bom L R 307. See also *Bunwari Lal* v. *Moheshur*, Marsh 544: 2 Hay 644, and *Sheoppa* v. *Rukhma*, (1909) 2 Ind Cas 27 (28, 29): 5 Nag L R 37 [Contract—Rate to be given even though interest is payable only on default of payment of instalments].

(3) *Khagaram* v. *Ram Sankar*, (1915) 27 Ind Cas 815 (819): 21 Cal L Jour 79; 19 Cal W N 775: 42 Cal 652. See also *Kutub-ud-din* v. *Bashir-ud-din*, (1910) 5 Ind Cas 665 (665): 32 All 448: 7 All L J 394 [Stipulation for higher rate of interest with a provision for lower rate in case of punctual payments—Not penal].

(3-a) See *Nandram* v. *Bhupal Singh*, (1912) 13 Ind Cas 5 (5): 8 All L J 1294: 34 All 126; *Mt Rukman Devi* v. *Sain Das*, (1912) 13 Ind Cas 401: 45 Pun W R 1912: 73 Pun L R 1912 [Mortgage by Hindu father, of joint family property—Necessity of borrowing at excessive rate of interest not proved—Interest may be reduced].

(4) *Bhola* v. *Fateh*, (1884) 6 All 63 (64): 1883 All W N 210: 8 Ind Jur 319; *Sarju* v. *Beni*, (1884) 6 All 61 (63): 1883 All W N 208; *Tejpal* v. *Keshri*, (1878-80) 2 All 621 (622): 5 Ind Jur 154; *Mathura* v. *Durjan*, (1878-80) 2 All 639 (641): 5 Ind Jur 214. See *Mangal Prasad* v. *Imtiazun Nissa*, (1919) 49 Ind Cas 414 (415): 6 Oudh L J 22 [*Held* intention of parties was to pay compound interest]. See *Alu Prasad* v. *Sukhan*, (1881) 3 All 610 (628) F B.

(5) *Raghunath Prasad* v. *Sarju Prasad*, 1924 P C 60 (65): 5 Pat L Tim 72: 22 All L J 105: 2 Pat L R 87: 34 Mad L Tim 57: 51 Ind App 101: 19 Mad L W 470: 3 Pat 279: 46 Mad L Jour 610: 26 Bom L R 595: 28 Cal W N 834: 11 Oudh L J 122: 1924 Mad W N 638: 5 L R P C 206: 82 Ind Cas 817 P C; *Mt Khollo* v. *Jawala Prasad*, 1927 All 538: 101 Ind Cas 759.

(6) *Jainandan Prasad* v. *Baij Nath Saran*, 1921 Pat 403 (405): 2 Pat L Tim 229: 63 Ind Cas 297 [But interest as damages is not a charge on the property]; *Kamra* v. *Bishambar Dass*, 1890 Pun Re No. 147 F B, *Bur Singh* v. *Sohel Singh*, 1894 Pun Re No 121; *Rada Kishen* v. *Muhamdu*, 1888 Pun Re No 57. But see *Makbul Ali* v. *Ali Ahmad*, (1913) 18 Ind Cas 80 (80): 40 Cal 514; *Bulaki Mal* v. *Duni Chand*, (1914) 22 Ind Cas 837 (839): 116 Pun L R 1914: 95 Pun W R 1914: 94 Pun Re 1914 [Interest is not a charge on the property unless it is specifically made so].

O.34, R.11, Note 2.

able to him.[7] But a mortgagee who was entitled to possession in lieu of interest could not claim any interest for the period for which he failed to obtain possession on account of his own laches.[8]

The present rule and S. 72 of the Transfer of Property Act make it clear that interest is payable on the "costs and charges and expenses" properly incurred by the mortgagee in respect of the mortgage security.[8-a]

Post diem *interest or interest after the date fixed in the mortgage deed for the payment of the mortgage money.*—There was a conflict of decisions as to the power of the Court to decree interest after the due date for payment under the mortgage deed. In some cases it was held that, in the absence of any specific stipulation for the payment of such interest, it could not be decreed.[9] But in a great many cases it was held that an intention to pay interest subsequent to the period fixed for redemption at the same rate as before might be implied in the absence of any agreement to the contrary.[10] Even if there was no intention to pay such interest, the Court could award it by way of *damages* for the breach of the contract to pay the mortgage money at the stipulated time.[11]

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(7) *Partab Bahadur* v. *Gajadhar Baksh*, (1902) 24 All 521 (531): 28 Ind App 148: 7 Cal W N 97 P C; *Jugal Kishore* v. *Bakal Rai*, (1913) 21 Ind Cas 593 (594) All; *Champat Singh* v. *Lakha Singh*, (1902) 5 Oudh Cas 155 (160); *Kallu and Gajraj* v. *Dayaram*, (1902) 5 Oudh Cas 286 (292).

(8) *Mahaduji* v. *Joti*, (1893) 17 Bom 425 (428); *Jhanku Singh* v. *Chatkan Singh*, (1909) 2 Ind Cas 221 (222): 6 All L J 247: 31 All 325; *Saklu Chaudhuri* v. *Harbansdeo Rai*, 1926 All 660 (666, 667): 95 Ind Cas 26 [Mortgagor to discharge debt in Jeth—Not taking any steps—Is not entitled to interest after suit for redemption]; *Dulli* v. *Bahadur*, (1875) 7 N W P 57 (58); *Bhawani Parsad* v. *Shaib Din Lal*, (1906) 9 Oudh Cas 144 (145). See also *Bansiddhar* v. *Hadi*, 1889 All W N 177 (177) [Mortgagee not executing his decree for possession—Not entitled to interest in subsequent suit for redemption].

(8-a) *Pinh Dal Shal* v. *Bhai Sawaya Singh*, 1893 Pun Re No. 67 [In Punjab where the Transfer of Property Act does not apply a different view was taken].

(9) *Balwant Singh* v. *Gayan Singh*, (1913) 21 Ind Cas 253 (254): 11 All L J 829: 35 All 534.

(10) *Bindesri* v. *Ganga*, (1898) 20 All 171 (180): 25 Ind App 9: 2 Cal W N 129: 7 Sar 273 P C; *Mathura Das* v. *Narindar Bahadur*, (1897) 19 All 39 (49, 50): 23 Ind App 138: 1 Cal W N 52: 6 Mad L Jour 214: 7 Sar 88 P C; *Honager Vithoba Timap Senbhog* v. *Vigneswar*, (1898) 22 Bom 107 (110); *Sarala Dasi* v. *Jogendra Narayan*, (1898) 25 Cal 246 (249, 250); *Pedda Subbaraya Chetty* v. *Ganga Razulungaru*, (1897) 20 Mad 149 (151): 7 Mad L Jour 18; *N Patnayadu* v. *Radha Chunder Deo*, (1897) 20 Mad 371 (375); *Jiranna* v. *Appalu*, (1899) 22 Mad 339 (340); *Ghantayya* v. *Papayya*, (1900) 23 Mad 534 (535); *Kalka Prasad* v. *Inayat Husain*, (1912) 16 Ind Cas 216 (217) All; *Rahas Behari* v. *Bachchu Singh*, (1914) 23 Ind Cas 871 (872): 1 Oudh L J 50; *Abdul Ahad* v. *Mahtab Bibi*, (1914) 24 Ind Cas 674 (675) All; *Thaithottathil* v. *Rama Chandra*, (1915) 26 Ind Cas 124 (124): 16 Mad L Tim 478 [*Post diem* compound interest not recoverable unless expressly provided for]; *Mallappappa Iyer* v. *Pichai Achari*, (1915) 28 Ind Cas 195 (196): 2 Mad L W 236: 1915 Mad W N 208; *Mola Singh* v. *Bishen Singh*, (1916) 32 Ind Cas 821 (822): 5 Pun Re 1916: 23 Pun W R 1916; *Jagat Pai Singh* v. *Harnam Singh*, (1916) 34 Ind Cas 745 (746): 3 Oudh L J 244: 19 Oudh Cas 166; *Mahadeo Prasad* v. *Tikni*, (1916) 36 Ind Cas 685 (689): 3 Oudh L J 390; *Allah Din* v. *Fateh Din*, (1918) 45 Ind Cas 101 (102): 31 Pun Re 1918: 54 Pun W R 1918: 27 Pun L R 1918; *Akbar Husain* v. *Ragunandan*, (1920) 57 Ind Cas 348 (349); *Rameshwar Bakhsh Singh* v. *Prabhu Dayal*, (1920) 57 Ind Cas 533 (538): 7 Oudh L J 348; *Mahadeo Prasad* v. *Dhiraj Singh*, 1923 All 7 (8): 44 All 772: 20 All L J 752: 77 Ind Cas 122; *Amar Singh* v. *Baijnath Singh*, 1926 Oudh 378 (379): 93 Ind Cas 958; *Umrao Singh* v. *Thakar Singh*, 1898 Pun Re No 77; *Radha Kishen* v. *Karim Ullah*, 1905 Pun Re No 92: 50 Pun L R 1906: 119 Pun W R 1905; *Sundara Boyi* v. *Sama Rayar*, (1894) 4 Mad L Jour 260 (262, 263); *Namburi* v. *Saladi*, (1900) 10 Mad L Jour 101 (104); *Ramanathan* v. *Nur Muhammad*, (1901) 11 Mad L Jour 183 (185); *Rupchand* v. *Pannalal*, (1901) 14 C P L R 49 (51); *Ma Shwe Kin* v. *Maung Shwe Hmo*, 1893-1900 L B R 457; *Malayappier* v. *Pitchai Asari*, (1915) 28 Ind Cas 195 (196): 2 Mad L W 236 (238): 1915 Mad W N 208; *Narasimhayya* v. *Srinivasayya*, (1919) 36 Mad L Jour 118 (118, 119): 52 Ind Cas 313 (313) [Even intention to pay *post diem* compound interest may be implied]; *Ghumandi Lal* v. *Kanhay Lal*, (1919) 1 Lah L Jour 116 (120); *Ghuznavi* v. *National Bank of India*, (1916) 20 Cal W N 562 (569, 571, 576): 23 Cal L Jour 256: 33 Ind Cas 34; *Badri* v. *Kundan*, 1892 Pun Re No 28 [*Post diem* interest is charge on property]; *Sundara Boyi* v. *Sama Rayar*, (1894) 4 Mad L Jour 260 (263), (Do.); *Najmunnissa* v. *Raghunath*, 1922 Oudh 122: 25 Oudh Cas 36: 67 Ind Cas 963; *Balgobind Das* v. *Narain Lal*, (1893) 15 All 339 (352): 20 Ind App 116: 6 Sar 313: 17 Ind Jur 425 P C [Express agreement to pay *post diem* interest]. See also *Parashram* v. *Krishna*, 1932 Nag 39 (40, 41): 28 Nag L R 1: 136 Ind Cas 887 [Terms of deed providing interest and payment by instalments—No provision nor indications as to interest after whole amount becomes payable—Presumption is payment at reasonable rate].

(11) *Chajmal* v. *Brij Bhukan*, (1895) 17 All 511 (517): 22 Ind App 199: 6 Sar 624 P C; *Mansab Ali* v. *Gulab Chand*, (1888) 10 All 85 (90): 1887 All W N 292; *Bhagwant Singh* v. *Daryao Singh*, (1889) 11 All 416 (419): 1889 All W N 165; *Bishen Dayal* v. *Udit Narain*, (1886) 8 All 486 (490): 1886 All W N 216 [Principle is of compensation for breach of con-

The contract rate of interest was ordinarily taken as the measure of damages,[12] though the Court could vary it if it considered it necessary.[13]

Post diem interest at a reasonable rate might also be decreed under the Interest Act of 1839 though there might be no agreement to pay such interest.[14] Such interest awarded either as damages,[15] or under the Interest Act,[16] was held not to constitute a charge on the mortgaged property though a contrary view also was held in the undermentioned cases.[17] It was also held that *post diem* interest claimed as damages for breach of contract could be recovered only for the period prescribed by the Limitation Act for a suit for compensation for such breach[18], and that a claim for such damages would fail unless the mortgage suit was brought within the period of limitation for a suit for damages for breach of the contract.[19] But the Privy Council observed in the undermentioned case that the claim was a recurring one and so long as the principal itself was not barred, *post diem* interest could be recovered for the six years (or three years, as the case may be), preceding the suit on the mortgage.[20]

Interest from institution of suit to the date fixed under the preliminary decree for the payment of the mortgage money.—The same rules which guided

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tract and not *implied* contract to pay *post diem* interest]; *Jaula Prasad* v. *Khuman Singh*, (1880) 2 All 617 (619): 5 Ind Jur 154; *Deen Dayal Lall* v. *Hetnarain*, (1876-77) 2 Cal 41 (44); *Deen Dayal Lall* v. *Choa Singh*, 25 Suth W R 189; *Thayar Ammal* v. *Lakshmi*, (1895) 18 Mad 331 (334); *Budhu Ram* v. *Niamat Rai*, 1923 Lah 632 (633, 634): 4 Lah 406: 6 Lah L Jour 72: 75 Ind Cas 875; *Krishna Mal* v. *Muhammad Bakhsh*, (1915) 27 Ind Cas 616 (617): 52 Pun L R 1915; *Gita Prasad Singh* v. *Ragho Singh*, (1917) 40 Ind Cas 809 (810): 1 Pat L W 777; *Motan Mal* v. *Muhammad Bakhsh*, 1922 Lah 254 (257): 3 Lah 200: 66 Ind Cas 771: 42 Pun L R 1922 F B; *Dera Singh* v. *Dhurm Singh*, 1866 Pun Re No 98; *Gregory* v. *Dulsook Roy*, Cor 9; *Maung Pa* v. *Maung Kya Bu*, 1872-1892 L B R 570.

(12) *Bishen Dayal* v. *Udit Narain*, (1886) 8 All 486 (489): 1886 All W N 216; *Baldeo Panday* v. *Gokul Rai*, (1875-78) 1 All 603 (607): 2 Ind Jur 725; *Juala Prasad* v. *Khuman Singh*, (1878-80) 2 All 617 (619): 5 Ind Jur 154; *Motan Mal* v. *Muhammad Bakhsh*, 1922 Lah 254 (257): 3 Lah 200: 66 Ind Cas 771: 42 Pun L R 1922; *Mangli* v. *Bhida Lal*, 1923 Lah 404 (405): 6 Lah L Jour 457: 76 Ind Cas 916; *Budhu Ram* v. *Niamat Rai*, 1923 Lah 632 (633): 4 Lah 406: 6 Lah L Jour 72: 75 Ind Cas 375; *Naklu Mal* v. *Phagu Singh*, (1910) 6 Ind Cas 664 (664): 56 Pun W R 1910: 76 Pun L R 1910 [Even compound interest may be allowed].

(13) *Chajmal Das* v. *Brij Bhukan Lal*, (1895) 17 All 511 (517): 22 Ind App 199: 6 Sar 624 P C; *Bishan Dayal* v. *Udit Narain*, (1886) 8 All 486 (489, 490): 1886 All W N 216; *Nanchand* v. *Bapusahab*, (1878-79) 3 Bom 131 (133); *Jaula Prasad* v. *Khuman Singh*, (1878-80) 2 All 617 (619): 5 Ind Jur 154; *Deen Dayal* v. *Het Narain*, (1876-77) 2 Cal 41 (43, 44); *Deen Dayal Lall* v. *Choa*, 25 Suth W R 189; *Hari Ram* v. *Zaida*, 1929 Lah 385 (385): 108 Ind Cas 384; *Seethanath Bose* v. *Mathooranath Roy*, (1869) 11 Suth W R 68 (69): 2 Beng L R App 10; *Moizooddy*, In re, (1878) 14 Suth W R 450 (450); *Mohamed Hoosein* v. *Faqueeroodeen*, (1871) 15 Suth W R 284 (285); *Joy Ram* v. *Nobin Chunder*, (1876) 25 Suth W R 318 (318); *Dowla Mall* v. *Sawan*, 1872 Pun Re No 42; *Sheochand* v. *Chunna*, 1892 Pun Re No 73; *Jagmohan* v. *Tikaitrai*, (1893) 6 C P L R 11 (12); *Rajaput Rai* v. *Ghulam*, 1902 Pun L R No 95 (page 368); *Rama Reddi* v. *Appaji Reddi*, (1895) 18 Mad 248 (250): 4 Mad L Jour 265.

(14) *Bikramajit* v. *Durga Dyal*, (1894) 21 Cal 274 (278); *Moti Singh* v. *Ramohari Singh*, (1897) 24 Cal 699 (703): 1 Cal W N 437 F B; *Krishna Reddi* v. *Varadarajalu*, (1895) 18 Mad 338 note; *Krishna Reddi* v. *Varadarajulu*, (1895) 5 Mad L Jour 154 (155).

(15) *Moti Singh* v. *Ramohari Singh*, (1897) 24 Cal 699 (703): 1 Cal W N 437; *Narindra Bahadur* v. *Kadim Husain*, (1895) 17 All 581 (586, 587): 1895 All W N 128 F B; *Rikhi Ram* v. *Sheo Parshan*, (1896) 18 All 316 (319): 1896 All W N 78; *Sri Niras Ram* v. *Udit Narain*, (1891) 13 All 330 (336): 1891 All W N 66; *Gudri Koer* v. *Bhubaneshwari Coomar Singh*, (1892) 19 Cal 19 (24); *Badi Bibi* v. *Sami Pillai*, (1895) 18 Mad 257 (261); *Hoshnakmal* v. *Sohna Mal*, 1894 Pun Re No 114; *Murat Singh* v. *Baktawar Singh*, (1893) 6 C P L R 22 (23).

(16) *Narindra Bahadur* v. *Khadim Hussain*, (1895) 17 All 581 (588, 589): 1895 All W N 128 F B.

(17) *Bikramajit Tewary* v. *Durga Dyal*, (1894) 21 Cal 274 (278) [*Post diem* interest awarded under Interest Act]; *Rama Reddi* v. *Appaji Reddi*, (1895) 18 Mad 248 (250): 4 Mad L Jour 265; *Jawahir Mall* v. *Raja Shah*, 1902 Pun Re No. 95: 1903 Pun L R 21 (74). See also *Chajmal* v. *Brij Bhukan*, (1895) 17 All 511 (517): 22 Ind App 199: 8 Sar 624 P C [Where the *post diem* interest awarded as damages was directed to be added to the principal in taking the accounts].

(18) *Badi* v. *Sami*, (1895) 18 Mad 257 (262); *Motan Mal* v. *Muhammad Bakhsh*, 1922 Lah 254 (257): 3 Lah 200: 66 Ind Cas 771: 42 Pun L R 1922 F B; *Moti* v. *Ramhari*, (1897) 24 Cal 699 (703): 1 Cal W N 437 F B.

(19) *Narindra* v. *Khadim*, (1895) 17 All 581 (587): 1895 All W N 128; *Gudri Koer* v. *Bhubaneswari*, (1892) 19 Cal 19 (25).

(20) *Mathura Das* v. *Narindar Bahadur*, (1887) 19 All 39 (47): 23 Ind App 138: 1 Cal W N 52: 6 Mad L Jour 214: 7 Sar 88 P C. See also Re *Marshfield* v. *Hutchings*, (1887) 34 Ch D 721, cited in 19 Halsbury, p. 101, *Mt Bhagwanti* v. *Mela Mall*, 1903 Pun L R No 33 [There is no limitation to a mortgagee's claim for interest in a suit for *redemption*].

O.34, R.11, Note 2.

the Court with reference to interest accruing prior to the suit applied also till the date fixed under the decree for the payment of the mortgage money. Hence, where there was a stipulated rate of interest, the Court was held bound to decree interest at that rate till the date fixed for payment of the decretal amount, however high it might be, unless it was *penal* or was excessive *and* the transaction was substantially unfair.[21] Where the period originally fixed for payment was *extended* by the appellate Court or otherwise, the contract rate of interest was payable till the extended period.[22] Though the mortgagor paid into the Court

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(21) *Jagannath Prasad Singh* v. *Surajmal Jalal*, 1927 P C 1 (2): 25 All L J 23: 99 Ind Cas 686: 4 Oudh W N 46: 31 Cal W N 390: 52 Mad L Jour 373: 38 Mad L Tim 73: 8 Pat L Tim 173: 54 Ind App 1: 54 Cal 161: 29 Bom L R 752: 45 Cal L Jour 279: 25 Mad L W 685 P C; *Rafikunnissa Bibi* v. *Tarini Churn*, (1893) 20 Cal 279 (284, 285); *Rameshwar* v. *Mahomed*, (1898) 26 Cal 39 (45): 25 Ind App 179: 2 Cal W N 638: 7 Sar 413 P C; *Rameshwar Prasad* v. *Raishan Kishen*, (1902) 29 Cal 43 (52); *Prayag* v. *Shyam*, (1904) 31 Cal 138 (141); *Bhoneswar Ram* v. *Ram Khelawan Sahoo*, (1910) 5 Ind Cas 654 (656): 12 Cal L Jour 137; *Maha Pershad Singh* v. *Surendra Mohan*, (1909) 4 Ind Cas 56 (57): 9 Cal L Jour 288; *Sayrat Saha* v. *Sader Saha*, (1921) 61 Ind Cas 241 (241, 242) Cal [Any other arrangement is inadmissble under S 92 of the Evidence Act]; *Giriya Chettiar* v. *Sabapathy*, (1906) 29 Mad 65 (67); *Subbaraya* v. *Ponnusami*, (1897) 21 Mad 364 (365); *Veerappa Chetty* v. *Muniandy Thevar*, (1911) 12 Ind Cas 18 (20): 4 Bur L Tim 207; *Bishen Chand* v. *Bishen Devi*, 1928 Lah 96 (97): 107 Ind Cas 893; *Shankar Dass* v. *Hukam Chand*, 1928 Lah 192 (192): 29 Pun L R 67: 106 Ind Cas 486; *Mangat Rai* v. *Babu Singh*, 1927 Lah 445 (447): 9 Lah L Jour 301: 28 Pun L R 380: 103 Ind Cas 437: 8 Lah 721; *Jogendra Nath Roy* v. *N Murtaza Begam*, 1925 Cal 268 (269): 29 Cal W N 118: 85 Ind Cas 218; *Samanadan Karakatetathil* v. *Manikoth Veluvarettil*, (1917) 42 Ind Cas 349 (350): 6 Mad L W 296: 33 Mad L Jour 679; *Chuni Lal* v. *Beli Ram*, (1915) 30 Ind Cas 104 (105): 58 Pun Re 1915: 166 Pun W R 1915: 58 Pun L R 1916; *Inderpal Singh* v. *Mewah Lal*, (1914) 23 Ind Cas 429 (430): 12 All L J 374: 36 All 264; *Rajwanta Kunwar* v. *Shamnarain*, (1914) 23 Ind Cas 88 (88): 12 All L J 283: 36 All 220; *Tarachand Marwari* v. *Brojo Gopal Mukherji*, (1913) 18 Ind Cas 747 (748): 17 Cal W N 457: 17 Cal L Jour 120; *Kali Prosonno* v. *Protap Singh*, (1913) 18 Ind Cas 965 (968): 17 Cal L Jour 221; *Medam Subbanna Chetty* v. *Yelkur Ramachandriah*, (1913) 20 Ind Cas 917: 1913 Mad W N 649; *Radhakishan Chamaria* v. *Zalim Singh*, 1925 Pat 455 (459): 88 Ind Cas 323: 6 Pat L Tim 459: 2 Pat L R (Civ) 315; *Maung Yan Gin* v. *Katharasan Chetty*, 1921 U B R 5 (7): 63 Ind Cas 799; *Rani Sunder Koer* v. *Rai Sham Kishen*, (1907) 4 All L J 109 (113): 34 Cal 150: 34 Ind App 9: 5 Cal L Jour 106: 9 Bom L R 304: 11 Cal W N 249: 17 Mad L Jour 43: 2 Mad L Tim 75 P C; *Brojolal* v. *Tara Prasanna*, (1906) 3 Cal L Jour 188 (193, 194); *Jogandara Nath* v. *Methana*, (1902) 6 Cal W N 769 (771); *Nazir* v. *Mehdi*, (1881) 7 Cal L Rep 206 (214); *Jamnadas* v. *Bhangi*, (1905) 1 Nag L R 43 (46); *Allahabad Bank* v. *Syed Mohammad Tawad*, (1899) 2 Oudh Cas 37 (40); *Samanadan* v. *Manikoth*, (1917) 42 Ind Cas 349: 6 Mad L W 296 (299): 33 Mad L Jour 679; *Tarachand Marwari* v. *Brojo Gopal Mukerji*, (1913) 18 Ind Cas 747 (748, 749): 17 Cal W N 457: 17 Cal L Jour 120 [Period cannot be enlarged by an unsuccessful appeal from the preliminary decree]; *Kaliprasad* v. *Muhammad Yasin Khan*, (1920) 54 Ind Cas 833: 6 Oudh L J 666 [Stipulated interest reduced as being penal—Reduced interest to be granted]. See *Hargovan Das* v. *Mohan Bhai*, (1900) 2 Bom L R 225 (227). But see *Ali Mohammad Khan Bahadur* v. *Qazi Ramzan Ali*, (1920) 24 Cal W N 977 (982): 7 Oudh L J 350: 23 Oudh Cas 150: 58 Ind Cas 891 [Where the Privy Council disallowed interest after the trial Court's decree, in view of mortgagee's misconduct]. See also *Hiralal Ichhalal Majumdar* v. *Desainarsilal Chaturbhujdas*, (1913) 18 Ind Cas 909 (911): 37 Bom 326: 25 Mad L Jour 101: 40 Ind App 68: 17 Cal W N 578: 13 Mad L Tim 415: 1913 Mad W N 428: 11 All L J 432: 17 Cal L Jour 474: 15 Bom L R 483 P C [Interest after suit not provided for in decree must be deemed to have been refused]. See also *Ganda Mal* v *Thakar Harkishen*, 1900 Pun Re No 8: 10 Pun L R 1900 [Method of taking accounts indicated]. See also *Sheoppa* v. *Rukhma*, (1909) 2 Ind Cas 27 (28, 29): 5 Nag L R 37 [Mortgagee entitled to contract rate—Allowed at 9 per cent. since he did not ask for more]; *Siba Prasad* v. *Kazimuddin*, (1922) 65 Ind Cas 709 (710) Cal [During proceedings to set aside *ex parte* decree suit pending and interest at contract rate allowable]; *Marotirao* v. *Mankuwarbhai*, 1931 Nag 161 (163 to 165): 27 Nag L R 312: 14 Nag L J 109: 134 Ind Cas 274 [Such interest is bound by the law of damdupat and S 34 is inapplicable]; *Sourendra Mohan* v. *Hari Prasad*, 1925 P C 280 (287): 52 Ind App 418: 42 Cal L Jour 592: 50 Mad L Jour 1: 91 Ind Cas 1033: 24 All L J 33: 1926 Mad W N 49: 5 Pat 135: 7 Pat L Tim 97: 28 Bom L R 1126: 30 Cal W N 482 P C [Trial Court granting interest, after suit, on amount of personal decree and not on mortgage amount and directing taking of accounts—Successor has no power to award interest on mortgage amount after suit].

The following cases holding that such interest was not payable till date fixed for payment must bo regarded as absoluto:—*Achyut Narayan Khare* v. *Ramchandra Keshav Ukidve*, 1925 Bom 362 (362): 27 Bom L R 492: 87 Ind Cas 719; *Managi Singh* v. *Sahebram*, (1909) 10 Cal L Jour 203 (207): 3 Ind Cas 289; *Magniram* v. *Dowlal Rai*, (1886) 12 Cal 569 (579) F B; *Omda Khanum* v. *Brojendro*, (1873-4) 12 Beng L R 451 (468, 482): 20 Suth W R 317: 21 Suth W R 352. See also *Mukund Lal* v. *Seth Mangaljeet*, (1899) 12 C P L R 78 (82) [Court granting extension of time on condition of mortgagor paying interest on decretal amount—Such interest does not form part of the mortgage money]; *Mohammad Ali* v. *Ramzan*, 1921 P C 100 (102): 14 Mad L W 710: 69 Ind Cas 65 [Where the Privy Council disallowed interest from decree of trial Court till the Privy Council judgment, in view of the mortgagee's persistence in ascertaining an unwarrantable cliam].

(22) *Jamuna Prasad Singh* v. *Chakradhar Prasad Singh*, 1930 Pat 380 (382): 126 Ind Cas 906; *Mt Bashiran* v. *Bishambar Nath*, 1922 Oudh 268 (269): 9 Oudh L J 439: 69 Ind Cas 667; *Ram Narain* v. *Gobind Pershad*, (1915) 29 Ind Cas 289 (290) All; *Jagannath Prasad* v. *Surajmal Jalal*, 1927 P C 1 (2): 25 All L J 23: 99 Ind Cas 686: 4 Oudh W N 46: 31 Cal W N 390: 52 Mad L Jour 373: 38 Mad

O.34, R.11, Note 2.

the decretal amount before the date fixed in the decree for payment he was bound to pay interest for the *entire period fixed.*[23]

Interest from date fixed in the decree for payment till realisation.—The Court could decree interest even for the period subsequent to the date fixed for payment in the decree, till realisation.[24] The following cases which held to the contrary[24-a] were obsolete even prior to the enactment of the present rule. The scheme of the Code being that after the date fixed in the decree for payment the relationship between the parties passed from the domain of *contract* into that of *judgment*, the Court was not bound to award interest, after such date, at the contract rate, but might award such interest at any rate that it considers *reasonable.*[25] The undermentioned cases[25-a] which held that the Court was bound to award the contract rate till payment are not good law.

L Tim 673: 8 Pat L Tim 173: 54 Ind App 1: 54 Cal 161: 29 Bom L R 752: 45 Cal L Jour 279: 25 Mad L W 685 [Six months' period of redemption will be counted from the date of appellate decree where the first Court's decree is varied]. See however *Sripat Singh* v. *Naresh Chundra Bose*, 1932 Pat 332 (334): 13 Pat L Tim 545 [After amendment o. 1929, interest at bond rate till period of grace is discretionary].

(23) *Khuman Singh* v. *Bholanath*, (1905) 1 Nag L R 106 (108); *Vishundas Fateh Chand* v. *Nagji Devchand*, (1919) 49 Ind Cas 160 (160): 12 Sind L R 59. See *Parashram* v. *Asaram*, 1933 Nag 22 (23): 28 Nag L R 345: 141 Ind Cas 42: 15 Nag L J 154 [Amount of interest till date of payment fixed in the preliminary decree to be included in valuation under S 110, C P Code]. But see *Monzoorad Dowlah* v. *Mehdi Begum*, (1881) 7 Cal L R 206; *Chotoo Lall* v. *Miller*, (1881) 7 Cal L R 267 [These cases were decided prior to the Transfer of Property Act and hence are obsolete].

(24) *Balwant Singh* v. *Amolak Ram*, (1906) 28 All 228(224): 3 Cal L J 85: 16 Mad L J 160: 1 Mad L T 65 P C; *Maharaja of Bhaitpur* v. *Rani Kanno Dev*, (1906) 23 All 181 (193): 3 Bom L R 51: 28 Ind App 35: 7 Sar 792: 5 Cal W N 137 P C; *Bakhar Sajjad* v. *Udit Narayan*, (1899) 21 All 361 (373): 1899 All W N 91 F B; *Achalabala Bose* v. *Surendra Nath Dey*, (1897) 24 Cal 766 (773): 1 Cal W N 550; *Rani Sunder* v. *Rani Sham Krishen*, (1907) 34 Cal 150 (161): 34 Ind App 9: 4 All L J 109: 5 Cal L Jour 106: 9 Bom L R 804: 11 Cal W N 249: 17 Mad L Jour 43: 2 Mad L Tim 75 P C; *Gokuldas* v. *Ghasiram*, (1908) 35 Cal 221 (225): 35 Ind App 28: 4 Nag L R 1: 10 Bom L R 144: 7 Cal L Jour 233: 12 Cal W N 369: 3 Mad L Tim 339 P C; *Venkatachelapathy* v. *Thavasi Servai*, (1919) 51 Ind Cas 67 (68): 36 Mad L Jour 288: 42 Mad 465; *Kanshi Ram* v. *Prem Singh*, 1926 Lah 11 (12): 26 Pun L R 240: 89 Ind Cas 879; *Seth Ghasiram* v. *Raja Gokul Das*, (1904) 17 C P L R 164 (168, 169); *Allahabad Bank* v. *Syed Mohammad*, (1899) 2 Oudh Cas 37 (44); *Achalabala Bose* v. *Surendra Nath Dey*, (1897) 24 Cal 766: (773) 1 Cal W N 550.

(24-a) *Amolak Ram* v. *Lachmi Narain*, (1897) 19 All 174 (178, 179): 1896 All W N 9: *Pirbhu Narain* v. *Rup Singh*, (1898) 20 All 397 (399): 1898 All W N 93; *Tarachand* v. *Dinanath*, 1895 All W N 76; *Nain Datt* v. *Harihar Datt*, 1898 All W N 57 (58). See *Moha Prasad* v. *Ramani Mohan*, (1909) 4 Ind Cas 546 (547): 13 Cal W N 744.

(25) *Lachmi Narain* v. *Uman Dat*, (1907) 29 All 322 (324): 1907 All W N 60: 4 All L J 219; *Prayag Kapri* v. *Shyam Lal*, (1904) 31 Cal 138 (141); *Commercial Bank of India* v. *Attendrulayya*, (1900) 23 Mad 637 (642); *Saminathan* v. *Swamiappa*, (1906) 29 Mad 170 (171): 16 Mad L Jour 133; *Managi Singh* v. *Saheb Ram Singh*, (1909) 3 Ind Cas 289 (290): 10 Cal L Jour 203; *Pyare Lal* v. *Ram Ratan*, (1911) 10 Ind Cas 695 (696, 697): 7 Nag L R 14 [Despite a provision to the contrary in the mortgage bond]; *Joshyam Narayaniah* v. *Uppu Madhava Row*, (1913) 18 Ind Cas 362 (363): 13 Mad L Tim 212: 1913 Mad W N 175; *Sahibzada Singh* v. *Hazari Sahu*, (1915) 27 Ind Cas 522 (523) Cal; *Udit Narain* v. *Jasoda Sahun*, (1918) 27 Cal L Jour 576 (578): 46 Ind Cas 469 (471); *Venkatachelapathy* v. *Thavasi Servai*, (1919) 51 Ind Cas 67 (68): 42 Mad 465: 36 Mad L Jour 288; *Bhagwati Prasad Singh* v. *Bishan Pragashi*, 1922 Pat 386 (387): 1922 Pat H C C 73: 3 Pat L Tim 310: 70 Ind Cas 953: 6 Pat L Jour 676; *Rada Kishun* v. *Zalim Singh*, 1925 Pat 455 (459): 2 Pat L R 315: 6 Pat L Tim 459: 88 Ind Cas 323; *Hargoandas* v. *Mohan Bai*, (1900) 2 Bom L R 225 (227); *Jogendra Nath Mookerjee* v. *Methana Abraham*, (1902) 6 Cal W N 769 (771); *Narendra Bahadur Singh* v. *Oudh Commercial Bank*, (1915) 30 Ind Cas 323 (350): 2 Oudh L J 402; *Sunder Koer* v. *Rai Sham*, (1907) 34 Cal 150 (161): 34 Ind App 9: 4 All L J 109: 5 Cal L Jour 106: 9 Bom L R 304: 11 Cal W N 249: 17 Mad L Jour 43: 2 Mad L Tim 75; *Ramachandra* v. *Devu*, (1886) 12 Mad 485 (486); *Bhagat Singh* v. *Jai Ram*, (1915) 26 Ind Cas 402 (403): 19 Pun W R 1915: 66 Pun L R 1915: 22 Pun Re 1915; *Lal Sheo Pratap* v. *Allahabad Bank*, (1900) 3 Oudh Cas 130 (155); *Manoo Lal* v. *Durga Prasad*, (1901) 5 Cal W N 653 (654); *Ajodhia Bank Ltd, Fyzabad* v. *Abdul Ghani*, (1918) 47 Ind Cas 701 (701) Oudh; *Ganga* v. *Apurba*, (1913) 18 Ind Cas 535 (542): 17 Cal W N 25 [Future interest may even be refused]; *Regd. Jessore Loan Co, Ltd* v. *Shailajanath*, 1932 Cal 689 (690, 691): 59 Cal 722, (Do.); *Allahabad Bank* v. *Suraj Koer*, (1915) 26 Ind Cas 177 (178): 1 Oudh L J 544. See *Rani Sunder Koer* v. *Rai Sham*, (1907) 34 Cal 150 (161): 2 Mad L Tim 75: 34 Ind App 9: 4 All L J 109: 5 Cal L Jour 106: 9 Bom L R 304: 11 Cal W N 249: 17 Mad L Jour 43 P C ["Date of realisation" means date fixed by the decree for payment].

(25-a) *Krishnaswami* v. *Srinivasan*, (1901) 11 Mad L Jour 7 (9); *Pirbu Dial* v. *Risal Singh*, (1911) 10 Ind Cas 846 (847): 37 Pun W R 1911: 111 Pun L R 1911; *Gangaram* v. *Jaibala*, (1903) 30 Cal 953 (960). See *Radhika* v. *Brojendra*, (1910) 5 Ind Cas 61 (62): 14 Cal W N 125.

O.34, R.11, Notes 2—3.

Future interest after the date fixed for payment is to be paid on the aggregate of the principal, interest and costs awarded by the decree.[26] The present rule makes it clear that such future interest forms part of the mortgage money and is not a simple money claim.[27] The proper stage for decreeing future interest is at the time of passing the final decree.[28] Subsequent interest not mentioned in the final decree must be taken as refused.[29] But an agreement between the parties for the payment of future interest may be given effect to though the final decree does not provide for it.[30] When future interest is decreed, it must be paid till the confirmation of the sale.[31]

3. **Rule of Damdupet.**—*See* Note 16 to S. 34.

O.34, R.12, Note 1.

Sale of property subject to prior mortgage.

R. **12**. [New Act IV of 1882, S. 96.] *Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.*

[*See* S. 73, sub-S. (1), cl. (*b*).]

Synopsis.

1. **Transfer of Property Act, S. 96.**
2. **Sale of property subject to prior mortgage.**
3. **Sale free of prior mortgage.**
4. **Where prior mortgage is a usufructuary one.**
5. **Sale by the Court subject to a charge.**

Sale without express reservation of prior mortgagee's rights—Effect. See Note 3, Pt. (1-a).

1. **Transfer of Property Act, S. 96.**—The present rule corresponds to the old S. 96 of the Transfer of Property Act of 1882 which was repealed in 1908. Under the Transfer of Property (Amendment) Act, XX of 1929, a

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(26) *Kamalapathi* v. *Bejoy Lal Roy,* (1909) 3 Ind Cas 291 (300); *Managi Singh* v. *Saheb Ram Singh,* (1909) 3 Ind Cas 289: 10 Cal L Jour 203; *Venkatachalapathi Aiyar* v. *Tharasi Serrai,* (1919) 51 Ind Cas 67 (68): 42 Mad 465: 36 Mad L Jour 288; *Sahu Banarsi Prasad* v. *Kuar Man Mohan,* 1926 All 119 (120): 6 L R (A) Civ 479: 89 Ind Cas 288; *Faghfur Mirza* v. *Khushal Chand,* 1923 Oudh 241 (241): 26 Oudh Cas 59: 74 Ind Cas 246; *Maung Yan Gin* v. *Katharasan Chetty,* 1921 U B R 5 (8): 63 Ind Cas 799: 4 U B R 1 [Interest at 9 per cent. allowed]; *Hari Kishen Bhagat* v. *Kamleshur Prasad Singh,* (1912) 16 Ind Cas 374 (375) Cal [If there was a valid tender of the mortgage money, interest thereon would cease though the appellate decree afterwards enhanced the amount found due]. See however *Said Ahmad* v. *Narain Singh,* 1932 Oudh 255 (263): 9 Oudh W N 253: 139 Ind Cas 64 [Trial Court's discretion to award future interest on the principal sum alone not interfered with in appeal].

(27) The contrary view in *Bhawany Prasad* v. *Brij Lal,* (1894) 16 All 269 (270): 14 All W N 79 [Is no longer law].

(28) *Tekait Krishna Prasad* v. *Surendra Mohan Kundu,* 1921 Pat 352: (1920) 58 Ind Cas 223 (225): 5 Pat L Jour 598: 2 Pat L Tim 78; *Udit Narain* v. *Jasoda Sahan Kalan,* (1918) 46 Ind Cas 469 (471): 27 Cal L Jour 576; *T Krishna Prasad* v. *Surendra Mohan,* 1921 Pat 352 (352): 2 Pat L Tim 78: 58 Ind Cas 223: 5 Pat L Jour 598; *Brij Raj* v. *Rameshwar Singh,* (1917) 42 Ind Cas 625 (627): 2 Pat L W 208 [Final decree awarding future interest cannot be questioned in execution].

(29) *Tekait Krishna Prasad* v. *Surendra Mohan Kundu,* 1921 Pat 352: (1920) 58 Ind Cas 223 (225): 2 Pat L Tim 78: 5 Pat L Jour 598. But see *Raj Kumar* v. *Bisheswar Nath,* (1894) 16 All 270 (273): 1894 All W N 80; *Dwarka Prasad* v. *Umrao Mohammad,* 1931 Oudh 47 (48): 7 Oudh W N 1205: 130 Ind Cas 387 [Preliminary decree providing for future interest—Mortgagee is entitled to such interest though *final decree* does not provide for it].

(30) *Gokhal Padhan* v. *Gonee Lal Pandit,* (1912) 17 Ind Cas 936 (940): 16 Cal L Jour 404: 17 Cal W N 565; *Narayan* v. *Raoji,* (1904) 28 Bom 393 (397): 6 Bom L R 417.

(31) *Menraj* v. *Nursing,* (1906) 33 Cal 846 (848); *Khil-Ul-Rahman* v. *Gokul Chand,* (1919) 41 All 526 (528): 50 Ind Cas 772: 17 All L Jour 617.

new S. 96 has been inserted in the Transfer of Property Act which deals with a different subject.

2. Sale of property subject to prior mortgage.—The explanation to O. 34, R. 1 makes it clear that the prior mortgagee is not a necessary party to a suit for sale on a puisne mortgage. Hence a puisne mortgagee can bring the mortgaged property to sale under his own decree subject to a prior mortgage.[1] The contrary view, taken in the undermentioned cases decided under the Transfer of Property Act, is obsolete.[2]

As to whether a person having two mortgages on the same property can sue on his puisne mortgage, reserving his rights under the first mortgage. (*See* Note 40 to S. 11.) He cannot, however, in any case, *sell* the property twice under his two mortgages.[3] But if the prior mortgage is a *usufructuary* one and the mortgagee is therefore unable to bring the property to sale under that mortgage, there is nothing to prevent his bringing the property to sale under his later simple mortgage subject to the prior usufructuary mortgage.[4]

3. Sale free of prior mortgage.—The rule clearly implies that without the prior mortgagee's consent, property cannot be sold free of his mortgage, in execution of a decree for sale on a subsequent mortgage.[1] In the absence of such consent, the sale under a decree on a puisne mortgage can only be subject to the prior mortgage though there may be no express reservation of the prior mortgagee's rights.[1-a] Although the prior mortgagee may be joined as a party to the suit on the puisne mortgage, it is not incumbent on him to assert and prove his priority where his mortgage or his priority is not impugned. (*See* Note 40 to S. 11.) The priority therefore cannot be lost merely because the prior mortgagee does not establish it in such a case.[2] *See also* the undermentioned case.[3]

4 Where prior mortgage is a usufructuary one.—(*a*) *Sale free of prior mortgage.*—A usufructuary mortgagee, as such, cannot sue for sale on his mortgage. There is, therefore, a conflict of opinion as to whether a prior usu-

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Order 34, Rule 12—Note 2.

(1) *Kanti Ram* v. *Kutubudin Mohammad*, (1895) 22 Cal 33 (46); *Madhub Mohappatra* v. *Surendra Mohun*, (1896) 23 Cal 795 (795); *Lalman* v. *Mohar Singh*, (1907) 29 All 205 (206): 1907 All W N 18: 3 All L J 848.

(2) *Mata Din* v. *Kazim Husain*, (1891) 13 All 432 (439, 453); *Mehrbano* v. *Nadir Ali*, (1900) 22 All 212 (214): 1900 All W N 27.

(3) *Sundar Singh* v. *Bholu*, (1898) 20 All 322 (324, 325): 1898 All W N 58.

(4) *Radha Krishnier* v. *Muthusamy Sholagam*, (1908) 31 Mad 530 (530, 531): 18 Mad L Jour 564; *Jager Nath* v. *Mohra*, (1917) 39 Ind Cas 76 (77): 2 Pat L Jour 118: 1 Pat L W 653: 1917 Pat H C C 194.

Note 3.

(1) *Radha Krishan* v. *Khurshed*, (1920) 55 Ind Cas 959 (962): 47 Cal 662: 47 Ind App 11: 38 Mad L Jour 424: 1920 Mad W N 308: 11 Mad L W 518: 22 Bom L R 557: 18 All L J 401: 25 Cal W N 417: 1920 P C 81 P C: *Maung Sein* v. *Ngwe Nu*, (1913) 19 Ind Cas 2 (2): 6 L B R 144: 6 Bur L Tim 72; *Abdul Shakur* v. *Muhd Matin*, 1924 All 307 (308): 22 All L J 202: 5 L R A Civ 93: 78 Ind Cas 429: 46 All 414.

(1-a) *Srinivasa Rao Saheb* v. *Yemunabhai*, (1906) 29 Mad 84 (86): 16 Mad L Jour 50.

(2) *Radha Kishun* v. *Khurshed*, 1920 P C 81 (83): 47 Cal 662: 47 Ind App 11: 38 Mad L Jour 424: 25 Cal W N 417: 28 Mad L Tim 425: 1920 Mad W N 308: 11 Mad L W 518: 22 Bom L R 557: 18 All L J 401: 55 Ind Cas 959 P C. *Gopal Singh* v. *Ladha Mal*, 1930 Lah 1063 (1065): 130 Ind Cas 49 [Prior Mortgagee's assignee]; *Gadadhar Prasad* v. *Mt Awadin*, (1915) 27 Ind Cas 164 (164) Cal. See *Venkataramana Ayyar* v. *Gompertz*, (1908) 31 Mad 425 (429): 18 Mad L Jour 298: 3 Mad L Tim 397 [No implication that puisne mortgagee not required to redeem when prior mortgagee is a party]; *Abdul Wahid Khan* v. *Ali Husain*, 1929 Oudh 463 (466): 4 Luck 250: 6 Oudh W N 1: 115 Ind Cas 833 [But if the priority is attacked, the prior mortgagee who has been made a party, must establish it].

(3) *Jhinka* v. *Baldeo*, (1892) 14 All 509 (511, 512): 1892 All W N 98 [Prior mortgagee appropriating portion of sale proceeds is estopped from alleging want of consent].

O.34, R.12, Notes 4—5.

fructuary mortgagee, with whose consent the property is sold under this rule in execution of a decree on a puisne mortgage, is entitled to share in the sale proceeds. The High Court of Madras has held that he can, on the ground that this rule applies to all mortgages whether simple or usufructuary or whether the mortgages are in favour of the *same person* or different persons.[1] The High Court of Allahabad, on the other hand, has held that he cannot do so.[2] It has, however, held that, where a puisne mortgagee redeems a prior usufructuary mortgagee, he can bring the mortgaged property to sale for the amounts due under both the mortgages.[3]

(*b*) *Sale subject to prior mortgage.*—As to sale of mortgaged property *subject* to a prior usufructuary mortgage, *see* Note 2, *supra*.

5. **Sale by the Court subject to a charge.**—A statement in a certificate of sale that the sale is subject to a charge is not conclusive against the purchaser when it is sought to enforce the charge by a suit.[1] A person who sells property subject to an encumbrance which has been recognised by the Court cannot claim a re-sale on the ground that the encumbrance has been found to be void.[2] Mortgages noted in the proclamation of sale as claimed upon the property sold should not necessarily be entered in the certificate of sale or be computed as part of the purchase-money unless the existence of the mortgage has been either admitted by the parties or established by a decree or declared under O. 21, R. 62.[3] When a sale is subject to encumbrances, the vendor is no longer liable for their satisfaction nor is he entitled to any benefit that the vendee might obtain therefrom.[4]

O.34, R.13.

Application of proceeds.

R. **13**. [New Act IV of 1882, S. 97.] (1) *Such proceeds shall be brought into Court and applied as follows :—*

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

Note 4.

(1) *Rangasami* v. *Subharaya*, (1907) 30 Mad 408 (410): 17 Mad L Jour 408: 2 Mad L Tim 346.

(2) *Bhagwandas* v. *Bhawani*, (1904) 26 All 14 (17, 18): 1903 All W N 177.

(3) *Bhagwan Das* v. *Bhawani*, (1904) 26 All 14 (17, 18): 1903 All W N 177.

Note 5.

(1) *Ramachandra* v. *Hazi Kassim*, (1893) 16 Mad 207 (213).

(2) *Parshotam* v. *Ganesh*, (1899) 23 Bom 759 (760, 761): 1 Bom L R 220 [*Semble*—He may sue for declaration].

(3) *Shantappa* v. *Subrai*, (1894) 18 Bom 175 (176, 177).

(4) *Isatunnissa* v. *Partab*, (1909) 3 Ind Cas 793 (794): 36 Ind App 203: 31 All 583: 13 Cal W N 1143: 10 Cal L Jour 313: 6 All L J 817: 11 Bom L R 1220: 6 Mad L Tim 277: 19 Mad L Jour 682 P C.

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.

[*Cf.* S. 73, sub-S. (1), Cl. (*c*).]

Synopsis.

1. **Transfer of Property Act, S. 97.**
2. **Application of proceeds.**
3. **"Whatever is due to the prior mortgagee."**
4. **"Person proving himself to be interested in the property sold."**

Prior mortgage being usufructuary. See R. 12, Note 4.
Rights of persons having two or more mortgages. See Note 4, Pt. (4).
Sale subject to prior mortgage. See Note 2, Pt. (1).
Scope and applicability. See Note 2.
Subsequent mortgagee's time-barred rights not enforceable. See Note 4, Pt. (3).

1. Transfer of Property Act, S. 97.—The present rule corresponds to S. 97 of the Transfer of Property Act.

2. Application of proceeds.—Compare S. 73, *ante*. R. 13 in terms applies only when the sale is ordered under R. 12, *i.e.*, when the sale is free of the prior mortgage. But the principle of the rule applies to other cases also. Hence, even in sales *subject* to a prior mortgage, the proceeds should first be applied towards the interest and costs of the mortgage under which the sale is held and then only towards the principal.[1]

Where a sale is held in enforcement of a prior mortgage, a puisne mortgagee receiving an amount from out of the surplus sale proceeds *by virtue of his security* is bound to apply them only in satisfaction of his mortgage debt though the mortgagor may have paid the money towards other debts.[2]

3. **"Whatever is due to the prior mortgagee".**—Each of the prior encumbrancers is entitled to interest at the contract rate up to the date of the *confirmation* of the sale, that being the earliest date when the money really becomes available for distribution.[1]

4. **"Person proving himself to be interested in the property sold".**—This expression includes a subsequent encumbrancer,[1] but not if the existence or

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Order 34, Rule 13—Note 2.

(1) *Sabapathi Pillai* v. *Chockalinga*, (1913) 21 Ind Cas 691 (693): 25 Mad L Jour 552: *Maung Po Mya* v. *M A S Chettiar*, 1931 Rang 153 (157, 158): 9 Rang 186: 133 Ind Cas 225: *Rajagopalaswami Naicken* v. *Palanisami Chettiar*, 1932 Mad 155 (156, 157): 34 Mad L W 961: 135 Ind Cas 578: 62 Mad L Jour 93: 55 Mad 332: 1932 Mad W N 554.

(2) *Gangaram Marwari* v. *Jaiballav Narain*, (1903) 30 Cal 953 (958, 959).

Note 3.

(1) *Benode Lal* v. *Srikristo*, (1910) 8 Ind Cas 4 (6): 15 Cal W N 783.

Note 4.

(1) *Krishnaswami Bagavathar* v. *Thirumala Iyer*, 1926 Mad 101 (105): 90 Ind Cas 410: *Padmanabhah* v. *Khemu*, (1894) 18 Bom 684 (688).

validity of the subsequent encumbrance is challenged by the mortgagor.[2] A subsequent mortgagee who has obtained a decree on his mortgage but has allowed it to become time barred is not a person interested in the property sold.[3] It was held in the case cited below[4] that the holder of two successive mortgages on the same property, who failed to include the second mortgage in his suit on the first mortgage, could claim the surplus sale proceeds under this rule as a puisne encumbrancer. That position, will, it is conceived, be different in cases governed by S. 67-A of the Transfer of Property Act which has been newly introduced by Act, XX of 1929. A mere unsecured creditor is not a person "interested in the property sold". But after the subsequent encumbrances are satisfied, he can proceed against the balance, if any, payable to the mortgagor.[5]

Suit for sale necessary for bringing mortgaged property to sale.

R. **14.** [New. Act IV of 1882, S. 99[1].] (1) *Where a mortgagee[5] has obtained a decree[15] for the payment of money in satisfaction of a claim arising under the mortgage,[6] he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit[11] for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, Rule 2.*[13]

(2) *Nothing in sub-rule* (1) *shall apply to any territories to which the Transfer of Property Act,* 1882, *has not been extended.*[2]

Synopsis.

1. Transfer of Property Act, S. 99.
2. Scope and object of the rule.
3. Applicability of the rule to the enforcement of a charge.
4. Applicability of the rule to the enforcement of security-bonds.
5. "Mortgagee," meaning of, under this rule.
6. "Decree for the payment of money in satisfaction of a claim arising under the mortgage."
7. Effect of sale in contravention of the rule.
8. Position of purchaser at such sale. See Note 7, supra.
9. Attachment of the property is not prohibited.
10. Transferee of money decree from mortgagee if bound by the restrictions against the mortgagee.
11. "Otherwise than by instituting a suit."
12. Sale of mortgaged property for claim unconnected with the mortgage.
13. O. 2, R. 2.
14. Consent decree.
15. "Decree."

Applicability only if mortgage is valid and enforceable. See Note 6, Pt. (3).

Applicability to Revenue Courts. See Note 2, Pt. (6).

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(2) *Lachminarain Achary* v. *Mittu Bhagat,* 1927 All 467 (468): 25 All L J 390: 101 Ind Cas 505: 49 All 636.

(3) *Mahammad Abdul Rahim Khan* v. *Ram Bharos Ojhal,* 1925 All 6 (8): 22 All L J 825: 5 L R A (Civ) 596: 83 Ind Cas 1083.

(4) *Krishnamachariar* v. *Anangarachariar,* (1907) 30 Mad 353 (355): 17 Mad L Jour 301: 2 Mad L Tim 330.

(5) *Padmanabah* v. *Khemu,* (1894) 18 Bom 684 (687, 688).

Inapplicability to a mortgage created by the decree itself and not existing prior thereto. See Note 6, Pt. (2).

Inapplicability to judicial sales before Transfer of Property Act. See Note 2, Pt. (8).

Mortgagee himself purchasing contrary to this rule—Effect. See Note 7, Pts. (8) and (9).

Purchase in a sale in enforcement of money decrees of third persons. See Note 12, Pts. (3) and (4).

Sale under Public Demands Recovery Act—What passes. See Note 11, F.-N. (1).

Sales prior to Transfer of Property Act—What interest passed. See Note 7, Pt. (12).

Sub-R. (2). See Note 2, Pts. (4) and (5).

1. **Transfer of Property Act, S. 99.**—This rule corresponds to S. 99 of the Transfer of Property Act, with this difference, *viz.*,—that while S. 99 applied even to cases in which the mortgagee had obtained a money decree on a claim *unconnected* with the mortgage, R. 14 is expressly confined to cases where a money decree has been obtained on a claim *arising under the mortgage. See* Note 11, below.

2. **Scope and object of the rule.**—As has been seen in Note 19 to R. 5, *ante,* a sale in execution of a decree on a mortgage passes the interests of both the mortgagor and the mortgagee, while a sale in execution of a *money* decree conveys only the interest of the mortgagor namely, the equity of redemption. The object of the present rule is to prevent the mortgagee from bringing to sale the bare equity of redemption in execution of a money decree which he may obtain in respect of a *claim arising under the mortgage.* Thus where a mortgagee obtains a simple money decree for the interest that has accrued due on the mortgage, or obtains a money decree for the mortgage debt under S. 68 of the Transfer of Property Act, he cannot attach and sell the *mortgaged properties* in execution of the said decree though he can proceed against the person or other properties of the mortgagor. If he wants to proceed against the mortgaged properties he is bound to bring a suit for sale again, and such a suit will not be barred by the provisions of O. 2, R. 2.

The reason of the rule is the avoidance of several evils which are likely to result if a mortgagee is allowed to bring the mortgaged properties to sale in execution of a money decree which he has obtained on a claim arising under the mortgage.[1] Such a sale would deprive the mortgagor summarily of the right of redemption without giving him any of the facilities which an ordinary suit for sale ensures. Being subject to the unascertained claim of the mortgagee the property would not fetch a fair value at the sale and the mortgagee would be enabled to purchase it at an unduly low price. If a stranger purchased it at the sale without notice of the mortgage he would be subjected to great hardship unless the mortgagee could be held to be estopped from asserting his rights under the mortgage against such a purchaser.[2]

Order 34, Rule 14—Note 2.

(1) *Ram Sunder Das* v. *Nathuni Singh,* (1911) 9 Ind Cas 1034 (1036, 1037): 15 Cal W N 748: 13 Cal L Jour 664; *Muthuraman Chetti* v. *Ettappaswami,* (1899) 22 Mad 372 (376): 9 Mad L Jour 113; *Khiarajmal* v. *Daim,* (1905) 32 Cal 296 (316): 32 Ind App 23: 9 Cal W N 201: 2 All L J 71: 7 Bom L R 1: 1 Cal L Jour 584: 8 Sar 734 P C; *Fakirayyah* v. *Gadinayya,* (1902) 26 Bom 88 (104, 105): 3 Bom L R 628; *Mahabir* v. *Saira,* (1895) 17 All 520 (522): 1895 All W N 116; *Murad* v. *Dayaram,* 1925 Sind 156 (157): 78 Ind Cas 49; *Chaurasi* v. *Bhagan,* 1924 Pat 20 (22): 2 Pat 787: 1923 Pat H C C 299: 74 Ind Cas 144; *Braja Sunder* v. *Sarat Kumari,* (1917) 38 Ind Cas 791 (793): 2 Pat L Jour 55: 1917 Pat H C C 67: 3 Pat L W 258.

(2) *Ram Sunder Dass* v. *Nathuni Singh,* (1911) 9 Ind Cas 1034 (1036, 1037): 15 Cal W N 748: 13 Cal L Jour 664.

O.34, R.14, Notes 2—3.

The rule is retrospective in effect being a rule of procedure, and applies to decrees passed even prior to its coming into force.[3]

The rule does not apply to Punjab, the Transfer of Property Act not having been extended thereto.[4] *See* sub-R. 2. *See also* the undermentioned cases.[5]

Under S. 99 of the Transfer of Property Act, it was held that it applied to Civil Courts and Revenue Courts.[6] It was also held that the section applied to mortgages created before the Transfer of Property Act,[7] but not to judicial sales held and perfected before the date of the Act.[8]

The rule prevents only a *sale* of the mortgaged property under a money decree in respect of a claim arising under the mortgage. It does not prevent the *attachment* of the mortgaged property under such a decree. *See* Note 8, *infra.*

3. **Applicability of the rule to enforcement of a charge.**—By force of R. 15, *infra* this rule applies to charges as well as mortgages.[1] It applies, however, only to a charge which exists *prior* to the decree for money and not one which is created for the first time *by* the decree as in the latter case the decree cannot be said to be obtained in satisfaction of a claim arising under the mortgage. (*See* Note 6, *infra.*) In such a case, therefore, the charge can be enforced in execution without any fresh suit for sale being filed.[2]

Thus where, in a suit for maintenance, by a Hindu widow, the maintenance decreed is made a charge on certain property, the widow can enforce

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(3) *Bai Ganga* v. *Rajaram Atmaram*, (1911) 10 Ind Cas 815 (816): 13 Bom L R 245: 35 Bom 248.

(4) *Moti Ram* v. *Harbhagavandas*, 1911 Pun Re No 15: 80 Pun L R 1911: 109 Pun W R 1911: 9 Ind Cas 549 (551); *Jaganath* v. *Budhawa*, 1907 Pun Re No 2: 157 Pun L R 1906: 1906 Pun W R Vol 1: 27 [Principle of S 99 applied to Punjab]; *Aya Ram Tola Ram* v. *Het Ram Bhojh Raj*, 1928 Lah 209 (211): 103 Ind Cas 449; *Kishen Narain* v. *Pala Mal*, (1918) 47 Ind Cas 937 (938): 88 Pun Re 1918: 167 Pun W R 1918: 102 Pun L R 1918 [In view of Sub-R (1) even the principle of R 14 does not apply in Punjab]. See also *Abdul Aziz* v. *Alliance Bank of Simla*, 1931 Lah 483 (485): 132 Ind Cas 215: 13 Lah 143 [Decree for sale not a necessary preliminary to sale of equity of redemption.

(5) *Ghulam Murtza Khan* v. *Changoomal*, (1911) 11 Ind Cas 192 (195): 5 Sind L R 71 [Prior to extension of Transfer of Property Act to Sind in 1915, R 14 did not apply to Sind]; *Raghunandan Prasad* v. *Firm of Wajid Ali Mian Muhammad Rafiq*, 1929 Pat 439 (440) [Rule does not apply to Sonthal Pargannas as the T P Act has not been extended to those territories].

(6) *Tara Chand* v. *Imdad Husain*, (1896) 18 All 325 (327): 1896 All W N 94.

(7) *Kaveri* v. *Ananthayya*, (1887) 10 Mad 129 (130, 131): 11 Ind Jur 138.

(8) *Naranappa* v. *Samacharlu*, (1896) 19 Mad 382 (384): 6 Mad L Jour 88; *Nannuvien* v. *Muthuswami Dekshithar*, (1906) 29 Mad 421 (423): 15 Mad L Jour 445; *Hussein* v. *Shankargiri*, (1899) 23 Bom 119 (121).

Note 3.

(1) *Mohammad Amin* v. *Jan Patal*, (1899) 12 C P L R 26 (27); *Mangal Prasad* v. *Chandra Mall*, (1919) 1 Nag L R 117 (119); *Aubhoyessury* v. *Gouri Sankar*, (1895) 22 Cal 859 (863); *Venkata* v. *Menda*, (1920) 57 Ind Cas 764 (766): 11 Mad L W 466: 1920 Mad W N 294: 39 Mad L Jour 30: 28 Mad L Tim 44: 43 Mad 786; *Raj Kumar Lal* v. *Jai Karan Das*, (1920) 57 Ind Cas 653 (654): 5 Pat L Jour 248: 1 Pat L Tim 225 [Mortgagee's charge on mortgaged property for Government revenue paid by him]; *Gobinda Chandra Pal* v. *Kailash Chandra Pal*, (1917) 41 Ind Cas 73 (75) Cal. See *Ganesh* v. *Babu Ram*, (1915) 26 Ind Cas 427 (428): 13 All L J 9: 37 All 72 [Flag of Pragwals at confluence of Ganges and Jumna can be subject of a charge for the payment of an annuity out of the contributions of pilgrims].

(2) *Ambalal* v. *Narayan*, (1919) 51 Ind Cas 929 (932): 21 Bom L R 698: 43 Bom 681; *Mahamayaprasad Sinha* v. *Sakudai Koer*, (1918) 46 Ind Cas 169 (172) Pat; *Shankar* v. *Ganpat*, 1929 Bom 227 (227): 31 Bom L R 489: 119 Ind Cas 186; *Official Receiver, Tanjore* v. *R M Nagarapana Mudaliar*, 1926 Mad 194 (196, 197): 49 Mad L Jour 643: 1925 Mad W N 907: 92 Ind Cas 497. See also *Buchayya* v. *Sriramamma*, 1931 Mad 603 (603): 131 Ind Cas 15: 33 Mad L W 559. But see *Aubhoyessury* v. *Gouri*, (1895) 22 Cal 859 (863, 864); *Matangini* v. *Chooney*, (1895) 22 Cal 903 (908) [Both cases decided under S 99, Transfer of Property Act, which was not as clear as R 14 on this question]; *Ramaswami* v. *Subbaraya*, 1925 Mad 1101 (1103): 49 Mad L Jour 490: 1925 Mad W N 525: 88 Ind Cas 648; *Firm of Aya Ram Tola Ram* v. *Het Ram Bodh Raj*, 1928 Lah 209 (212): 103 Ind Cas 449; *Postimal* v. *Radhakishen*, 1932 All 439 (440): 1932 All L J 486: 138 Ind Cas 608

O.34, R.14, Notes 3—5.

the charge by applying for sale of the property in execution and cannot be compelled to file a suit for sale.[3]

4. **Applicability of the rule to the enforcement of security bonds.**—Under S. 145 of the Code, the liability of a surety for a judgment-debtor can be enforced summarily in execution proceedings, in so far as the surety has made himself personally liable. But, suppose, besides making himself personally liable, he mortgages some property as security, can the property be sold in execution without a suit for sale? On this question there is a conflict of decisions. It has been held by the High Courts of Allahabad,[1] Bombay,[2] Madras[3] and Patna[4] that this rule does not apply to such a case as there is no *decree for money* against the surety within the meaning of the rule. But the High Court of Calcutta[5] has held that the rule applies and is an absolute bar to the sale of the mortgaged property without a regular suit for sale.

Where the security bond is given to the *Court* and not to any named person, there is no mortgage, the Court not being a juridical person and the proper procedure to enforce the security is by a summary order for the sale of the property covered by the bond, unless the surety pays the amount of security within a specified date.[6]

5. **"Mortgagee" meaning of, under this rule.**—"Mortgagee" includes the holder of a charge. *See* Note 3, *supra*.

[Compromise charging property for payment—Subsequent decree on compromise—Charge held to be prior to decree—Obiter].

(3) *Indramani Dasi* v. *Surendranath Mondal*, 1922 Cal 35 (37): 64 Ind Cas 852: 35 Cal L Jour 61; *Raja Braja Sunder* v. *Surat*, (1917) 38 Ind Cas 791 (793): 2 Pat L Jour 55: 1917 Pat H C C 67: 3 Pat L W 202; *Sowbagiya Ammal* v. *Manikka Mudali*, (1917) 42 Ind Cas 975 (976): 22 Mad L Tim 386: 33 Mad L Jour 801: 1917 Mad W N 782: 6 Mad L W 701; *Venkata Ramanamurthi* v. *Sundara Ramiah*, (1918) 47 Ind Cas 630 (631): 23 Mad L Tim 355; *Meenakshi Achi* v. *Chinnappa Udayan*, (1901) 24 Mad 689 (694); *Ashutosh* v. *Lukhimoni Debya*, (1892) 19 Cal 139 (146) F B; *Hari Sankar Rai* v. *Mussammat Tapai Kuer*, 1926 Pat 31 (31, 32): 4 Pat 693: 6 Pat L Tim 802: 88 Ind Cas 923. But see *Matangini Dassee* v. *Chooneeymoney Dassee*, (1895) 22 Cal 903 (908); *Tangutoori Venkatasubbamma* v. *Molakalapalli Venkanna*, (1907) 17 Mad L Jour 217 [Cases decided under Transfer of Property Act, S 99]. See also *Hemanginee Dassee* v. *Kumode Chunder Dass*, (1899) 26 Cal 441 (448): 3 Cal W N 139 [To avoid difficulty in executing decree for maintenance the better course would be to appoint a Receiver with power to sell in case of default by the judgment-debtor].

Note 4.

(1) *Janki* v. *Sarup*, (1895) 17 All 99 (101, 102): 1895 All W N 19; *Bans Bahadur* v. *Mugha*, (1878-80) 2 All 604 (607); *Makta Prasad* v. *Mahadeo Prasad*, (1916) 33 Ind Cas 982 (984): 14 All L J 885: 38 All 327.

(2) *Venkapa* v. *Baslingapa*, (1888) 12 Bom 411 (414). See also *Gurushantappa* v. *Garava*, 1926 Bom 279 (280): 28 Bom L R 603: 50 Bom 339: 95 Ind Cas 696 [Where decree-holder gives up the mortgage he can enforce the personal liability by attaching and selling the property].

(3) *Thirumalai* v. *Ramayyar*, (1890) 13 Mad 1 (3, 4); *Official Receiver, Tanjore* v. *R M Nagaratana Mudaliar*, 1926 Mad 194 (196, 197): 49 Mad L Jour 643: 1925 Mad W N 907.

(4) *Ganga Deo* v. *Joti Lal*, (1917) 39 Ind Cas 648 (649): 2 Pat L Jour 197: 3 Pat L W 414; *Madho Prasad* v. *Chandra Bati Kuer*, (1917 38 Ind Cas 130 (131) Pat. See however *Gokul Nath Shah* v. *Pran Mal Marwari*, (1917) 37 Ind Cas 397 (398, 399): 1 Pat L W 69: 1917 Pat H C C 371 [Compromise in money suit—Referring to mortgage *already executed*—Property cannot be sold otherwise than by suit for sale].

(5) *Tokhan Singh* v. *Girwar Singh*, (1905) 32 Cal 494 (496): 9 Cal W N 372: 1 Cal L Jour 118; *Chandrabati* v. *Babu Ram*, (1915) 27 Ind Cas 365 (365): 19 Cal W N 178; *Tokhan* v. *Udwant*, (1895) 22 Cal 25 (28); *Kali Charn* v. *Balgobind*, (1888) 15 Cal 497 (502). But see *Baij Nath* v. *Sia Ram Das*, (1913) 18 Ind Cas 900 (904): 17 Cal L Jour 267 [Case under S 99, Transfer of Property Act—In view of its peculiar facts, *held* S. 99 did not apply].

(6) *Raghubar Singh* v. *Jai Indra*, (1920) 55 Ind Cas 550 (555): 22 Oudh Cas 212: 6 Oudh L J 682: 38 Mad L Jour 302: 18 All L J 263: 22 Bom L R 521: 42 All 158: 46 Ind App 228: 13 Mad L W 82: 1919 P C 55 P C; *Janki Kuar* v. *Sarup Rani*, (1895) 17 All 99 (101): 1895 All W N 19; *Shyam Sunder Lal* v. *Raj Pai Jai Narain*, (1903) 30 Cal 1060 (1062, 1063): 7 Cal W N 914; *Sukumari Debi* v. *Mugneeram Bhanger & Co*, 1926 Cal 889 (892): 30 Cal W N 683: 95 Ind Cas 908. See *Girandra Nath* v. *Bejoy Gopal*, (1899) 26 Cal 246 (249): 3 Cal W N 84 [Security bond given to Registrar was held to constitute mortgage and require the formalities of a mortgage].

6. **"Decree for the payment of money in satisfaction of a claim arising under the mortgage".**—S. 99 of the Transfer of Property Act, applied though the claim on which the money decree was obtained was totally *unconnected* with the mortgage. The present rule applies only to cases in which a money decree is obtained on a claim *arising under the mortgage*.[1] (For further information on this aspect of the subject *see* Note 11, *infra*.)

It follows from the language of the rule that the mortgage should be one *existing* prior to the decree and not one created by the decree itself (*See* Note 3, *supra*).[2] The rule also presupposes that the mortgage is *valid and enforceable* at the time of the passing of the money decree. If the mortgage is invalid or has become unenforceable through the efflux of time or any other reason, the rule does not apply and is no bar to the sale of the property under the money decree.[3]

7. **Effect of sale in contravention of the rule.**—A sale in contravention of the rule can be prevented by objection being taken at any time before the sale takes place.[1] But if it does actually take place, it is not void but is only voidable at the instance of the mortgagor or of any other person having an interest in the equity of redemption.[2] The contrary view held in the under-

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Note 6.

(1) *Braja Sunder Debi* v. *Sarat Kumari*, (1917) 38 Ind Cas 791 (792): 2 Pat L Jour 55: 1917 Pat H C C 67.

(2) *Raghunandan Prasad Bhakat* v. *Wajid Ali Mian Mahomed Rafiq*, 1929 Pat 439 (440); *Official Receiver, Tanjore* v. *Nagaratnam*, 1926 Mad 194 (196, 197): 1925 Mad W N 907: 49 Mad L Jour 643: 92 Ind Cas 497; *Brajasundar Deb* v. *Sarat Kumari*, (1917) 38 Ind Cas 791 (798): 2 Pat L Jour 55: 1917 Pat 67: 3 Pat L W 202; *Indramani Dasi* v. *Surendra Nath Mandal*, 1922 Cal 35 (37): 35 Cal L Jour 61: 64 Ind Cas 852; *Hasomal Gianchand* v. *Dulahmal Dholomal*, (1909) 4 Ind Cas 606 (606): 3 Sind L R 120 [Even under S 99, Transfer of Property Act, same was the rule].

(3) *Arumugam Pillai* v. *Alagappa Chettiar*, 1921 Mad 477 (478): 41 Mad L Jour 160: 14 Mad L W 331: 1921 Mad W N 376: 62 Ind Cas 756; *Suraj Narain Singh* v. *Jagbali Shukul*, (1920) 57 Ind Cas 14 (15): 2 U P L R (All) 196: 18 All L J 677: 42 All 566; *Chedi Lal* v. *Saadat-un-nissa Bibi*, (1916) 36 Ind Cas 907 (910): 14 All L J 902: 39 All 36; *Sheo Prasad Singh* v. *Mufassil Bank, Ltd, Gorakhpur*, 1929 All 580 (581): 1929 All L J 958: 118 Ind Cas 590; *Tansukh Rai* v. *Sri Gopal*, 1921 All 131 (133): 43 All 677: 19 All L J 728: 63 All L J 445; *Rampalli Ramachandrudu* v. *Karai Krishna Reddi*, (1929) 115 Ind Cas 829 Mad: 1929 Notes 12 (d) [In this case the principle was applied to a case where the mortgagee decree-holder had given up his rights under the mortgage]. See also *Gurushantapa* v. *Gurava Madivallappa*, 1926 Bom 279 (280): 28 Bom L R 603: 50 Bom 339; 95 Ind Cas 696; *Arumuga Theran* v. *Meera Ibrahim Ravuthar*, (1920) 55 Ind Cas 417 (418) Mad [Rule does not apply to mortgage which was not brought into operation owing to the fact that a prescribed condition precedent had not been fulfilled]; *Gowri Ambal Achi* v. *Ramanathan Chettiar*, 1930 Mad 138 (141): 1929 Mad W N 917: 31 Mad L W 38: 122 Ind Cas 366: 53 Mad 670 [Suit on mortgage—Finding that the mortgagor had no title to the property at the time of the mortgage—Money decree passed—Judgment-debtor subsequently acquiring interest in the property by inheritance—*Held* that the decree-holder could sell the property].

Note 7.

(1) *Kaji Inus* v. *Kaji Inus*, (1906) 8 Bom L R 576 (577); *Jhabba Lal* v. *Chhajju Mall*, (1907) 4 All L J 787 (789): 1908 All W N 1: 3 Mad L Tim 132; *Madho Pershad* v. *Baij Nath*, (1905) 2 All L J 356 (357): 1905 All W N 152; *Gobind Chandra Pal* v. *Kailash Chandra Pal*, (1917) 41 Ind Cas 73 (76): 45 Cal 530.

(2) *Sheo Narain Ojah* v. *Ram Jatan Ojha*, (1917) 41 Ind Cas 533 (533, 534, 536): 1 Pat L W 729: 2 Pat L Jour 587: 1917 Pat H C C 378; *Uttam Chandra Daw* v. *Raj Krishna Dalal*, (1920) 55 Ind Cas 157 (163, 164): 24 Cal W N 229: 31 Cal L Jour 98: 47 Cal 377; *Basdeo* v. *Arjun*, (1905) 8 Oudh Cas 327 (331); *Panchan Lal* v. *Kishun Pershad*, (1910) 6 Ind Cas 47 (49): 14 Cal W N 579: 12 Cal L Jour 574; *Muthu* v. *Karuppan*, (1907) 30 Mad 313 (315): 17 Mad L Jour 163: 2 Mad L Tim 181; *Venkayya* v. *Surayya*, (1907) 30 Mad 362 (365): 17 Mad L Jour 325; *Mayan* v. *Pakuran*, (1899) 22 Mad 347 (348): 9 Mad L Jour 98; *Ashutosh* v. *Behari Lal*, (1908) 35 Cal 61 (66): 11 Cal W N 1011: 6 Cal L Jour 320 F B; *Khiarajmal* v. *Daim*, (1905) 32 Cal 296 (316): 32 Ind App 23: 9 Cal W N 201: 2 All L J 71: 7 Bom L R 1: 1 Cal W N 584: 8 Sar 734 P C; *Kishan Lal* v. *Umrao Singh*, (1908) 30 All 146 (148): 1908 All W N 49: 5 All L J 121; *Muhammad Abdul* v. *Dilsukh Rai*, (1905) 27 All 517 (523, 524, 525): 3 All L J 210: 1905 All W N 80; *Bahsidhar* v. *Md Suleman*, 1926 Lah 490 (491, 492): 27 Pun L R 494: 8 Lah L J 464: 97 Ind Cas 181; *Bhaichand Kirparam* v. *Ranchhoddas Manchharam*, (1920) 58 Ind Cas 231 (233): 22 Bom L R 670: 45 Bom 174; *Uttamchandra* v. *Raj Krishna*, (1920) 55 Ind Cas 157 (163, 164): 24 Cal W N 229: 31 Cal L Jour 98: 47 Cal 377; *Ganesh Narayan Khare* v. *Gopal Vishnu Apte*, (1917) 39 Ind Cas 3 (4): 19 Bom L R 75: 41 Bom 357; *Lal Bahadur Singh* v. *Abharan Singh*, (1915) 27 Ind Cas 795 (796): 13 All L J 188: 37 All 165; *Sahadu* v. *Davlya*, (1912) 14 Ind Cas 780 (781): 14 Bom L R 254; *Bhaichand Kirparam* v. *Ranchoddas Manupparam*, 1921 Bom 285 (287): 45 Bom 174; *Tejpal* v. *Kalyan*, 1926 Jour 160 (2): 97 Ind Cas 256.

O.34, R.14, Note 7.

mentioned cases[3] cannot be considered to be good law. The proper remedy to set aside a sale held in contravention of the rule is by an application under S. 47 of the Code and not by a separate suit.[4] The application should be made before the *confirmation* of the sale. After the sale has been confirmed it cannot be set aside unless owing to fraud or other reasons the mortgagor was kept in ignorance of the sale proceedings prior to the sale.[5] Where the sale is held after due notice to the judgment-debtor he cannot subsequently question its validity.[6]

Once the sale is confirmed, the purchaser gets a good title to the property and is not liable to be redeemed subsequently by the mortgagor.[7] The fact that the mortgagee himself has purchased the property with the leave of the Court makes no difference.[8] In the undermentioned cases, however, it was held that if the mortgagee himself is the purchaser, the mortgagor's right of redemption is not affected.[9] It is submitted that the latter view is not correct for two reasons:—

(1) S. 60 of the Transfer of Property Act, recognises the possibility of the extinguishment of the equity of redemption by its becoming vested in the mortgagee and,

(2) a decree-holder who buys with the leave of the Court is in the same position as any other purchaser.

(*See* cases cited in Foot-note 8, *supra* and also O. 21, R. 72).

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[3] *Sathumayyan* v. *Muthusami*, (1889) 12 Mad 325 (328); *Grant* v. *Subramaniam*, (1899) 22 Mad 241 (245): 9 Mad L Jour 179; *Durgayya* v. *Anantha*, (1891) 14 Mad 74 (76); *Vigneswara* v. *Bapayya*, (1893) 16 Mad 436 (437): 3 Mad L Jour 216; *Basiruddi* v. *Kailas Kamini Devi*, (1906) 33 Cal 113 (115); *Sonu Singh* v. *Behari Singh*, (1906) 33 Cal 283 (286); *Shib Dass* v. *Kali Kumar Roy*, (1903) 30 Cal 463 (465, 466): 7 Cal W N 532; *Sheodoni* v. *Ram Saran*, (1899) 26 Cal 164 (166): 3 Cal W N 290; *Narayan Chandra* v. *Keshab Lal*, (1918) 46 Ind Cas 493 (494): 28 Cal L Jour 151.

[4] *Muthu* v. *Karuppan*, (1906) 30 Mad 313 (315): 17 Mad L Jour 163: 2 Mad L Tim 181 [Though the property may have been bought by a stranger]; *Mayan* v. *Pakuram*, (1899) 22 Mad 347 (349): 9 Mad L Jour 98; *Ashutosh* v. *Behari Lal*, (1908) 35 Cal 61 (66): 11 Cal W N 1011: 6 Cal L Jour 320; *Gaya Prasad Misri* v. *Randharsing*, (1906) 28 All 681 (682): 3 All L J 456: 1906 All W N 206; *Bansi Dhar* v. *Muhammad Suleman*, 1926 Lah 490 (491, 492): 27 Pun L R 494: 97 Ind Cas 181: 8 Lah L Jour 464; *Bhaichand Kirparam* v. *Ramchhoddas Manchharam*, (1920) 58 Ind Cas 231 (235): 22 Bom L R 670: 1921 Bom 285 (288): 45 Bom 174; *Sadhu Manaji* v. *Deviya Jaba Mahar*, (1912) 14 Ind Cas 780 (781): 14 Bom L R 254.

[5] *Mehr Baksh* v. *Sanjhe Khan*, (1916) 33 Ind Cas 802 (804): 18 Pun Re 1916: 194 Pun W R 1915; *Lal Bahadur Singh* v. *Abrahan Singh*, (1915) 27 Ind Cas 795 (797, 798): 13 All L J 138: 37 All 165; *Mangai Prasad* v. *Pati Ram*, (1904) 1 All L J 360 (363); *Madan Makund Lal* v. *Jamna Kaulapuri*, (1905) 2 All L J 123 (124); *Kishan Lal* v. *Umrao Singh*, (1908) 30 All 146 (148): 1908 All W N 49: 5 All L J 121. See also *Saminatha Pillai* v. *Saminatha Iyer*, (1909) 4 Ind Cas 1096 (1096, 1097): 5 Mad L Tim 84.

[6] *Thaleri Pathumma* v. *Thandora Mammad*, (1900) 10 Mad L Jour 110 (111).

[7] *Muthu* v. *Karuppan*, (1907) 30 Mad 313 (315): 17 Mad L Jour 163: 2 Mad L Tim 181: *Tara Chand* v. *Imdad*, (1896) 18 All 325 (327, 328): 1896 All W N 94; *Jagannatha Pillai* v. *Kanthaperumal Pillai*, 1927 Mad 1135: 101 Ind Cas 89; *Arjuna Reddi* v. *Venkatachalla*, (1916) 32 Ind Cas 611 (612): 19 Mad L Tim 121: 5 Mad L W 242: 32 Mad L Jour 525; *Lal Bahadur Singh* v. *Abharan Singh*, (1915) 27 Ind Cas 795 (799): 13 All L J 138: 37 All 165 F B; *Sirdar Singh* v. *Ratan Lal*, (1914) 24 Ind Cas 612 (616): 12 All L J 855: 36 All 516.

[8] *Mehr Baksh* v. *Sanjhe Khan*, (1916) 33 Ind Cas 802 (804): 18 Pun Re 1916: 194 Pun W R 1915; *Ram Jagadishchandra* v. *Bhubaneswar*, 1923 Cal 121 (126), 27 Cal W N 38: 37 Cal L Jour 265: 76 Ind Cas 241; *Bansidhar* v. *Md Suleman*, 1926 Lah 490 (491, 492): 27 Pun L R 494: 97 Ind Cas 181: 8 Lah L Jour 464; *Dharnikota Venkaya* v. *Budharazu Surayya*, (1907) 30 Mad 362 (366): 17 Mad L Jour 325; *Madan Makund Lal* v. *Jamna Kalapuri*, 1908 All W N 48 [Purchase by assignee of mortgagee]; *Mahabir Pershad* v. *Macnaghten*, (1889) 16 Cal 682 (692): 16 Ind App 107: 5 Sar 345: 13 Ind Jur 133 P C; *Gunga Pershad* v. *Jawahir Singh*, (1892) 19 Cal 4 (7).

[9] *Wadero* v. *Sajanmal*, (1909) 1 Ind Cas 952 (953): 3 Sind L R 17; *Pancham Lal* v. *Kishun Pershad*, (1910) 6 Ind Cas 47 (49, 50): 14 Cal W N 579: 12 Cal L Jour 574; *Mayan* v. *Pakuran*, (1899) 22 Mad 347 (349): 9 Mad L Jour 98: *Martand* v. *Dhondo*, (1898) 22 Bom 624 (629): *Sirdar Singh* v. *Ratan Lal*, (1914) 24 Ind Cas 612 (616, 617): 12 All L J 855: 36 All 516: *Ramlochan* v. *Srimati Kamini Debi*, (1870) 5 Beng L R 460 [Case before Transfer of Property Act].

O.34, R.14, Notes 7--10.

S. 47 and O. 21, R. 92 do not apply to persons who are not parties to the sale proceedings and therefore such persons can object to the sale by a separate suit even subsequent to its confirmation.[10]

A sale of the mortgaged property in execution of a money decree is subject to the encumbrances covering the property at the time in as much as only the mortgagor's interest passes at such a sale.[11] (Compare the under-mentioned cases,[12] decided prior to the Transfer of Property Act, in which it was held that the mortgagee's interest also passed at such a sale.)

But a mortgagee decree-holder who, while bringing the mortgaged property to sale under a money decree, fails to disclose his mortgage is estopped from asserting his rights under the mortgage against an innocent auction-purchaser.[13]

An application for sale made in contravention of R. 14 is not one in accordance with the law within the meaning of Art. 182 of the Limitation Act.[14]

8. **Position of purchaser at such sale.**—*See* Note 7, *supra*.

9. **Attachment of the property is not prohibited.**—The rule prohibits only the *sale* of the mortgaged property under a money decree for the mortgage debt. The rule does not preclude the mere *attachment* of the property in execution of such a decree.[1]

10. **Transferee of money decree from mortgagee if bound by the restrictions against the mortgagee.**—Under S. 49 of the Code a transferee of a decree in respect of a claim *arising under the mortgage,* holds it subject to the equities which the judgment-debtor might have enforced against the decree-holder. Hence, the transferee of a money decree obtained by the mortgagee is bound by the restrictions imposed by this rule against the mortgagee.[1]

The transferee of a money decree, *not in respect of the mortgage,* obtained by the mortgagee against his mortgagor, is not barred, under this rule, from selling the judgment-debtor's equity of redemption.[2] *See* Note 11, *infra*.

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(10) *Muthuraman Chetti* v. *Ettippaswami*, (1899) 22 Mad 372 (376, 377): 9 Mad L Jour 113; *Jhabba* v. *Chaggu*, (1907) 4 All L J 787 (789): 1901 All W N 8: 3 Mad L Tim 132.

(11) *Bhawandas* v. *Tarachand*, (1901) 14 C P L R 17; *Ponnappa Pillai* v. *Pappunayyangar*, (1882) 4 Mad 1 (37, 38); *Khub Chand* v. *Kallain Das*, (1875-78) 1 All 240 (242, 243).

(12) *Narsidas* v. *Joglekar*, (1879-80) 4 Bom 57 (63); *Ramanath Das* v. *Bolaram*, (1881) 7 Cal 677 (680, 681): 9 Cal L Rep 233; *Bhaggobutty* v. *Shamuchurn*, (1875-76) 1 Cal 337 (353); *Syud Emam* v. *Raj Coomar*, (1875) 14 Beng L R 408: 23 Suth W R 187 (192); *Venkatanarasimma* v. *Ramiah*, (1878-80) 2 Mad 108 (112): 3 Ind Jur 360.

(13) *Rani Ratan Kuar* v. *Lal Seth Mahesari*, (1906) 2 Nag L R 106 (109).

(14) *Chattar* v. *Newal Singh*, (1890) 12 All 64 (66): 1889 All W N 200.

Note 9.

(1) *Ram Das* v. *Munna*, (1913) 18 Ind Cas 201 (202): 4 Oudh L J 671; *Chhagan* v. *Lakshman*, (1907) 31 Bom 462 (463): 9 Bom L R 728; *Chundra Nath* v. *Barroda Sundary Ghose*, (1895) 22 Cal 813 (817); *Beni Prasad* v. *Puran Chand*, (1898) 25 Cal 262 (269, 270); *Jeevaratnam* v. *Srinivasa*, (1908) 31 Mad 33 (35): 3 Mad L Tim 107: 17 Mad L Jour 508; *Kaji Inus Kaji Bapu* v. *Kaji Inus Kajiba*, (1906) 8 Bom L R 576 (577); *Nathubhai* v. *Bai Ujam*, (1908) 32 Bom 205 (207): 10 Bom L R 274.

Note 10.

(1) *Chhagan* v. *Lakshman*, (1907) 31 Bom 462 (463, 464): 9 Bom L R 728; *Ibrahim* v. *Nihal Chund*, (1920) 55 Ind Cas 536 (538): 22 Bom L R 113: 44 Bom 366; *Sripal* v. *Gauri*, (1898) 11 Oudh Cas 231 (233); *Jeevarathanam* v. *Srinivasa*, (1908) 31 Mad 33 (34): 17 Mad L Jour 503: 3 Mad L Tim 107; *Tokhan* v. *Girwar*, (1905) 32 Cal 494 (497): 9 Cal W N 372: 1 Cal L Jour 118. See *Chundranath* v. *Barroda Soondharee Ghose*, (1895) 22 Cal 813 (816).

(2) *Ban Bal* v. *Manni Lal*, (1904) 27 All 450 (451, 452): 2 All L J 121: 1905 All W N 42.

O.34, R.14, Note 11.

11. "Otherwise than by instituting a suit".—As has been seen in Note 2, *ante* the effect of this rule is that where a mortgagee has obtained a simple money decree on his mortgage, he cannot bring the mortgaged property to sale in execution of such decree but must file a separate suit for sale in enforcement of the mortgage and such a suit would not be barred despite the provisions of O. 2, R. 2.[1] A decree in a suit on the mortgage bond, which does not *provide for the sale* of the mortgaged property, is only a simple money decree though it may declare the existence of a lien on the property covered by the bond.[2] On the other hand, a decree on a mortgage bond which, though not drawn up in the form prescribed for a decree for sale, yet provides for the *sale* of the property in case of default by the mortgagor, is not a simple money decree and R. 14 is no bar to the sale of the mortgaged property in execution thereof.[3]

The rule applies also to usufructuary mortgages. When the mortgagee has obtained a money decree for the mortgage amount in such a case, he cannot bring the mortgaged property to sale in execution of the decree. He must bring a suit for sale for that purpose. He can bring such a suit though, if he had not obtained a money decree for the mortgage amount, he could not have done so, on account of the mortgage being a usufructuary one.[4]

Where a mortgagee has given up all his rights under the mortgage the rule is no bar to the sale of the mortgaged property in execution of a money decree for the mortgage debt.[5] (*See* Note 6, *supra*, foot-note 3.)

Note 11.

(1) ***Ram Narain* v. *Ram Prasad*,** 1931 All 65 (68): 1930 All L J 913: 130 Ind Cas 712: 52 All 964; ***Rai Ramani Dasi* v. *Surendra Nath*,** (1897) 1 Cal W N 80 (81) [Landlord taking a mortgage of the tenant's holding as security for the rent—He cannot bring the holding to sale otherwise than by a suit for sale]; ***Bhola Nath* v. *Muhammad Sadiq*,** (1904) 26 All 223 (224): 1904 All W N 2; ***Hanumant* v. *Raghavendra*,** (1920) 58 Ind Cas 221 (222): 22 Bom L R 650: 44 Bom 981; ***Kaveri* v. *Ananthiah*,** (1887) 10 Mad 129 (130, 131): 11 Ind Jur 138 [Decree for arrears of interest—Mortgaged property cannot be sold without suit for sale]; ***Ram Keshab* v. *Sanatun Pal*,** (1898) 2 Cal W N 320 (321); ***Luchmi Narain Singh* v. *Nand Kishore Lal*,** (1902) 29 Cal 537 (542): 6 Cal W N 484 [*Semble*:—Attachment and sale under public demands Recovery Act does not confer on the purchaser the *mortgagee* interest of the Government. Such interest can pass only as a purchaser of sale under a decree under S 67 of the Transfer of Property Act]. See ***Abdul Rakiman* v. *Akath Mahammad*,** (1892) 2 Mad L Jour 188 (190) [Holder of two mortgages on same property—Rule is no bar to sale of property in execution of decree on second mortgage subject to the first mortgage]; ***Neerunjun* v. *Oopendro*,** (1872) 10 Beng L R 57 [Principle of R 14 not recognised before T P Act].

(2) ***Hem Ban* v. *Bhihari Gir*,** (1905) 28 All 58 (59, 60): 1905 All W N 189: 2 All L J 479; ***Gobinda* v. *Kailas*,** (1917) 41 Ind Cas 73 (75): 45 Cal 530; ***Gobind Chandra Pal* v. *Kailash Chandra Pal*,** (1917) 40 Ind Cas 230 (232): 25 Cal L Jour 854; ***Narsingh* v. *Munna*,** (1909) 8 Ind Cas 537 (538): 6 Mad L Tim 182: 6 All L J 731.

(3) ***Anna Pillai* v. *Thangathammal*,** (1897) 20 Mad 78 (79); ***Kasi Prasad* v. *Jamuna Prasad*,** (1904) 31 Cal 922 (927): 8 Cal W N 264; ***Fazil Hawladar* v. *Krishna Bandhoo*,** (1898) 25 Cal 580 (583): 2 Cal W N 118; ***Lal Behari* v. *Habibur*,** (1899) 26 Cal 166 (170, 171): 3 Cal W N 8; ***Dinandre Nath* v. *Chandra Kishore*,** (1886) 12 Cal 436 (437); ***Parmanand* v. *Daulat*,** (1902) 24 All 549 (552): 1902 All W N 162; ***Chaurasi Mahasarick* v. *Bhagwan Sahu*,** 1924 Pat 20 (22): 2 Pat 787: 1923 Pat H C C 209: 74 Ind Cas 144; ***Kashi Chandra* v. *Priya Nath*,** 1924 Cal 645 (646): 28 Cal W N 550: 83 Ind Cas 424; ***Md Abdulla* v. *Jamiat Rai*,** 1930 Lah 685 (686): 121 Ind Cas 369. See ***Kissory Lal* v. *Sewbux Bogola*,** (1909) 3 Ind Cas 999 (1000): 13 Cal W N 787.

(4) ***Govinda Bhatta* v. *Narain Bhatta*,** (1906) 29 Mad 424 (425): 16 Mad L Jour 285; ***Khan Chand* v. *Ghosita*,** 1931 All 350 (351): 1931 All L J 159: 131 Ind Cas 119; ***Rangaswamy* v. *Subbaraya*,** (1907) 30 Mad 408 (409): 2 Mad L Tim 346: 17 Mad L Jour 403; ***Sheo Devi Tewari* v. *Ram Saran*,** (1899) 26 Cal 164 (165, 166): 3 Cal W N 290.

(5) ***Ramachandradu* v. *Kerri Krishna Reddi*,** 1929 Notes 12 (d): 115 Ind Cas 829; ***Guru Shantappa* v. *Guruva Madivallappa*,** 1926 Bom 279 (280): 28 Bom L R 603: 50 Bom 339: 95 Ind Cas 696. See also ***Khanchand* v. *Ghasita*,** 1931 All 350 (351): 131 Ind Cas 119: 1931 All L J 159 [Real test in such cases is whether the mortgage security *existed* at the time the money decree was passed]. But see ***Kishan Lal* v. *Umrao Singh*,** (1908) 30 All 146 (148) 1908 All W N 49: 5 All L J 121 (Case under the Transfer of Property Act].

O.34, R.14, Notes 11—12.

It has been held by the Calcutta High Court that the rule does not apply to a suit for *contribution* brought by a co-mortgagor who has redeemed the entire mortgage and claims a charge on the shares of the other co-sharers for the proportionate amounts due by them. The reason given is that such a suit is not mere suit for money but a development of the suit on the mortgage.[6]

Under O. 33, R. 13 and S. 47 the charge which the Government has on the subject-matter of the suit for the Court-fee payable in cases where the plaintiff has been allowed to sue as a pauper is enforceable by proceedings in execution and not by separate suit.[7]

12. Sale of mortgaged property for claim unconnected with the mortgage.—S. 99 of the Transfer of Property Act, prohibited a sale of the mortgaged property in execution of a money decree obtained by the mortgagee although the decree was upon a claim unconnected with the mortgage.[1] The present rule applies only if the decree for money is in satisfaction of a claim *arising under the mortgage* and not to a decree on a claim *unconnected* with the mortgage.[2] *A fortiori* there is no bar to the sale of the mortgaged property in execution of a money decree obtained by a third person or to the mortgagee purchasing the property at such a sale.[3] Even S. 99 of the Transfer of Property Act was no bar to such a sale or purchase.[4]

The following are cases showing what are and what are not "claims arising under the mortgage":—

(1) Where a usufructuary mortgagee grants a lease of the property to the mortgagor, a claim for rent accruing under the lease is not a claim arising under the mortgage,[5] unless the lease for-

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[6] *Kumar Birandra Nath* v. *Tarini Kantha Roy*, 1928 Cal 191 (192): 47 Cal L Jour 107: 107 Ind Cas 724.

[7] *Rum Das* v. *The Secretary of State*, (1896) 18 All 419 (421): 1896 All W N 121; *Dost Muhamad* v. *Mani Ram*, (1907) 29 All 537 (540): 1907 All W N 157: 4 All L J 720; *Gayananda Bala Dassee* v. *Buttu Kristo*, (1906) 33 Cal 1040 (1046): 10 Cal W N 857.

Note 12.

[1] *Shib Dass* v. *Kali Kumar Roy*, (1903) 30 Cal 463 (465): 7 Cal W N 532; *Jadub Lall* v. *Madhub Lall*, (1894) 21 Cal 34 (36, 37); *Durgayya* v. *Anantha*, (1891) 14 Mad 74 (75); *Jagan Nath* v. *Budhwa*, 1907 Pun Re No 2: 157 Pun L R 1906: 27 Pun W R 1906; *Khiarajmal* v. *Diam*, (1904) 32 Cal 296 (316): 32 Ind App 23: 9 Cal W N 201: 2 All L J 71: 7 Bom L R 1: 1 Cal L Jour 584: 8 Sar 784 [The observations of P C on this page indicate that in their opinion the principle of S 99 need not be applied to claims unconnected with the mortgage]; *Azimulla* v. *Najimunnissa*, (1894) 16 All 415 (416, 417): 1894 All W N 140.

[2] *Nur Mahomed* v. *Kessumal*, (1913) 20 Ind Cas 523 (525): 7 Sind L R 11; *Tarak Nath* v. *Bhubaneshwar*, (1915) 30 Ind Cas 988 (988): 42 Cal 780; *Mehr Baksh* v. *Sanjhe Khan*, (1916) 33 Ind Cas 802 (801): 18 Pun Re 1916: 194 Pun W R 1915; *Sowbagia Ammal* v. *Manicka Mudaliar*, (1917) 42 Ind Cas 975 (976): 22 Mad L Tim 386: 33 Mad L Jour 601: 1917 Mad W N 782: 6 Mad L W 701; *Raja Jagadishchandra* v. *Baubaneswar*, 1923 Cal 121 (126): 27 Cal W N 38: 37 Cal L Jour 265: 76 Ind Cas 241; *Official Receiver, Tanjore* v. *R M Nagaratana*, 1926 Mad 194 (196, 197): 49 Mad L Jour 648: 1925 Mad W N 907: 92 Ind Cas 497.

[3] *Bharat Ramanuj Das* v. *Ishan Chandra Haldhar*, (1918) 43 Ind Cas 212 (214): 27 Cal L Jour 481; *Tikait Dal Narayan* v. *Christian*, (1919) 50 Ind Cas 472 (476): 1919 Pat 92.

[4] *Thakur Durga Singh* v. *Seth Jai Dayal*, (1904) 7 Oudh Cas 307 (310); *Sesha Aiyar* v. *Krishna Aiyangar*, (1901) 24 Mad 96 (111): 10 Mad L Jour 383; *Ikkotha* v. *Chakkiamma*, (1903) 27 Mad 428 (429); *Ramakrishna Chatraiya Deo* v. *Pushapoti Vijayarama*, (1912) 15 Ind Cas 589 (592) Mad; *Narhar* v. *Shivram*, (1905) 7 Bom L R 816 (818) [Transferee of money bond from mortgagee was not subject to the restrictions imposed by S 99]. See *Sumera* v. *Bhagwant*, (1895) 15 All W N 1 (1); *Reeve* v. *Lisle*, (1902) A C 461: 71 L J Ch 768: 87 L T 308: 51 W R 576: 18 T L R 767, Ref 24 Oudh W N 229: 31 Cal L Jour 98: 55 Ind Cas 157 [A mortgagee can purchase equity of redemption by agreements subsequent to, and independent of, the original mortgage transaction. Ref. to in 27 Bom 297 (300) and 55 Ind Cas 157 (169) Cal]. But see *Erulappa Mudaliar* v *Commercial and Mortgage Bank*, (1930) 28 Mad 377 (381, 382, 383): 10 Mad L Jour 91 [The mortgagee's liability to be redeemed continued after such sale].

[5] *Ram Narayan* v. *Biswanath*, (1920) 57 Ind Cas 384 (386): 1920 Pat 250: 1 Pat L Tim 694; *Uttam Chandra* v. *Raj Krishna*, (1920) 55 Ind Cas 157 (163): 24 Cal W N 229: 31 Cal L Jour 98: 47 Cal 377. See *Bromunda Nath*

med part of the mortgage transaction.[6]

(2) Where a mortgagee holds two distinct mortgages on two different properties of the same mortgagor, he can bring to sale one of the properties in execution of a money decree which he has obtained on the mortgage of the *other* property.[7]

(3) A claim for costs awarded to a usufructuary mortgagee in a suit for possession against the mortgagor is not a claim arising *under the mortgage* but one arising by virtue of the decree made by the Court in the suit for possession.[8]

(4) Subsequent to a usufructuary mortgage of the right to receive certain offerings at a temple, the parties agreed between themselves that the mortgagor should pay to the mortgagee a certain sum of money annually in lieu of the offerings; a decree was then obtained by the mortgagee, on the basis of this agreement, for the arrears of the annual payments, and it was held that the annual payments formed an essential part of the mortgage money and that hence the decree came within the mischief of R. 14.[9]

(5) A mortgagee who has obtained, a mortgage decree, as well as a money decree on an independent claim, can sell the property for the consolidated sum and realise, from the sale proceeds, the amount of a decree he has for the mortgage debt.[10]

13. **O. 2, R. 2.**—This rule expressly provides that O. 2, R. 2 shall not be a bar to a second suit for sale on a mortgage when the mortgagee has merely obtained a money decree on his mortgage, under which he cannot bring the mortgaged property to sale, by virtue of this rule.[1] (There was a con-

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Deb v. *Hem Chandra Mitra*, (1914) 23 Ind Cas 981 (983): 18 Cal W N 1016. Contra *Kadma Pasin* v. *Muhammad Ali*, (1919) 50 Ind Cas 134 (137): 17 All L J 481: 41 All 399 [As the claim cannot be said to be unconnected with the mortgage, the claim arises under the mortgage within R 14].

(6) *Bhaichand Kirparam* v. *Ranchhoddas*, 1921 Bom 285 (286): 45 Bom 174; *Ibrahim Gulam* v. *Mihalchand*, (1920) 55 Ind Cas 536 (538): 22 Bom L R 118: 44 Bom 366; *Bhaichand Kirpa Ram* v. *Ranchhoddas*, (1920) 58 Ind Cas 231 (232): 22 Bom L R 670: 45 Bom 174; *Lakshmi Kutti Amma* v. *Mariathuamma*, 1925 Mad 127 (128): 47 Mad L Jour 798: 20 Mad L W 649: 85 Mad L Tim 118: 1924 Mad W N 771: 82 Ind Cas 504; *Muhammad Yakub* v. *Hamid Ali*, 1927 Cal 884 (885): 104 Ind Cas 353: 55 Cal 104.

(7) *Bai Nurjan Begam* v. *Hansraj Jethumal & Co*, 1925 Bom 239 (240): 49 Bom 208: 27 Bom L R 202: 86 Ind Cas 870. See, however, *Arumuga Mudaliar* v. *Yogammal Boiammani Ammal*, (1909) 4 Ind Cas 1126 (1126): 5 Mad L Tim 248 [S 99, T P Act applies to cases where there is more than one mortgage].

(8) *Haribans Rai* v. *Sriniwas*, (1913) 20 Ind Cas 896 (898): 11 All L J 841: 35 All 518.

(9) *Kadma* v. *Muhammad Ali*, (1919) 50 Ind Cas 134 (137, 138): 17 All L J 481: 41 All 399.

(10) *Fida Ali* v. *Ismailji*, (1910) 5 Ind Cas 701 (704, 705): 6 Nag L R 20; *Behari Bharthi* v. *Bhagwan Gir*, (1909) 1 Ind Cas 162 (163): 6 All L J 43: 31 All 114.

Note 13.

(1) *Babu Lal Sahu* v. *Ram Prasad*, (1904) 7 Oudh Cas 314 (317); *Ganpat Rao* v. *Mt Sakhoo Bhai*, (1890) 3 C P L R 170 (172); *Ramarayaningar* v. *Krishna Yachendra*, 1921 Mad 183 (191): 44 Mad 301: 40 Mad L Jour 236: 61 Ind Cas 612: 12 Mad L W 685: 28 Mad L Tim 234; *Inderpal Singh* v. *Mewah Lal*, (1914) 23 Ind Cas 429 (429): 12 All L J 374: 36 All 264; *Lalta Prasad* v. *Puran Lal*, 1930 All 286 (287): 51 All 974: 1929 All L J 1045: 119 Ind Cas 90. See *Sultan Singh* v. *Joti Sarup*, 1928 Lah 269 (270): 109 Ind Cas 613; *Punit Deo Narain* v. *Bhagwati Saran*, (1921) 63 Ind Cas 303 (307, 308) Pat [Suit on the personal covenant on the mortgage—Subsequent suit on the security itself, not barred]. But see *Official Assignee* v. *Chimniran*, 1933 Bom 51 (54, 55): 34 Bom L R 1615 [Charge on moveables—Personal decree alone got—O 2, R 2 bars subsequent suit to enforce the charge since O 34 applies only to immoveables—But pleas and rights in defence are not barred].

O.34, R.14, Notes 13—15.

flict of decisions on this question prior to the Transfer of Property Act. *See* the undermentioned cases.[2]

Even after the execution of the decree for money has become time-barred, the mortgagee can sue for sale under this rule.[3]

If, however, the prior decree was a decree providing for sale of the mortgaged property though not strictly drawn up in the form prescribed for a decree for sale, this rule does not apply and a second suit for sale is barred by *res judicata*.[4] (*See* Note 11, *supra*, foot-notes 2 and 3.) Similarly, if the mortgagee sues for sale but is content to take only a simple money decree he cannot subsequently sue again for sale. Such a suit will also be barred by *res judicata*. The exemption in this rule is only from O. 2, R. 2 and not from S. 11.[5]

Further this rule relieves the mortgagee only from the restrictions imposed by O. 2, R. 2 on the splitting of *remedies*. The restriction as to splitting of *claims* is not affected by it.[6] Thus a suit for interest alone brought at a time when the principal also had become due is a bar to a subsequent suit for the principal.[7]

14. **Consent decree.**—This rule does not apply to cases in which a decree for money is passed against the mortgagor by consent. The reason is that the benefit under the rule is intended only for the mortgagor, and so he can *waive* it by consenting to a money decree being passed for the mortgage amount.[1]

15. **"Decree"**.—An order directing a surety for a judgment-debtor to pay the amount secured is not a decree for the payment of money within the meaning of this rule, and, hence, the rule does not preclude the sale of the property covered by the security bond, by proceedings in execution without a suit for sale being filed.[1] (See Note 4, *supra*.) Although a decree providing for the sale of the equity of redemption for arrears of interest due under the mortgage is contrary to the provisions of S. 99 of the Transfer of Property Act, it cannot be objected to in execution.[2] (*See* Note 7, *supra*.)

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[2] *Umrao* v. *Behari*, (1881) 3 All 297 (302, 303); *Rajkishore* v. *Bhadoo*, (1881) 7 Cal 78 (81); *Callynath* v. *Koonjo*, (1883) 9 Cal 651 (655); *Gumani* v. *Rampadarath*, (1878-80) 2 All 838 (839); *Gonmenjoy Mullick* v. *Dossmoney Dossee*, (1881) 7 Cal 714 (716) F B [3 Cal 363 overruled].

[3] *Chunni* v. *Banaspat*, (1887) 9 All 23 (25, 26): 1886 All W N 279.

[4] *Jogemaya* v. *Thakomoni*, (1897) 24 Cal 473 (488); *Hanmant* v. *Raghavendra Rao*, 1922 Bom 237 (237): 24 Bom L R 410: 67 Ind Cas 847: 46 Bom 848.

[5] *Piari Lal* v. *Nand Ram*, (1909) 1 Ind Cas 561: 31 All 19 (20): 1908 All W N 265: 5 All L J 732; *Shibu* v. *Chandra*, (1906) 33 Cal 849 (852).

[6] *Govind* v. *Parashram*, (1901) 25 Bom 161 (168): 2 Bom L R 864.

[7] *Shah Mosihuddin* v. *Sheo Logan Sahu*, (1909) 2 Ind Cas 265 (266) Cal. See *Bishhen Das* v. *Gurudasmal*, 1930 Lah 148 (149): 11 Lah L Jour 441: 31 Pun L R 138: 122 Ind Cas 477 [Interest alone can be claimed where the principal has not become due].

Note 14.

[1] *Ganesh Singh* v. *Debi Singh*, (1910) 5 Ind Cas 419 (420): 7 All L J 321: 32 All 377 (380); *Kasi Pershad* v. *Jamuna*, (1904) 31 Cal 922 (927): 8 Cal W N 264; *Kashi Chandra* v. *Priya Nath*, 1924 Cal 645 (646): 28 Cal W N 550: 83 Ind Cas 424; *Indramani Dasi* v. *Sarendra*, 1922 Cal 35 (38): 64 Ind Cas 852: 35 Cal L Jour 61; *Appanda Mudaly* v. *Raghuthamby Ammani*, (1911) 9 Ind Cas 939 (939): (1911) 1 Mad W N 147: 9 Mad L Tim 261. But see *Posti Mal* v. *Firm Radha Kishen*, 1932 All 439 (440): 1932 All L J 486: 138 Ind Cas 603 [Suit on pro-note—Compromise decree charging properties specified—Compromise silent as to mode of enforcement—Held this rule applies].

Note 15.

[1] *Madho Prasad* v. *Chandrabati Kuer*, (1917) 38 Ind Cas 130 (131) Pat; *Gengadeo Narain* v. *Joti Lal Sahu*, (1917) 39 Ind Cas 648 (649): 2 Pat L Jour 197: 3 Pat L W 414.

[2] *Kasi Prasad* v. *Jamuna Prasad*, (1904) 31 Cal 922 (927): 8 Cal W N 264.

Mortgages by the deposit of title-deeds and charges.

R. 15. [*New.*] All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds[11] within the meaning of Section 58, and to a charge[3] within the meaning of Section 100 of the Transfer of Property Act, 1882.

[*Cf.* S. 96 of Act, IV of 1882.]

Local Amendment.

OUDH.

Read the present R. 15 as R. 15 (1) and *add* as sub-R. (2), the following:—

> "Where a decree orders payment of money and charges it on immoveable property on default of payment, the amount can be realised by sale of that property in execution of that very decree."

Synopsis.

1. **Amendments after 1908.**
2. **Scope of the rule.**
3. **Charge.**
   4. **Creation of charge by operation of law.**
   5. **Creation of charge by act of parties.**
   6. **Charge under Rent Act.**
   7. **Priority between rent decree and mortgage decree.**
   8. **Invalid mortgage, if creates a charge.**
   9. **Right of maintenance.**
   10. **Claim for dower.**
11. **Mortgage by deposit of title-deeds.**
12. **Charges enforceable by sale.**
13. **Charge on the surplus sale proceeds of sale for arrears of revenue or rent.**

Charge distinguished from mortgage. See Note 3, Pts. (1) and (2).

Decree for charge final by itself—No fresh final decree needed. See Note 2, Pt. (2).

1. **Amendments after 1908.**—The rule has been substituted for old R. 15 by the Transfer of Property Act (Amendment) Supplementary Act, XXI of 1929. The main changes effected in the rule are:

(1) The words "which apply to a simple mortgage" have been substituted for the words "as to the sale or redemption of the mortgaged property."

(2) The words "mortgage by deposit of title-deeds within the meaning of S. 58" are new.

2. **Scope of the rule.**—By force of this rule O. 34, R. 6 applies also to suits to enforce charges.[1] The rule makes the provisions of the Code apply only *so far as may be*. Hence, where a charge is declared by a decree, which in its terms is final, no fresh final decree is necessary.[2]

3. **Charge.**—A charge is defined in S. 100 of the Transfer of Property Act as follows:—

> "Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to

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Order 34 Rule 15—Note 2.

(1) *Lala* v. *Amir Haidar Khan*, 1930 Oudh 10 (10): 6 Oudh W N 969: 123 Ind Cas 215; *Uttam Ishlok* v. *Phulman Rai*, (1905) 2 All L J 379 (385): 1905 All W N 144: *Fala Krista* v. *Jagannath*, 1932 Cal 775 (780, 781): 36 Cal W N 709: 56 Cal L Jour 187: 140 Ind Cas 788: 59 Cal 1314.

(2) *Bapuji* v. *Tansa*, 1930 Nag 17 (19): 120 Ind Cas 218.

O.34, R.15.
Notes
3—4.

another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property''.

The distinction between a simple mortgage and a charge is often a question of great nicety but there is a well-marked distinction between the two, *viz.*, that a mortgage does, and a charge does not, involve a *transfer of an interest* in immoveable property.[1] The Transfer of Property Act, S. 100, now makes it clear that a charge is not enforceable against a *bona fide* transferee of the property for value without notice, while a mortgage is so enforceable.[2] A document purporting to create a charge in future in the event of non-payment of the debt does not create any charge within S. 100 of the Transfer of Property Act.[3] That section also says that all the provisions of the Transfer of Property Act applicable to simple mortgages, apply also to charges. As to limitation for suits to enforce charges, *see* the undermentioned cases.[4]

4. **Creation of charge by operation of law.**—According to S. 100 of the Transfer of Property Act, a charge may be created by operation of law or by act of parties. Thus, under S. 55 of that Act the vendor of immoveable property has a charge on it for the unpaid purchase money.[1] A puisne mortgagee who is impleaded as a party to a suit by a prior mortgagee to enforce his mortgage is entitled to a *charge* on the surplus sale proceeds of the property remaining after satisfaction of the prior mortgage.[2] Under S. 95 of that Act one of several co-mortgagors who redeems the whole mortgage is entitled to a charge on the shares of the other co-mortgagors for their respective portions of the mortgage debt.[3] (Under the Section as amended by Act, XX of 1929 the redeeming co-mortgagor is subrogated to the rights of the mortgagee.) It has been held by the Madras High Court[4] that

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Note 3.

(1) *Narayana* v. *Venkataramana*, (1902) 25 Mad 220 (237); *Royzuddi Sheik* v. *Kali Nath*, (1906) 33 Cal 985 (992): 4 Cal L Jour 219; *Rangaswami* v. *Muthukumarappa*, (1887) 10 Mad 509 (513): 11 Ind Jur 452; *Kishan Lal* v. *Ganga Ram*, (1891) 13 All 28 (44): 1890 All W N 216.

(2) The contrary view indicated in *Cooling* v. *Saravana*, (1889) 12 Mad 69 (71), is clearly not good law now; *Parbhu Dayal* v. *Babban Lal*, (1914) 23 Ind Cas 867 (868): 1 Oudh L J 43 [Charge created by will].

(3) *Madho Misser* v. *Sidh Binaik*, (1887) 14 Cal 687 (691); *Harjas Rai* v. *Naurang*, (1906) 3 All L J 220 (223): 1906 All W N 82.

(4) *Ramakrishna* v. *Subramania*, (1906) 29 Mad 305 (307) [Article 132 applies—Overruling 27 Mad 28]; *Girwar Singh* v. *Thakur Narain*, (1887) 14 Cal 730 (738, 739) [Distinction between mortgage and charge drawn in the Transfer of Property Act is not observed in the Limitation Act—Art. 132 and not 147 applies to suit for sale on simple mortgage].

Note 4.

(1) *Velayutha Chetty* v. *Govindaswami*, (1907) 30 Mad 524 (525): 17 Mad L Jour 450: 3 Mad L Tim 10 [Unpaid vendor's lien is non-possessory]; *Natesan Chetti* v. *Sundararaja Ayyangar*, (1898) 21 Mad 141 (142): 7 Mad L Jour 275 [Limitation applicable to suit to enforce lien]; *Uttam Ishlok* v. *Phulman Rai*, (1905) 2 All L J 379 (388): 1905 All W N 144 [Unpaid vendor's lien also gives a personal remedy]; *Webb* v. *Macpherson*, (1904) 31 Cal 57 (72): 8 Cal W N 41: 30 Ind App 238: 5 Bom L R 838: 13 Mad L Jour 389: 8 Sar 554 P C [Unpaid vendor's lien under S. 55 is different from similar lien in English law].

(2) *Berhamdeo Prasad* v. *Tara Chand*, (1906) 33 Cal 92 (99): 9 Cal W N 989.

(3) *Har Prasad* v. *Raghunandan*, (1909) 31 All 166 (168): 1 Ind Cas 825: 6 All L J 67 and 832; *Raushan Ali* v. *Kali Mohan*, (1906) 4 Cal L Jour 79 (84); *Bhagwan Das* v. *Har Dei*, (1904) 26 All 227 (232): 1904 All W N 3; *Ahmad Wali Khan* v. *Shamshul Jahan Begam*, (1906) 28 All 482 (487): 10 Cal W N 626: 3 Cal L Jour 481: 3 All L J 360: 16 Mad L Jour 269: 8 Bom L R 397: 33 Ind App 81: 1 Mad L Tim 143: 8 Sar 918; *Ibn Hasan* v *Brigbhukan*, (1904) 26 All 407 (416): 1904 All W N 74: 1 All L J 148 F B [But not where only a portion of the mortgage money was paid]. See *Jahan Ara Begam* v. *Mirza Shujaul-din*, (1905) 9 Cal W N 865 (867).

(4) *Raja of Vizianagram* v. *Raja Setrucherlu*, (1903) 26 Mad 686 (701): 13 Mad L Jour 63 F B. See *Achut Ram Chandra* v. *Hari Kamti*, (1887) 11 Bom 313 (319): 11 Ind Jur 339 [Rule not applicable where the co-sharer who has paid the Government revenue has excluded the others from the joint property].

O.34, R.15, Notes 4–8.

where one of several co-sharers of property pays the entire Government revenue due on the land, in order to prevent its sale for arrears of revenue, he is entitled to a charge on the shares of the others, for their respective portions of the amount due. But the Calcutta High Court has taken a different view.[5] *See also* the undermentioned case.[6]

5. **Creation of charge by act of parties.**—No formal words are necessary to create a charge, if the intention to do so is clear from the document read as a whole.[1] Thus where a Hindu executed a document agreeing to pay to his sister and after her death to her daughter Rs. 10 per mensem from the produce of an estate, *held* that a charge was created on the profits of the estate for the payment of the amount.[2] A charge may be created for religious purposes and in such cases the property descends to the heirs or other representatives of the donor subject to the charge for the purposes mentioned.[3] Similarly a testator may make a charge on his properties for the payment of his debts.[4]

6. **Charge under Rent Act.**—A charge for the payment of rent under the Bengal Tenancy Act[1] or the Madras Estates Land Act[2] is not such a charge as is covered by S. 100 of the Transfer of Property Act.

7. **Priority between rent decree and mortgage decree.**—It has been held by the Calcutta High Court that a purchaser in execution of a rent decree has priority over the purchaser in execution of a mortgage decree.[1] But according to the High Court of Madras a sale for arrears of *rent* unlike a sale for arrears of *revenue* is not free of prior encumbrances.[2] Even where property is sold for arrears of Government revenue if the property is purchased by the mortgagor himself the mortgagee is entitled to have the property sold for the satisfaction of his mortgage debt. This is on the principle that a mortgagor cannot set up against a mortgagee an incumbrance created by himself.[3]

8. **Invalid mortgage if creates a charge.**—An instrument which is intended to create a mortgage but which is invalid and fails to take effect as it does not fulfil the requirements of the law does not create a charge.[1]

S. N. DAR, [illegible]
Vakil High Court
SRINAGAR (Kashmir)

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(5) *Upendra Lal* v. *Girindra Nath,* (1898) 25 Cal 565 (570): 2 Cal W N 425; *Kinuram* v. *Mozaffer Hosain,* (1887) 14 Cal 809 (825) F B.

(6) *Raj Kumar* v. *Jai Karan,* (1920) 57 Ind Cas 653 (654): 5 Pat L Jour 248: 1 Pat L Tim 225.

Note 5.

(1) *Nabin Chand* v. *Raj Coomar,* (1905) 9 Cal W N 1001 (1002); *Janardhan* v. *Anant,* (1908) 32 Bom 386 (390): 10 Bom L R 575.

(2) *Chetti Chalamanna* v. *Pandrangi Subbamma,* (1884) 7 Mad 23 (24): 7 Ind Jur 465.

(3) *Jagadindra Nath* v. *Hemanta Kumari,* (1905) 32 Cal 129 (141): 8 Cal W N 809: 6 Bom L R 765: 31 Ind App 203: 1 All L J 585: 8 Sar 698 P C; *Sonatun Bysack* v. *Juggut Soondree,* (1859-61) 8 Moo Ind App 66 (88): 2 Suth 37: 1 Sar 721 P C; *Ashutosh Dutt* v. *Doorga Churn,* (1880) 5 Cal 438 (444): 6 Ind App 182: 5 Cal L Rep 296: 3 Suth 694: 4 Sar 58: 3 Ind Jur 571: 3 Shome L R 32 P C.

(4) *Anundmoye* v. *Girish Chunder,* (1881) 7 Cal 772 (774): 9 Cal L Rep 327.

Note 6.

(1) *Soshi* v. *Gogan,* (1895) 22 Cal 364 (374); *Fotick Chunder* v. *Foley,* (1888) 15 Cal 492 (496); *Royzuddi Sheik* v. *Kali Nath,* (1906) 33 Cal 985 (995): 4 Cal L Jour 219.

(2) *Suranna* v. *Suryanarayana,* (1918) 48 Ind Cas 794 (796): 42 Mad 114: 35 Mad L Jour 443: 1919 Mad W N 23: 25 Mad L Tim 365. But see *Bollapragada* v. *Venkatalakshmana Garu* v. *Nenda Seetayya,* (1920) 57 Ind Cas 764 (767): 43 Mad 786: 1920 Mad W N 294: 11 Mad L W 466: 28 Mad L Tim 44: 39 Mad L Jour 30 [Per *Sadasiva Aiyar, J.*—The rule applies to enforcement of a charge for rent payable in money].

Note 7.

(1) *Gopinath* v. *Kashinath,* (1909) 1 Ind Cas 35 (35): 9 Cal L Jour 234: 13 Cal W N 412; *Meherunnisa* v. *Sham Sundar,* (1902) 6 Cal W N 834 (835).

(2) *Subramanya* v. *Rajaram,* (1885) 8 Mad 573 (575): 10 Ind Jur 60; *Raja Gopal* v. *Subbaraya,* (1884) 7 Mad 31 (36): 7 Ind Jur 524.

(3) *Ganga Sahai* v. *Tulsiram,* (1903) 25 All 371 (374, 375): 1903 All W N 75.

Note 8.

(1) *Tofaluddi* v. *Mahar Ali,* (1899) 26 Cal 78

O.34, R.15, Notes 9—13.

9. **Right of maintenance.**—A right to maintenance is not a charge on the property out of which the maintenance is payable. But the right may be made a charge by act of parties or by a decree of Court.[1] As to the procedure for recovering maintenance charged on property by a decree of Court, *see* Notes under R. 14, *supra*.

10. **Claim for dower.**—A claim for dower by a Muhammadan widow is not a charge on the estate in the hands of the heirs of the deceased husband but only ranks with ordinary debts.[1] But her decree for dower is entitled to *priority* over a decree against the heir for the latter's personal debt.[2]

11. **Mortgage by deposit of title-deeds.**—*See* Transfer of Property Act, Ss. 58 and 96. S. 96 makes the provisions of the Transfer of Property Act as to simple mortgages applicable to mortgages by deposit of title-deeds. Similarly, the present rule makes the provisions of O. 34, which are applicable to simple mortgages, applicable also to mortgages by deposit of titlle-deeds.

12. **Charges enforceable by sale.**—As the remedy of a simple mortgagee is only to sue for sale of the mortgaged property, so the charge holder's remedy is also to sue for sale. But if the sale proceeds of the property charged are not sufficient to satisfy the charge and if the balance is legally recoverable from the debtor's other properties or from him personally, then a personal decree may be obtained under R. 6, *supra*. *See* Note 2, foot-note 1, *supra*.

13. **Charge on the surplus sale proceeds of sale for arrears of revenue or rent.**—Under S. 73 of the Transfer of Property Act, where the mortgaged property is sold for arrears of revenue or rent, the mortgage charge is transferred to the surplus sale proceeds and the mortgagee is entitled to have his mortgage debt satisfied out of such proceeds in preference to other creditors of the mortgagor.[1] But if the sale was due to the mortgagee's *own default* he is not entitled to sue for his mortgage money.[2]

ORDER XXXV.

INTERPLEADER.

O. 35, R. 1.

Plaint in *interpleader*-suits.

R. **1**. [S. 471.] In every suit of interpleader the plaint *shall*, in addition to the other statements necessary for plaints, state—

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(81); *Prannath* v. *Jadunath*, (1905) 32 Cal 729 (732): 9 Cal W N 697; *Rouzuddi Sheik* v. *Kali Nath*, (1906) 33 Cal 985 (993): 4 Cal L Jour 219; *Rani Kumari* v. *Srinath*, (1897) 1 Cal W N 81 (83); *Samoo Patter* v. *Abdul Sammad*, (1908) 31 Mad 337 (337, 338); *Konchadi* v. *Shira Rao*, (1905) 28 Mad 54 (56).

Note 9.

(1) *Gajadhar* v. *Kaunsilla*, (1909) 1 Ind Cas 761 (761): 31 All 161: 6 All L J 107 [The right may be enforced against the property in the hands of a transferee who collusively takes a transfer of the property]; *Raja Rajeswara Dorai* v. *Sundara Pandiyasami Terar*, (1919) 49 Ind Cas 704 (705): 42 Mad 581: 1918 P C 156: 46 Ind App 64: 17 All L J 153: 36 Mad L Jour 164: 23 Cal W N 549: 29 Cal L Jour 551: 25 Mad L Tim 400: 21 Bom L R 685: 1919 Mad W N 511: 10 Mad L W 322 P C.

Note 10.

(1) *Wahidunnissa* v. *Shubrattun*, (1871) 14 Suth W R 239 (246): (1871) 6 Beng L R 54; *Ameer Ammal* v. *Sankaranarayanan*, (1902) 25 Mad 658 (659).

(2) *Bholanath* v. *Maqbulunnissa*, (1904) 26 All 28 (36): 1903 All W N 184.

Note 13.

(1) *Umatara* v. *Uma Charan*, (1906) 3 Cal L Jour 52 (55); *Hem Chandra* v. *Tafazzel Hossein*, (1904) 8 Cal W N 832 (836); *Kamala Kant Sen* v. *Abul Barkat*, (1900) 27 Cal 180 (183); *Gosto Behary* v. *Shib Nath*, (1893) 20 Cal 241 (244); *Kristodas* v. *Ram Kant*, (1881) 6 Cal 142 (147): 7 Cal L Rep 396; *Premchand* v. *Purnima*, (1888) 15 Cal 546 (553); *Jogeshur* v. *Ghanasham*, (1901) 5 Cal W N 356 (359); *Heera Lal* v. *Janckeenath*, (1871) 16 Suth W R 222 (223); *Gobind Sahai* v. *Sibdut Rom*, (1906) 33 Cal 878 (880).

(2) *Chitkali Koer* v. *Mathura Lal*, (1906) 3 Cal L Jour 220 (221, 222).

O. 35, R. 1, Note 1.

(*a*) that the plaintiff *claims* no interest in the *subject-matter in dispute other than for charges or costs*;

(*b*) the claims made by the defendants severally; and

(*c*) that there is no collusion between the plaintiff and any of the defendants.

[1877—S. 471; R. S. C., O. 57, R. 2-A. *See* S. 88, C.P.C.]

1. **Plaint in interpleader suits.**—*See* Notes to S. 88, *ante*.

O. 35, R. 2, Notes 1—2.

Payment of thing claimed into Court.

R. 2. [S. 472.] *Where* the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff *may be required to* so pay or place it before he can be entitled to any order in the suit.

[1877—S. 472.]

Synopsis.

1. **"May be required to so pay or place it."**
2. **Payment to one of the contestants on security.**

1. **"May be required to so pay or place it."**—Where the subject-matter of the dispute is a chose in action its disposition as the Court may direct is a sufficient compliance with the rule.[1] The Court has a discretion to make such orders as regards the subject-matter in dispute and the party is bound to obey the order before he can ask for any relief in the suit. This is a further condition that will be imposed upon the party to test his *bona fides* or disinterestedness. If he is not ready to pay or deliver the property to one of the defendants but disputes his title, the suit is not an interpleader suit.[2] But if the plaintiff complies with the order of the Court he is fully discharged from liability. Thus where the plaintiff pays the amount in dispute into Court for payment to the right person, but the Court pays it to the wrong person the plaintiff cannot be made responsible for the mistake of the Court but is fully discharged from liability.[3]

2. **Payment to one of the contestants on security.**—The money paid into Court cannot be handed over to one of the parties pending the suit even on security after the original plaintiff is discharged and one of the rival defendants to the interpleader suit, is made a plaintiff. It must be kept under the control of the Court available for payment at any time to the successful party.[1]

Order 35, Rule 2—Note 1.

(1) *Robinson* v. *Jenkins*, (1890) 24 Q B D 275 (279): 59 L J Q B 147: 62 L T 439: 38 W R 360 (C A).

(2) *Asan Ali* v. *Sarada Charan*, 1922 Cal 138 (139). See also *Bombay-Baroda and Central India Railway Company* v. *Jacob Elias Sassoon*. (1894) 18 Bom 231 (236) [In the case of a Railway company, the claim for wharfage and demurrage was disallowed].

(3) *Sadasheo Balkrishna* v. *Krishna Rao Deorao*, (1889) 2 C P L R 9 (14).

Note 2.

(1) *Dorasingam* v. *Vyravan Chettiar*, (1913) 19 Ind Cas 219 (219): 13 Mad L Tim 326: 24 Mad L Jour 404: 1913 Mad W N 362

O. 35, R. 3. Notes 1--2.

Procedure where defendant is suing *plaintiff*.

R. **3.** [S. 476.] *Where* any of the defendants in an interpleader suit is actually suing the *plaintiff* in respect of the subject-*matter* of such suit, the Court in which the suit against the *plaintiff* is pending shall, on being informed by the Court *in* which the interpleader suit *has been instituted*, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and *in* so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit.

[*Cf.* R. S. C., O. 57, R. 6.]

Synopsis.

1. Legislative changes.
2. Appeal.

1. Legislative changes.—

Under the old Code proceedings in another suit by the defendant against the plaintiff could be stayed only after a *decree* in the interpleader suit. Under the present rule, such proceedings could be stayed even on the *institution* of the interpleader suit.[1]

2. Appeal.—An appeal lies from an order under this rule. *See* O. 43, R. 1 (*p*).

O. 35, R.4.

Procedure at first hearing.

R. **4.** [S. 473.] (1) At the first hearing the Court may—

(*a*) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; *or*

(*b*) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) *Where the Court* finds that the admissions of the parties or other evidence enable it *to do so, it may* adjudicate the title to the thing claimed.

(3) *Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—*

(*a*) *that an issue or issues between the parties be framed and tried, and*

(*b*) *that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,*

and shall proceed to try the suit in the ordinary manner.

[1877—S. 473. *Cf.* R. S. C., O. 57, R. 7.]

Order 35, Rule 3—Note 1.

[1] *See* the Report of the Select Committee.

Synopsis.

1. Legislative changes.
2. Non-appearance of claimants.
3. Appeal.
4. Court-fee.

1. Legislative changes.—

Sub-S. (3) is new. It has been adopted from the English rule of the Supreme Court, O. 57, R. 7, and substituted for Cl. (*d*) of the old S. 473. The change expressly authorises a Court to make one of the claimants a plaintiff in lieu of, or in addition to the original plaintiff.

The question whether a party to an interpleader issue shall be treated as plaintiff or defendant must be decided by the real merits of the case and not by the mere form of the issue itself.[1] As to the power of a Court to add a party claiming to be interested in an interpleader suit upon his own application, *see* the undermentioned case.[2]

2. Non-appearance of claimants.—On the non-appearance of claimants in a properly instituted interpleader suit the proper course for the Court is laid down under sub-R. (1). It is competent to the Court—

(1) to discharge the plaintiff from all liability to the claimants-defendants in respect of the subject-matter in dispute and dismiss him from the suit,

(2) to direct the plaintiff to pay the amount into Court to the credit of the proper claimant after deducting his costs,

(3) to direct the claimants-defendants to apply for payment and when they appear make one of them a plaintiff and raise an issue, and,

(4) to restrain by injunction either defendant in a proper case from taking any proceeding against the plaintiff.[1]

3. Appeal.—An appeal lies from an order under this rule. *See* O. 43, R. 1, Cl. (*p*). An order dismissing the interpleader suit itself[1] or an adjudication upon the claims of the defendants in the interpleader suit[2] will however be a *decree* and appealable as such under S. 96 of the Code.

4. Court-fee.—A memorandum of appeal from an order under this rule is chargeable with a Court-fee of one rupee under Art. 11, Sch. II of the Court Fees Act, VII of 1870.

A suit, or a memorandum of appeal against a decree declaring the right of one defendant as against another to the money held by the plaintiff, is chargeable with Court-fees under Art. 17 of Sch. II and not under S. 7, Cl. (*iv*), (*c*) of the Court-Fees Act, VII of 1870.[1]

Order 35, Rule 4—Note 1.

(1) *Rhodes* v. *Dawson*, (1886) 16 Q B D 548 (553): 55 L J Q B 134: 34 W R 240 (C A). Ref 46 Cal 156 [Per *Lindley, L J*].

(2) *Rabbaba Khanum* v| *Noorjahan Begum*, (1886) 13 Cal 90 (93).

Note 2.

(1) *Khemchand Isardas* v. *Khairuddin Ranglahi*, (1919) 53 Ind Cas 365 (367): 21 Bom L R 948.

Note 3.

(1) *Orr* v. *Chidambaram*, (1909) 4 Ind Cas 319 (320): 7 Mad L Tim 49: 20 Mad L Jour 36: 33 Mad 220.

(2) *Maharaj Singh* v. *Chhittar Mal*, (1908) 30 All 22 (23, 24): 4 All L J 683: 1907 All W N 270.

Note 4.

(1) *Brijnarain* v. *Balmiki Prasad*, 1921 Pat 305 (306): 2 Pat L Tim 280: 61 Ind Cas 820.

Agents and tenants may *not* institute interpleader suits.

R. **5.** [S. 474.] Nothing in this *Order* shall be *deemed* to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

Illustrations.

(*a*) *A* deposits a box of jewels with *B* as his agent. *C* alleges that the jewels were wrongfully obtained from him by *A*, and claims them from *B*. *B* cannot institute an interpleader suit against *A* and *C*.

(*b*) *A* deposits a box of jewels with *B* as his agent. He then writes to *C* for the purpose of making the jewels a security for a debt due from himself to *C*. *A* afterwards alleges that *C's* debt is satisfied, and *C* alleges the contrary Both claim the jewels from *B*. *B* may institute an interpleader suit against *A* and *C*.

[1877—S. 474.]

Synopsis.

1. **Interpleader suits by agents.**
2. **Interpleader suits by railway company.**
3. **Interpleader suits by tenants.**

Appeal. See Note 3, F.-N. (3).

1. **Interpleader suits by agents.**—This rule declares a prohibition and its concluding part provides an exception. The reason for the rule seems to be that an agent cannot ordinarily dispute the title of his principal. The illustrations to the rule explain the rule so far as the agent is concerned. In illustration (*a*) *C* claims adversely to *A* but not through *A*, whereas in Illustration (*b*), *C* claims through *A*. As to the definition of agent and principal *see* S. 182 of the Indian Contract Act.

2. **Interpleader suits by Railway Company.**—A Railway Company by accepting goods for carriage does not become the agent of the consignor. It merely enters into an independent contract with the consignor. It can therefore file an interpleader suit against the consignor and another party claiming adversely to the consignor.[1]

3. **Interpleader suits by tenants.**—The prohibition that a tenant cannot file an interpleader proceeding against his landlord is based on the principle that he cannot dispute the title of his landlord during the subsistence of the tenancy.[1-a] A tenant cannot therefore bring a suit against his landlord for the purpose of compelling him to interplead with any person other than a person making claim through such landlord.[1] Thus where a tenant passed two *Kabuliats* in favour of two persons in respect of the same land and then being threatened by suits by both of them, instituted a suit praying "that

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Order 35. Rule 5—Note 2.

[1] *Chagan Lal Himatlal* v. *B B and C I Ry.* (1915) 28 Ind Cas 948 (949): 17 Bom L R 339.

Note 3.

[1-a] *See* S. 116 of the Evidence Act. *See also* *Nakchedi* v. *Nakchedi*, (1896) 18 All 829 (831): 1896 All W N 90; *Vedu* v. *Nilkanth*, (1898) 22 Bom 428 (430).

[1] *Bhusan Chandra Ghose* v. *Jaharmal Bhutra*, (1918) 48 Ind Cas 733 (735) Cal; *Koylash Chandra* v. *Goluk Chunder*, (1898) 2 Cal W N 61 (62, 63) [*See*, however, 5 Cal W N 84 N].

O. 35 R.5. Note 3.

the Court may be pleased to declare which defendant has what right in which of the disputed lands, and in what right the plaintiff holds which of the said lands under whom'' it was held by the High Court of Calcutta that the suit was not maintainable.[2]

Where *A* leases certain lands to *B* and on *A's* death, two persons claim rent from *B*, namely *A's* heir on the one hand and a person who alleges that *A* was only a benamidar for *X* whose heir he is, it has been held that the latter must be regarded as claiming through *A* and that therefore *B* can file an interpleader suit compelling the two claimants to interplead with each other.[3]

Where a mortgagee does not deny an assignment by him of his rights under the bond to *X* but only contends that it is a voidable one, the mortgagor may treat the assignee as entitled to the money and is not bound to bring an interpleader suit compelling the mortgagee and *X* to interplead with each other.[4]

O. 35, R. 6, Notes 1—2.

Charge for plaintiff's costs.

R. 6. [S. 475.] *Where* the suit is properly instituted the Court may provide for the costs *of the original* plaintiff by giving him a charge on the thing claimed or in some other effectual way.

[*Cf.* R. S. C., O. 57, R. 15.]

Synopsis.

1. **Scope of the rule.**
2. **Appeal.**

1. **Scope of the rule.**—This rule provides for the award of costs to the original plaintiff. Such costs when awarded will be deducted from the fund on its being brought to Court or will be a first charge upon the fund or subject-matter.[1] But the plaintiff will not be entitled to costs which have been unnecessarily incurred.[2]

2. **Appeal.**—An appeal lies from an order under this rule. *See* O. 43, R. 1 (*p*).

ORDER XXXVI.

SPECIAL CASE.

O. 36, R.1.

Power to state case for Court's opinion.

R. 1. [S. 527.] (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion

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(2) *Bonnerjee* v. *Raj Chandra Dutt*, (1910) 5 Ind Cas 577 (578): 11 Cal L Jour 577: 14 Cal W N 784: 37 Cal 552; *Nanji Koer* v. *Umatul Batul*, (1912) 13 Ind Cas 40 (41): 15 Cal L Jour 653.

(3) *Orr* v. *Chidambaram Chetty*, (1909) 4 Ind Cas 319 (321): 7 Mad L Tim 49: 20 Mad L Jour 86: 33 Mad 220 [Order dismissing the suit is a decree within the meaning of S. 2 and therefore appealable].

(4) *Venkatasubba Ayyar* v. *Subbarathinam Ayyar*, (1914) 23 Ind Cas 607 (609): 1 Mad L W 419: 15 Mad L Tim 331: 27 Mad L Jour 134.

Order 35. Rule 6—Note 1

(1) *Seare* v. *Matthews*, (1883) W N 176: 19 Q B D 77 N; *Bombay-Baroda and Central India Railway Company* v. *Sassoon*, (1893) 18 Bom 231 (236); *The Secretary of State* v. *Mir Muhammad Husain*, (1863) 1 Mad H C 360 (361).

(2) *Crawford* v. *Fisher*, (1842) 1 Hare 436 (444): 11 L J Ch 273: 6 Jur 576; *Scottish Union Insurance Co* v. *Steele*, (1864) 9 L T 677.

of the Court, and providing that, upon the finding of the Court with respect to such question,—

(*a*) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them; or

(*b*) some property, moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them ; or

(*c*) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this *rule* shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and *specify such* documents as may be necessary to enable the Court to decide the question raised thereby.

[1877—S. 527, 1859—S. 328; R. S. C., O. 34, Rr. 1, 6 and 9. *See* S. 90, C. P. C.]

Synopsis.

1. **Special case.**

"Agreement in writing." See Note 1, Pt. (1).

1. **Special case.**—This order lays down the rules of procedure in respect of the statement of special case, its hearing, and other matters connected therewith and generally referred to in S. 90 of the Code. Rr. 1 and 2 prescribe the form and contents of an agreement to state a case. So far as possible, facts should be stated in a chronological order and in the form of a narrative. Material documents should be referred to, and their effect or contents stated. The statement must conclude with a formulation of the question to be decided by the Court and must be signed by the parties and their counsel, if any.[1] Where the agreement is duly entered into and filed in the Court having jurisdiction, the proceeding will be registered as a suit and heard and disposed of as such. *See* Rr. 2 to 5.

Rule 5 enacts that the Court hearing a special case must be satisfied on three points:—

1. *That the parties have a* bona fide *interest in the question stated.*—The right to state a case for the opinion of the Court is not, therefore, intended to enable parties to refer to the Court any *hypothetical* questions or matters of mere academic interest involving no substantial interest to the parties.[2]

Order 36, Rule 1—Note 1.

[1] *See* Annual Practice, 1930 Edn., p. 529.

[2] *Glasgow Navigation Co* v. *Iron Ore Co.* 1910 A C 293: 79 L J P C 83: 102 L T 435: 11 Asp M L C 387: 1910 S C (H L) 63: 47 Sc L R 507. See also *Trustees of the Port of Bombay* v. *Municipal Corporation, Bombay,* 1930 Bom 232 (234, 235): 82 Bom L R 416: 125 Ind Cas 897: 54 Bom 825; *Bright* v. *Tyndall,* (1876) 25 W R (Eng) 109: 4 Ch D 189 [Question as to what would be the rights of parties who were not in existence in circumstances which might never arise].

O. 36, R.1, Note 1.

2. *That the agreement was duly executed by the parties.*—The Court will not, therefore, interfere in a case where the parties have not provided in the agreement for an undertaking for payment of money, delivery of property, or the doing or the refraining from doing of any particular act in the event of a finding by the Court as required by R. 1.[3]

3. *That the case is fit to be decided.*—A case is not fit to be decided unless the successful party will be able either to execute the decree or to base a suit upon the decree passed in it.[3-a] Where there are special tribunals to try the question between the parties, as for example, a question relating to the adequate provision by a municipal corporation for the supply of water and for the protection against fire as regards an estate owned by a Port Trust, a special case cannot be stated for the opinion of the Court. Nor will a mere declaration of the rights involved in such a case be a fit point for a special case.[4] So also, a question which the Court is not competent to decide in an ordinary suit cannot be stated as special case.[5]

For instances of questions that can be stated as a special case *see* the undermentioned cases.[6]

As to the re-opening of a decided special case, *see* S. 90, Note 2 and the undermentioned cases.[7]

The provisions of this Order govern the procedure in regard to any dispute between two or more Government Wards referred to a Court for decision. *See* the Bombay Court of Wards Act (I of 1905). These provisions do not apply to proceedings under the Agra Tenancy Act (III of 1926). *See* Sch. II, List I of the Act.

O. 36, R.2.

***Where* value of subject matter must be stated.**

R. 2. [S. 528.] *Where* the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.

[1877—S. 528; 1859—S. 328.]

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(3) *Trustees of the Port of Bombay* v. *Municipal Corporation of Bombay*, 1930 Bom 232 32 Bom L R 416: 125 Ind Cas 897: 54 Bom 825.

(3-a) *Trustees of the Port of Bombay* v. *Municipal Corporation of Bombay*, 1930 Bom 232 (234): 32 Bom L R 416: 125 Ind Cas 897: 54 Bom 825.

(4) *Trustees of the Port of Bombay* v. *Municipal Corporation of Bombay*, 1930 Bom 232 (234, 235): 32 Bom L R 416: 125 Ind Cas 897: 54 Bom 825 [Special remedy by an application to the Governor-General in Council to act under Ss. 518 and 520, Municipal Act, Bombay].

(5) *Bombay Local Board* v. *West Kent Main Sewerage Board*, (1882) 9 Q B D 518. See also *Trustees of the Port of Bombay* v. *Municipal Corporation*, 1930 Bom 232 (235): 32 Bom L R 416: 125 Ind Cas 897: 54 Bom 825.

(6) *Fatmabibi* v. *A.-G. of Bombay*, (1881-82) 6 Bom 42 (48, 49): 6 Ind Jur 253 [The validity of a trust deed by a Sunni Mahomedan]; *B B Trading Co, Ltd* v. *Dorabji*, (1886) 10 Bom 415 (417, 420) [Powers of shareholders of a trading corporation to interfere with directors' discretion with declaration of dividend]; *Dinshaw* v. *Dinshaw*, (1907) 31 Bom 472 (475, 477)): 9 Bom L R 488 [Effect of a will by a Parsi upon a deed of settlement of a subsequent date], *Kraal* v. *Whymper*, (1890) 17 Cal 786 (803) [Whether subscribers to a general family pension fund are a company, association or partnership for the purpose of carrying on business other than that of banking and whether they form a company under S. 4 of the Indian Companies Act, 1882].

(7) *Hamilton Tracer & Co* v. *Staley Radford & Co*, (1884) *Solicitors' Journal* 478; *Monie* v. *Robert Scott*, (1918) 47 Ind Cas 642 (645): 20 Bom L R 839: 43 Bom 281.

O. 36. R. 3.

Agreement to be filed and *registered* as suit.

R. **3.** [S. 529.] (1) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

[1877—S. 529; 1859—S. 329.]

O. 36. R. 4.

Parties to be subject to Court's jurisdiction.

R. **4.** [S. 530.] *Where* the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein.

[1877—S. 530; 1859—S. 330.]

O. 36. R. 5.

Hearing and disposal of case.

R. **5.** [S. 531.] (1) The case shall be set down for hearing as a suit instituted *in the ordinary manner*, *and* the provisions of *this Code* shall apply to such suits so far as the same are applicable.

(2) *Where* the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,—

(*a*) that the agreement was duly executed by them,

(*b*) that they have a *bona fide* interest in the question stated therein, and

(*c*) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so *pronounced* a decree shall follow.

[1877—S. 531; 1859—S. 331.]

Synopsis.

1. **Hearing and disposal of case.**
2. **Appeal.**

1. **Hearing and disposal of case.**—*See also* Note 1 to R. 1. This rule enacts that the provisions of the Code, so far as may be applicable, shall apply to a special case registered as a suit. An infant born after *a* special *case* is set down for hearing must be added as a party.[1]

2. **Appeal**.—The decree passed upon a special case is open to appeal under S. 96, C.P.C. But if in a pending suit the parties agree to abide by the decision of the Court and refer the matters in dispute to the Court, the decree cannot be appealed against as it is in the nature of an arbitration award.[1]

ORDER XXXVII.

SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS.

Application of *Order.*

R. **1**. [S. 538.] *This Order shall* apply only to—

(*a*) the High Courts of Judicature at Fort William, Madras and Bombay;

(*b*) the Chief Court of Lower Burma;

(*c*) *the Court of the Judicial Commissioner of Sind*; *and*

(*d*) any other Court *to which sections* 532 *to* 537 *of the Code of Civil Procedure*, 1882, *have been already applied.*

Local Amendments.

ALLAHABAD.

Add the following Cl. (*e*):—

"(*e*) any Court in the province of Agra exercising the powers of a Small Cause Court."

LAHORE.

The word "and" and new Cl. (*e*) were *added*:—

"and

(*e*) the Courts of the District Judge and Subordinate Judges of the First Class of the Delhi Province."

Synopsis.

1. **Legislative changes.**
2. **Scope and applicability of the rule.**
3. **Courts of Small Causes.**
4. **Courts in which suits on negotiable instruments should be instituted. See Note 2, ante.**
5. **Cl. (e)—Lahore High Court.**

1. Legislative changes:—

1. The words "the Courts of Small Causes in Calcutta, Madras and Bombay" which occurred in Cl. (*c*) of the old S. 538 have been omitted as their

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Order 36, Rule 5—Note 1.

[1] See also *Barnaby* v. *Tassell*, (1870) L R 11 Eq 363 [Born a few days before but omitted by accident]; *Savage* v. *Snell*, (1871) L R 11 Eq 264: 40 L J Ch 216: 23 L T 801: 19 W R 382. But see *Palmer* v. *Flower*, (1871) 13 Eq 250: 41 L J Ch 193: 25 L T 816: 20 W R 174.

Note 2.

[1] *Sayed Zaman* v. *Kalabai*, (1899) 23 Bom 752 (755): 1 Bom L R 366. *Burges* v. *Morton*, 1896 A C 136 referred to. *Kumar Saradindu Roy* v. *Bhagobati Debya*, (1906) 10 Cal W N 835 (838).

O. 37, R. 1,
Notes
1—3.

"appropriate place will be in rules under the Presidency Towns Small Cause Courts Act, 1882". (Report of the Select Committee.)

2. The words "the Court of the Judge of Karachi" which occurred in Cl. (*d*) of the old section have been omitted and the words "The Court of the Judicial Commissioner of Sind" have been newly added as Cl. (*c*) to the present rule.

3. Cl. (*e*) and the last three paragraphs of the old section have been omitted and the present Cl. (*d*) newly added.

2. **Scope and applicability of the rule.**—The provisions of this order are merely rules of procedure to be applied after the plaint is admitted. They do not alter in any way the nature of the suit or the jurisdiction of Courts.[1] Consequently, suits can only be filed in the Courts which have jurisdiction to try them.[1-a] If they do not happen to be Courts to which the provisions of this order have been applied under Cl. (*d*) of this rule, the suit will have to be tried in the ordinary manner.[2]

Section 192, Cl. (*a*) of the Madras Estates Land Act, 1908 excludes the applicability of this order to suits, appeals and other proceedings under that Act.

3. **Courts of Small Causes.**—By virtue of O. 51, *infra* this order will not apply to Presidency Small Cause Courts save *as otherwise provided* by the Presidency Small Cause Courts Act, XV of 1882. Under S. 9 of the latter Act, the High Court, may from time to time prescribe the procedure to be followed by the Small Cause Court and may, therefore, extend the rules of this order also to such Courts. As regards the Provincial Small Cause Courts, S. 17 of the Provincial Small Cause Courts Act, IX of 1887 read with O. 50 of this Code makes it clear that this order will apply to such Courts if the conditions mentioned in this rule are satisfied. In other words, if a Provincial Small Cause Court is a Court coming within Cl. (*d*) of this rule, it can follow the procedure provided by this order, but not otherwise.

Where a Small Cause Court has exclusive jurisdiction in a suit, the fact that the Court has no power under this order to try it summarily will not enable the suit being filed in some other Court which has such power. The only proper course is to file the suit in the ordinary way in that Small Cause Court.[1]

A Subordinate Judge who is presiding over an ordinary Sub-Court but who is exercising Small Cause powers, cannot at that time be taken to be exercising his original jurisdiction and cannot, therefore, try suits summarily on the ground of his being a Subordinate Judge.[2]

Order 37, Rule 1—Note 2

[1] *Wor Lee Lone* v. *A. Rahman*, (1917) 42 Ind. Cas 839 (839): 9 L B R 69: 10 Bur L Tim 165.

[1-a] *Doulatram Valabdas* v. *Halo Klanya*, (1912) 13 Ind Cas 244 (249): 5 Sind L R 155; *Chandra Kant Roy* v. *N. P. Pogose*, (1869) 8 Beng L R O C 83.

[2] *Doulatram* v. *Halo Kanya*, (1912) 13 Ind Cas 244 (246, 249): 5 Sind L R 155.

Note 3.

[1] *Doulatram* v. *Halo Kanhya*, (1912) 13 Ind Cas 244 (249): 5 Sind L R. 155; *Wor Lee Lone* v. *A. Rahman*, (1917) 42 Ind Cas 839 (839): 9 L B R 69: 10 Bur L Tim 165. [The Chief Court has no jurisdiction to entertain a suit cognisable by the Court of Small Causes.]

[2] *Kutbuddeen Sahib* v. *Periyanayaga Padayachi*, 1928 Mad 517 (518): 27 Mad L W. 450: 51 Mad 491: 55 Mad L Jour 114: 109 Ind Cas 446.

O. 37, R.1, Notes 4—5.

4. **Courts in which suits on negotiable instruments should be instituted.**—*See* Note 2, *ante*.

5. **Clause (e)—Lahore High Court.**—Clause (*e*) added to this rule by the Lahore High Court is not *ultra vires*, notwithstanding that it is not one of the Courts mentioned in Cl. (*a*) of this rule.[1]

O. 37, R.2.

Institution of summary suits upon bills of exchange, etc.

R. 2. [S. 532.] (1) All suits upon bills of exchange, hundies or promissory notes may, in case the plaintiff desires to proceed *hereunder*, be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No. 4 *in Appendix B* or in such other form as may *be* from time to time prescribed.

(2) In any case in which the plaint and summons are in such forms, respectively the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter *provided* so to appear and defend; and, in default of his obtaining such leave or of *his* appearance and defence in pursuance thereof, *the allegations in the plaint shall be deemed to be admitted, and the plaintiff* shall be entitled to a decree.

(*a*) for the principal sum due on the instrument and for interest calculated in accordance with the provisions of section 79 or section 80, as the case may be, of the Negotiable Instruments Act, 1881, up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up-to-date of the decree at the same rate or at such other rate as the Court thinks fit; and

(*b*) for such subsequent interest, if any, as the Court may order under section 34 of this Code; and

(*c*) for such sum for costs as may be prescribed:

Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way.

(3) A decree passed under this rule may be executed forthwith.

[1877—S. 532.]

Note 5.

[1] *Bhondu Mal* v. *Muhamed Ahmed Mushtaq Ahmad*, 1927 Lah 174 (175, 176): 9 Lah L Jour 57: 99 Ind Cas 648, 8 Lah 156: 28 Pun L R 538.

Local Amendments.

BOMBAY.

In sub-R. (1) of R. 2 of O. 37, *after* the words "promissory notes" the following words shall be *inserted*, namely:—

> "and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising on a contract express or implied, or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only."

RANGOON.

In O. 37, R. 2, sub-R. (2) the following shall be inserted after the words "pursuance thereof":—"Or of his applying for such leave within ten days from the service of the summons on him and on proof that the summons was duly served on him more than ten days before".

Synopsis.

1. Legislative changes.
2. Summary suits and ordinary suits.
3. Form of summons in summary suit.
4. Limitation for summary suits.
5. "Unless he obtains leave."
6. "Allegations in the plaint shall be deemed to be admitted."
7. Limitation for application for leave to defend.
8. Interest.
9. Negotiable instruments—Meaning of.
10. Suit against firm. See Note 5, supra.

Scope and object. See Note 2.

1. Legislative changes.—

1. The words "In any Court to which this section applies" and the words "High Court" which occurred in the first paragraph of S. 532 of the old Code have been omitted.

2. The words "The allegations in the plaint shall be deemed to have been admitted" have been newly added in substitution of the *explanation* annexed to the old section; and the words "by a Rule of the High Court" which occurred in the old section have been omitted.

3. The provision for immediate execution of decree at the end of the second paragraph of S. 532 has been incorporated in sub-R. (3) with the word "executed" substituted for the word "enforced".

4. The third paragraph of the old section has been omitted.

2. Summary Suits and Ordinary Suits.—The rule is only an enabling provision. A plaintiff wishing to enforce a bill of exchange, a hundi or a promissory note, may, at his option, bring a summary suit under this order, or a suit under the ordinary procedure. A summary suit, however, can only be brought in the Courts mentioned in R. 1 and within one year from the date when the debt becomes due.[1] But the corresponding advantage to the plaintiff choosing this procedure is that the defendant is not entitled as of right to be heard in defence. He must apply for leave within 10 days of the service of summons upon him[2] and if he does not apply for such leave or if the leave is refused, the plaintiff is entitled to a decree.

Order 37, Rule 2—Note 2.

[1] Art 5 of Sec I of the Limitation Act as amended by Act, XXX of 1925.

[2] Art 159 of Sch I of the Limitation Act.

O. 37, R.2, Notes 2—5.

Suits under the Madras Estates Land Act (I of 1908) are not governed by this order. *See* S. 192-A of the Act.

3. **Form of summons in summary suit.**—*See* Form No. 4 of Appendix B, *infra*. Where the High Court of Madras framed rules under S. 9 of the Presidency Small Cause Courts Act, XV of 1882 prescribing the form of summons in summary suits under that Act, it was held that the fixing of 3 days thereon as the time within which the defendant should apply for leave to defend, was unreasonable and *ultra vires*.[1]

The summons under this rule should be served in the same manner as is provided for the service of ordinary summons under O. 5.[2]

4. **Limitation for summary suits.**—Art. 5 of the Limitation Act, 1877 prescribed a period of 6 months for suits on *negotiable instruments instituted under Chapter* 39 *of the Old Code* (corresponding to O. 37). There was no specific provision for other summary suits such as those specified in S. 128 of this Code. When this latter section was newly introduced in the present Code in 1908, Art. 5 was also amended by the Limitation Act of 1908 by providing a period of 6 months for suits "under the summary procedure *referred to in S.* 128 (2) (*f*) of the *Code of Civil Procedure* 1908." The intention of the Legislature obviously being to provide for all summary suits under the Code. It was, however, held by the High Court of Calcutta in the undermentioned case[1] that the words "summary procedure referred to in S. 128 (2) (*f*) of the Code of Civil Procedure" did not include suits under O. 37. Art. 5 has, in view of this, been again amended by Act, XXX of 1925, so as to include suits under this order. The period of 6 months has also been increased to one year. At present, therefore, a summary suit whether under this order or under S. 128 of the Code should be filed within one year from the date when the debt becomes payable or when the property becomes recoverable.[2]

5. "**Unless he obtains leave**".—A defendant who has obtained no leave to defend the suit under this rule, cannot be allowed to appear at or participate in the trial of the suit. Thus he cannot appear at the hearing and ask the Court to make the decree amount payable in instalments.[1] Where, in a summary suit against a firm under O. 30 of the Code, a partner enters appearance, he should obtain leave to defend as required by this rule.[2] Before granting a decree under this rule the Court should be satisfied that the defendant has had full opportunity to obtain leave to defend.[3]

Note 3.

[1] *Kannisa* v. *Devi Chand*, 1924 Mad 46 (47, 48): 46 Mad 847: 45 Mad L Jour 699: 1923 Mad W N 750: 18 Mad L W 414: 75 Ind Cas 390.

[2] See *Schiller* v. *Marker*, (1866) 1 Ind Jur N S 283 [Case under Act, V of 1866]

Note 4.

[1] *Robindra Nath Dutt* v. *Abdul Ahad & Co*, 1925 Cal 781 (782): 29 Cal W N 589: 41 Cal L Jour 368: 88 Ind Cas 406: 52 Cal 954.

[2] *Jetha Devji & Co* v. *Firm of Sriram Moolchand*, 1927 Sind 90 (92): 98 Ind Cas 78: 21 Sind L R 257.

Note 5.

[1] *Pestonji* v. *Jamshedji*, 1926 Bom 250 (251): 28 Bom L R 138: 94 Ind Cas 9: 50 Bom 262. [The only way open to such a defendant is to apply for instalments either under O 20, R 11 (2) or under O 37, R 4 of the Civil Procedure Code].

[2] *Ramanujacharry* v. *Pohoomal Bros*, 1926 Bom 585 (588): 50 Bom 665: 28 Bom L R 1275: 99 Ind Cas 495.

[3] *Grob* v. *Palmer*, (1866) 1 Ind Jur N S 393.

O. 37, R. 2, Notes 6—8.

6. **"Allegations in the plaint shall be deemed to be admitted".**—This clause is new and has been substituted for the explanation contained in the old section. It embodies an exception to the fundamental principle that a plaintiff must prove the case with which he comes to Court and dispenses with such proof in view of the special nature of the documents mentioned in the rule.[1]

The effect of this provision is that in the special class of suits under consideration, where leave is not applied for or is applied for and refused, the plaintiff gets a decree without adducing any evidence, but on mere proof of service of summons.[2]

7. **Limitation for application for leave to defend.**—An application for leave to defend should be made within 10 days of the date of service of summons on the defendant.[1] This period which is fixed by the Limitation Act, cannot be extended by the Court under the provisions of S. 148 of the Code.[2] The High Court, may, however, under its rule making powers, extend S. 5 of the Limitation Act, to applications under this rule, and where it has been so extended, the Court may, for sufficient cause, excuse the delay in making the application. The Bombay High Court has so extended S. 5 of the Limitation Act, to applications under this rule. It has also been held by the same High Court that under R. 193 of the High Court Rules, a discretion is vested in the Chamber Judge, in a fit case, to extend the period of 10 days allowed under that rule in cases to which this order is applicable.[3]

Where an *ex parte* decree is passed in a summary suit and the defendant shows sufficient cause for his inability to appear and apply in time for leave to defend, the *ex parte* decree will be set aside.[4]

8. **Interest.**—Before the amendment of this rule by Act, XXX of 1926 interest was awardable *at the rate specified*, if any, *up to the date of the decree.* Under the present rule as amended by Act XXX of 1926 interest is to be awarded as follows:—

(*a*) Up to the institution of the suit, in accordance with the provisions of S. 79 or S. 80 of the Negotiable Instruments Act, 1881, *i.e.*, at the rate specified *in the document*, or where no rate is so specified, at 6 per cent. per annum.[1]

Note 6.

(1) *J B Rouss & Co* v. *C R Scriven*, (1916) 34 Ind Cas 235 (237): 20 Cal W N 1192: 43 Cal 1001 F B.

(2) See *Remfry* v. *Shillingford*, (1876) 1 Cal 130 (132).

Note 7.

(1) Art 159 of Sch I of the Limitation Act, 1908; *Madhub Lall* v. *Woopendra Narain*, (1895) 23 Cal 573 (576). [In determining any question as to limitation arising on an application under this rule, the date shown in the sheriff's return as the date of service, should only be referred to]; *Giri Mohun* v. *Amarendra Nath*, (1903) 7 Cal W N 252.

(2) *Quazie Mahumdar Rohman* v. *Sarat Chandra Dut*, (1901) 5 Cal W N 259 (262); *Madhub Lall* v. *Woopendranarain Sen*, (1896) 23 Cal 573 (575). But see *Groom* v. *Wilson*, (1877-78) 3 Cal 539 (539) [Which is a case under the Code of 1877]; *Crob* v. *Palmer*, (1866) 1 Ind Jur N S 395.

(3) *Mohunlal* v. *Duruwala*, 1926 Bom 578 (578): 28 Bom L R 1080: 97 Ind Cas 766.

(4) *The Firm of Jamnadas & Co* v. *A. E. Gayer*, (1911) 11 Ind Cas 433 (434); *Lakmidas Vithaldas* v. *Ebrahim Osman*, (1877-78) 2 Bom 644 (647, 648) [Case under Act V of 1866].

Note 8.

(1) *Kadar Buksh Hazir Buksh* v. *Shaikh Sirajuddin*, 1922 Cal 513 (514): 49 Cal 716: 70 Ind Cas 130; [No rate specified—Only six per cent can be granted notwithstanding oral agreement to the contrary]. See also *Bhupati* v. *Sourendra Mohan*, (1903) 30 Cal 446 (448): 7 Cal W N 412; see also *De Souza* v. *Rangaian*, (1870-71) 6 Mad H C R 257 (257).

(*b*) From the institution of the suit up to the date of the decree, at the same rate as mentioned above or such other rate as the Court thinks fit.

(*c*) From the date of the decree up to date of realisation as the Court may order under S. 34 of the Code.

9. **Negotiable Instrument—Meaning of.**—*See* S. 13 of the Negotiable Instruments Act, 1881 and the undermentioned cases.[1] For the definition of a promissory note and a bill of Exchange, *see* Ss. 4 and 5 of the said Act.

10. **Suit against firm.**—*See* Note 5, *supra*.

Defendant showing defence on merits to have leave to appear.

R. 3. [S. 533] (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) *Leave to defend may be given unconditionally or subject to* such terms as to *payment into Court, giving* security, framing and recording issues or otherwise as the Court thinks fit.

[1877—S. 533.]

Local Amendments.

BOMBAY.

In R. 3 of O. 37, the following sub-R. (3) shall be *inserted*:—

"(3) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-R. (1)."

LAHORE.

The following sub-rule was added:—

"(3) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-R. (1)."

Synopsis.

1. Legislative changes.
2. The affidavit must disclose a defence.
3. Leave when granted conditionally —Sub-R. (2).
4. Limitation. See Note 7 to R. 2, supra.
5. Appeal.

1. **Legislative changes.**—

1. The words "upon the defendant paying into Court the sum mentioned in the summons, or" which occurred in the old S. 533, have been omitted. As to the effect of this omission, *see* Note 2, *infra*.

Note 9.

[1] *Dhondbhat Narharbhat* v. *Atmaram Moreshuar*, (1889) 13 Bom 669 (670); *Jetha Parkha* v. *Ram Chandra*, (1892) 16 Bom 689 (695); *Ramachandra* v. *Sesha*, (1894) 17 Mad 85 (86); *Narayanasami Mudaliar* v. *Lokambalammal*, (1900) 23 Mad 156-*n*: 7 Mad L Jour 220; *Bharata Pishardoi* v. *Vasudevan*, (1904) 27 Mad 1 (3): 14 Mad L Jour 65 F B; *East India Bank* v. *Vullie Goolwany*, (1866) 1 Ind Jur N S 247.

O. 37, R. 3,
Notes
1—2

2. The words "and on such terms as to security, framing and recording issues, or otherwise, as the Court thinks fit" which occurred at the end of the old section have been omitted and the present sub-R. (2) has been substituted in their place. *See* Note 4, *infra.*

2. The affidavit must disclose a defence.—The application for leave to defend must be supported by an affidavit disclosing a defence.[1] If the affidavit discloses a triable issue, that is, a plea which is at least plausible then leave should be granted,[2] whether the defence is a legal or an equitable one[3] and even though it may not ultimately turn out to be a good defence.[4] On the other hand, if no triable issue is disclosed by the affidavit leave should be refused.[5]

Leave to defend was granted in the following cases:—

(*a*) Where the claim was based on an endorsed promissory note and the defendant pleaded that the endorsement was a forgery.[6]

(*b*) Where a suit is instituted against a member of a joint Hindu family on a *hundi* drawn by the manager thereof, and the defendant pleaded that no notice of dishonour was given to the drawer.[7]

(*c*) Where the defendant prefers a cross-claim for damages for wrongful arrest before judgment in the very suit instituted against him.[8]

Leave to defend was refused in the following cases:—

(*a*) Where the defendant's plea was that the plaintiff is only a *benamidar* for another.[9]

(*b*) Where the defendant pleaded partial failure of consideration which is not ascertainable in money without collateral enquiry.[10]

(*c*) Where the defendant pleaded that the note sued on formed part of an account of the mutual dealings between him, the plaintiff and other parties.[11]

(*d*) Where the defendant pleaded a collateral agreement to discharge a promissory note not inconsistent with the note which contained an absolute promise to pay.[12]

Order 37, Rule 3—Note 2.

(1) *Kooverbhan* v. *Madan Das,* (1919) 49 Ind Cas 193 (194): 12 Sind L R 70.

(2) *Pera Mipana Markaya* v. *Subramania,* 1924 Mad 612 (613): 46 Mad L Jour 255: 19 Mad L W 342: 34 Mad L Tim 310: 1924 Mad W N 240: 78 Ind Cas 505.

(3) *Simon* v. *Hakim* (1896) 19 Mad 368 (375).

(4) *Volintzy* v. *Narayan Singh,* (1871) 6 Ben L R App 64

(5) *Shyam Sundar* v. *Titaghar Paper Mills Co. Ltd,* 1928 Cal 123 (124): 46 Cal L Jour 566: 32 Cal W N 125: 106 Ind Cas 848

(6) *Hansraj Parmanand* v. *Ruttonji Walji,* (1900) 24 Bom 65 (73): 1 Bom L R 734; *Chandra Kali Debi* v. *E. P. Chaman,* (1905) 32 Cal 799 (815): 9 Cal W N 443.

(7) *Krishnaset* v. *Hari Valji,* (1896) 20 Bom 488 (490).

(8) *Roulet* v. *Fetterle,* (1894) 18 Bom 717 (720).

(9) *Subba Narayana* v. *Ramaswami,* (1907) 30 Mad 88 (91): 1 Mad L Tim 877: 16 Mad L Jour 508 F B; *Ramanuja* v. *Sadagopa,* (1905) 28 Mad 205 (207): 15 Mad L Jour 249. See also *Subba Narayana* v. *Ramaswami,* (1905) 28 Mad 244 (254).

(10) *Sethna* v. *Ladak Khaku,* (1910) 8 Ind Cas 924 (925): 4 Sind L R 147; *Issur Singh* v. *Bergmann,* (1903) 30 Cal 627 (630).

(11) *Kishomal Kirpomal* v. *Vishnudas Sukhramdas,* (1911) 9 Ind Cas 299 (300) Sind.

(12) *Simon* v. *Hakim Mahomed Sheriff,* (1896) 19 Mad 368 (375). [An agreement to liquidate the amount due by fortnightly consignments was a collateral undertaking consistent with the

O. 37, R. 3, Notes 2—5.

(*e*) Where the defendant made a counter claim for damages caused by the failure of the plaintiff to supply goods of the right sort.[13]

(*f*) *See also* the following case.[14]

3. **Leave when granted conditionally—Sub-R. 2.**—The Court has a discretion in the matter of attaching conditions to the grant of leave to defend. As a rule where a valid defence or triable issue is disclosed, the leave should be granted unconditionally.[1] It is only in cases where there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only to obtain further time, that conditions should be attached to the grant of the leave.[2] In such cases the proper course is to grant the leave on the defendant depositing the money into Court.[3]

In cases where money is deposited as a condition to obtaining leave to defend, the decretal amount will be a charge on such deposit.[4]

4. **Limitation.**—*See* Note 7 to R. 2, *supra*.

5. **Appeal.**—The High Court of Bombay has held that an order by a Judge in Chambers, granting leave on a condition which the defendant is not able to comply with, is a judgment within the meaning of Cl. 15 of the Letters Patent and hence appealable under that clause.[1] But a mere order to give security as a condition to the grant of leave has been held by the Calcutta High Court not to be a "judgment" and hence not appealable.[2]

O. 37, R. 4.

Power to set aside decree.

R. 4. [S. 534.] After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to *the defendant to* appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

[1877—S. 534.]

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existence of the note containing an absolute promise to pay—Such collateral agreement was no answer to the suit on the promissory note and the plaintiffs were entitled to a decree.]

(13) *Weiss Biheller & Brooks, Ltd* v. *Firm of Habibhoy Gangji*, 1929 Notes 28 (c): 120 Ind Cas 528.

(14) *Phoenix Trading Co, Ltd* v. *F R B Divanchand Sihal & Sons*, 1929 Sind 172 (172): 117 Ind Cas 160: 23 Sind L R 479.

Note 3.

(1) *Olayatt Kunchu* v. *Usman Sait*, 1929 Mad 841 (841): 119 Ind Cas 64.

(2) *Peria Miyana Marakayar* v. *Subramania Ayyar*, 1924 Mad 612 (613, 614): 46 Mad L Jour 255: 19 Mad L W 342: 34 Mad L Tim 310: 1924 Mad W N 240: 78 Ind Cas 505; *Lloyds Bank, Ltd* v. *F O Devidas Kallian Das*, 1927 Sind 60 (61): 98 Ind Cas 72.

(3) *Chakrapany Chettiar* v. *Kamalavalli Ammal*, (1921) 60 Ind Cas 639 (640): 12 Mad L W 712; *Vonlintzgy* v. *Narayan Singh*, (1871) 6 Ben L R App 64.

(4) *Gopalayyar* v. *Thiruvengadam Pillai*, (1917) 38 Ind Cas 481 (482): 5 Mad L W 407: 32 Mad L Jour 503. See also *East India Cigarette Manufacturing Co Ltd* v. *Anand Mohan Basak*, (1920) 58 Ind Cas 10 (11); 24 Cal W N 401. [An order charging the property of an insolvent debtor for the repayment of plaintiff's claim on conditions of granting permission to defend his suit is a permanent charge till repayment of claim].

Note 5.

(1) *Ramanlal* v. *Chunilal*, 1932 Bom 163 (165): 34 Bom L R 252: 137 Ind Cas 397: 56 Bom 268: See also *Madanlal* v. *Kedarnath*, 1930 Bom 364 (364, 365): 32 Bom L R 660: 125 Ind Cas 438.

(2) *Sukhlal* v. *Eastern Bank*, (1915) 31 Ind Cas 238 (238): 22 Cal L Jour 41: 42 Cal 735.

O. 37, R.4, Note 1.

Synopsis.

1. **Power to set aside decree.**

1. **Power to set aside decree.**—A defendant who has not obtained leave to defend will not be allowed to appear at the hearing of the suit. In such cases a decree should follow. Thereafter the remedy of the defendant is to apply under O. 20, R. 11 or to apply under this rule to set aside the decree.[1] If, on such application, the defendant satisfies the Court about his being prevented by sufficient cause from appearing in time and getting leave to defend, the decree against him will be set aside and he will be allowed to contest the claim.[2]

O. 37, R.5.

Power to order bill, etc., to be deposited with officer of Court.

R. 5. [S. 535.] In any proceeding under this *Order* the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

O. 37, R.6.

Recovery of cost of noting non-acceptance of dishonoured bill or note.

R. 6. [S. 536.] The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this *Order* for the recovery of the amount of such bill or note.

[1877—S. 536.]

O. 37, R.7.

Procedure in suits.

R. 7. [S. 537.] *Save* as provided by *this Order*, the procedure in suits *hereunder* shall be the same as the procedure in suits instituted *in the ordinary manner*.

Synopsis.

1. **Procedure in suits.**

Order 37, Rule 4—Note 1.

(1) *Pestonji* v. *Jamshedji*, 1926 Bom 250 (251): 28 Bom L R 158: 94 Ind Cas 9: 50 Bom 262; *Quazi Mahmudar Rahman* v. *Sarat Chandra*, (1901) 5 Cal W N 259 (260); *Firm of Jamnadas* v. *A E Gayer*, (1911) 11 Ind Cas 433 (434); *Joseph* v. *Solano*, (1872) 18 Suth W R 424 (428): 9 Beng L R 441.

(2) *The Firm of Jamnadas & Co* v. *A E Gayer*, (1911) 11 Ind Cas 433 (434): 112 Pun W R 1911; *Chandrakant* v. *Pogose*, (1901) 8 Beng L R O C 83; *Madhu Lal* v. *Woopendranarain*, (1896) 23 Cal 573 (575) [The question as to what took place upon the occasion of the service of summons by the Sheriff is one which may properly be taken into consideration on an application under this section to set aside the decree]; *Ewing & Co* v. *Gosaidas*, (1869) 3 Beng L R App 7. [But irregular service of summons on two out of three defendants to an action brought on a joint promissory note does not give the defendant properly served any ground to question the decree passed against him].

O. 37, R.7, Note 1.

1. **Procedure in suits.**—The Court has power, under O. 6, R. 17 of the Code to amend the plaint filed under this Order, so as to connect it with an ordinary suit.[1]

ORDER XXXVIII.

ARREST AND ATTACHMENT BEFORE JUDGMENT.

Arrest before Judgment.

O. 38, R.1.

Where defendant may be called upon to furnish security for appearance.

R. **1.** [Ss. 477, 478.] *Where* at any stage of a suit, other than a suit *of the nature referred to in section* 16, *clauses* (*a*) *to* (*d*), the Court *is* satisfied, by affidavit or otherwise,—

(*a*) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—

(*i*) has absconded or left the *local limits of the* jurisdiction of the Court, or

(*ii*) is about to abscond or leave the *local limits of the* jurisdiction of the Court, or

(*iii*) has disposed of or removed from the *local limits of the* jurisdiction of the Court his property or any part thereof, or

(*b*) that the defendant is about to leave British India under circumstances *affording reasonable probability that* the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not *furnish* security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

[1877—Ss. 477, 478; 1859—Ss. 74, 75. *See* Ss. 94 and 95.]

Order 37, Rule 7—Note 1.

[1] *Bishen Sahai* v. *Abdul Sattar*, 1930 Lah 559 (560): 125 I C 329.

Synopsis.

1. Legislative changes.
2. Scope of the Rule and of the Order.
3. Distinction between Cls. (a) and (b).
4. "Affording reasonable probability."—See Note 3, above.
5. "Is satisfied by affidavit or otherwise."
6. Suit must be bona fide.
7. "To show cause why he should not furnish security for his appearance."
8. Consequences of arrest on insufficient grounds—See Notes to S. 95, ante.
9. Form—See Appendix F, Form No. 1.

"Appeal." See S. 104, Note 18.
Money deposited—If liable to rateable distribution. See S. 73, Note 4, Pt. (35).

1. Legislative changes.—

The following are the material changes introduced in the rule:—

1. The words "other than a suit for the possession of the immoveable property" which occurred in the old section have been substituted by the words "other than a suit of the nature referred to in S. 16, Cls. (*a*) to (*d*)".
2. The proviso to the rule is new and is similar to R. 38 of O. 21.
3. The provision for the examination of the applicant which occurred in S. 478 of the old Code has been omitted. *See* Note 5, below.

2. Scope of the rule and of the Order.—The normal remedy available to a creditor having a demand against his debtor is to first obtain a decree against him and *then* to arrest him or to attach his property in execution of that decree under the provisions of O. 21. Under special circumstances, however, which are specified in this rule, and R. 5, *infra*, the creditor can take out arrest or attachment against his debtor even *before* judgment. The object of such a provision is to prevent any attempt on the part of the defendant to defeat the realisation of the decree that may be passed against him.

Before the creditor can resort to the extraordinary procedure provided by this rule he must show that there is good reason to believe that the debtor is about to depart from the jurisdiction of the Court or to make away with his property. (*See* Note 5, *infra*.) The rule will not enable him to take out arrest before judgment merely because it would secure easy execution of the decree.[1]

3. Distinction between Cls. (a) and (b).—In order to apply Cl. (*a*), it is necessary to show that the defendant has committed or is about to commit any of the acts specified therein *with intent* to delay the plaintiff or to avoid the process of the Court or to obstruct or delay the execution of any decree that may be passed against him.[1] No such intention need be proved in cases coming under Cl. (*b*). It is only necessary to show that the circumstances under which the defendant is about to leave British India afford a *reasonable probability* that the plaintiff will be obstructed or delayed in realising his decree.[2]

Order 38, Rule 1—Note 2.

(1) *Kelaram Mhajee* v. *Narain Das*, (1878) 13 Suth W R 278 (279): 5 Beng L R 215.

Note 3.

(1) *Kelaram Mhajee* v. *Narain Das*, (1870) 13 Suth W R 278 (279): 5 Beng L R 215.

(2) In re *Agra and Masterman's Bank*, (1866) 1 Ind Jur N S 265; *Spencer's Hotel Company* v. *Anderson*, 1 Ind Jur N S 294 Note *Everet* v. *Frere*, (1885) 8 Mad 205 (207); See *Probode Ohunder Mullick* v. *M Dowey*, (1887) 14 Cal 695 (702).

4. **"Affording reasonable probability.**—*See* Note 3 above.

5. **"Is satisfied by affidavit or otherwise".**—Under S. 478 of the old Code, the Court could issue a warrant to arrest the defendant before judgment where, *after examining the applicant,* and making such further investigation as it thinks fit, it is satisfied that the defendant has committed or is about to commit any of the acts specified in Cls. (*a*) and (*b*).[1] This provision has now been omitted and the Court can, without any such examination or investigation, act under this rule if it is satisfied by *affidavit or otherwise* of the existence of the circumstances specified in those clauses. Before the Court can act under this rule it must have reason to believe, on adequate materials, that, unless the jurisdiction is exercised, there is real danger that the defendant will remove himself or his property from the ambit of the powers of the Court.[1-a] Where there was reason to believe that the defendants were removing goods and selling them at less than cost price, and that they were evading arrest without furnishing any security, it was held the rule was properly applied to the case.[2] But where the defendant had to leave his place of residence for attendance in a criminal Court, it was held that the departure could not be said to be with a view to delay the plaintiff or to avoid the process of the Court or to obstruct or delay execution, and that therefore an order under this rule should not be passed.[3]

6. **Suit must be bona fide.**—Before exercising the powers conferred by this rule a Court should be satisfied that the plaintiff's suit is ***bona fide***[1] and that his cause of action is *prima facie* an unimpeachable one subject to his proving the allegations made in the plaint.[2]

Where the plaintiff is undisputably entitled to a part of his claim the mere circumstance of the rest of the claim being of a disputable character does not render the suit *mala fide*.[3]

7. **"To show cause why he should not furnish security for his appearance".**—Where the Court issues a warrant of arrest against the defendant, he is entitled to show cause against his arrest. The "cause" must be either that he is not going to leave the jurisdiction of the Court, or not for so long a time, as will obstruct or tend to obstruct the plaintiff should he succeed, or that the suit is not a *bona fide* one, or that even if it is, the institu-

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Note 5.

(1) See *Kelaram Mhajee* v. *Narain Das,* (1870) 13 Suth W R 278 (279): 5 Beng L R 215.

(1-a) *Seth Chand Mull Dudha* v. *Purushottamdoss,* 1926 Mad 584 (584): 50 Mad L Jour 348: 1926 Mad W N 828: 94 Ind Cas 512: 24 Mad L W 94: 50 Mad 27; *Goutiere* v. *Emile Robert,* (1869) 1 N W P H C R 91; *Kilaram Mhaji* v. *Narain Das,* (1870) 13 Suth W R 278 (279): 5 Beng L R 215; *Teenaram* v. *Ramrutton,* 2 Hyde. 181.

(2) *K O M Syed Hossein* v. *S R M M C T Chetty Firm,* 1924 Rang 361 (361, 362): 2 Rang 362: 3 Bur L Jour 159: 84 Ind Cas 270. [Court has power even to issue simultaneous execution for arrest and attachment before judgment].

(3) *Daulat Ram* v. *Kirpa Ram,* 1921 Jour 23 (2): 4 Lah L Jour 423.

Note 6.

(1) *Spencer's Hotel Company* v. *Anderson,* (1866) 1 Ind Jur N S 294 Note; *Probode Chunder* v. *Dowey,* (1874) 14 Cal 695 (702).

(2) *Seth Chand Mull Dudha* v. *Purushottamdas,* 1926 Mad 584 (584): 50 Mad L Jour 348: 1926 Mad W N 328: 94 Ind Cas 512: 24 Mad L W 94: 50 Mad 27.

(3) *Probode Chunder* v. *Dowey,* (1887) 14 Cal 695 (702)

O. 38, R.1, Notes 7—9.

tion of it has been vexatiously delayed till the defendant is about to depart, in order embarrass or coerce him.[1]

8. **Consequences of arrest on insufficient grounds.**—*See* Notes to S. 95, *ante.*

9. **Form.**—*See* Appendix F Form No. 1.

O. 38, R.2, Notes 1—3.

Security.

R. 2. [S. 479.] (1) *Where* the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to *furnish* security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, *or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.*

(2) *Every* surety *for the appearance of a defendant* shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

[1877—S. 479; 1859—S. 76.]

Synopsis.

1. **Security.**
2. **Deposit not open to rateable distribution.**
3. **Deposit by defendant—Effect of insolvency.**
4. **"Or to furnish security for his appearance."**
5. **Extent of surety's liability.**
6. **Appeal.**
7. **Form—See Appendix F, Form No. 2.**

Payment by surety—Rateable distribution. **See S. 73, Note 4, Pt. (14).**

1. **Security.**—In a suit for the recovery of Rs. 29,508 the plaintiff obtained a warrant for arrest of the defendant but the warrant directed the warrant officer to demand Rs. 10,000 and if the sum was not paid, then, to arrest him. The defendant did not pay the amount and was arrested and brought before the Court. It was held that the Court should limit the security to be given to Rs. 10,000 as per terms of the notice in the warrant and not to order security to be given for amount claimed in the suit.[1]

2. **Deposit not open to rateable distribution.**—*See* the last paragraph of Note 4 to S. 73.

3. **Deposit by defendant—Effect of insolvency.**—Money or other property deposited by a defendant arrested before judgment, sufficient *to answer the claim* is earmarked for the suit and is subject to the lien of the

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Note 7.

[1] *Spencer's Hotel Company* v. *Anderson,* (1866) 1 Ind Jur N S 294.

Order 38, Rule 2—Note 1.

[1] *Elie Goldberg* v. *Sarojini Dasi,* 1929 Cal 732 (733): 56 Cal 700: 120 Ind Cas 815.

O. 38, R. 2, Notes 3—7.

plaintiff in the event of his success. Consequently if the defendant becomes insolvent the plaintiff is entitled to appropriate it to the exclusion of the Official Receiver and other creditors. But a security given for the *appearance* of the defendant in Court whenever called upon, cannot be said to be to the credit of the suit or earmarked to the general purposes of the suit.[1]

4. **"Or to furnish security for his appearance."**—Where a judgment-debtor was released on furnishing security *for his appearance* on a certain day and the surety executed a bond for the due *performance of the decree* on failure of the judgment-debtor to satisfy it, it was held that the bond was not in accordance with the Court's order and the surety was discharged from his responsibility on the appearance in Court of the judgment-debtor on the specified day.[1] Where, on an application by the plaintiff, for arrest of the defendant, a pleader appeared on behalf of the latter and stood bail and thereupon the defendant was not arrested, it was held that the surety could not be allowed afterwards to contend that the security was illegal by reason of the fact that the defendant was not arrested.[2]

5. **Extent of surety's liability.**—The security to be furnished under this rule is for the *appearance* of the defendant while the suit is pending and until satisfaction of any decree that may be passed against him. But the fact that the surety bond went beyond the terms of this rule and provided for the *payment* of the amount claimed in the suit in the event of a decree being passed against the defendant, will not render the bond unenforceable.[1] Nor will a surety for the appearance of the defendant, be relieved of his obligation merely because the decree is a compromise decree instead of being one on trial.[2]

The object of the security bond under this rule is merely to secure the rights of the judgment-creditor. The Government is not interested in the proceedings in any way. On the failure of the defendant to appear as required the Court cannot *suo motu* make an order forfeiting the bond and direct him to pay the whole of the maximum sum therein stipulated to Government. The enforcement of the bond should only be made on the application of the judgment-creditor and then, only to the extent of the sum of money found payable under the decree.[3]

See also Notes to S. 145, *ante*.

6. **Appeal.**—An order for arrest before judgment is appealable under S. 104 (*h*) of the Code.

An order under this rule is appealable under O. 43, R. 1 (*q*).[1]

7. **Form.**—*See* appendix F, Form No. 2.

Note 3.

(1) *Ramiah* v. *Gopalier*, (1918) 49 Ind Cas 20 (23): 41 Mad 1053: 35 Mad L Jour 355.

Note 4.

(1) *Chandi Charan Sen* v. *Ram Koomar Chakravarti*, (1914) 23 Ind Cas 349 (351): 7 Bur L Tim 5.

(2) *Col N Elphinstone* v. *Raheem Bux*, 1868 Pun Re No. 77.

Note 5.

(1) *Muthuraju Srinivasa Rao* v. *Mahomed Ghouse Sahib*, 1929 Notes 9-c: 115 Ind Cas 244.

(2) *Odayamangalath Appanni Nair* v. *Isaak Mackadam*, (1919) 53 Ind Cas 367 (370): 37 Mad L Jour 435: 10 Mad L W 533: 43 Mad 272.

(3) *Hussein Ali Sulemanji* v. *Secretary of State for India in Council*, (1915) 28 Ind Cas 92 (93): 8 Sind L R 270.

Note 6.

(1) See *Ahmed Ali Mahomed* v. *Mrs Gladstone Wyllie & Co*, (1867) 7 Suth W R 508 (508) [Case under the Code of 1859].

Procedure *on* application by surety to be discharged.

R. 3. [S. 480.] (1) A surety for the appearance of *a* defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant *in* pursuance *of* the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

[1877—S. 480; 1861—S. 24; 1859—S. 78.]

Synopsis.

1. Scope of the rule.
2. Appeal.
3. Form—See Appendix F, Form No. 3.

Discharge of surety. See S. 145, Note 9.

Voluntary surrender. See Note 1, Pts. (1) to (3).

1. **Scope of the rule.**—A surety for the *appearance* of the defendant may apply under this rule to be discharged from his obligation. But before he is so discharged it is essential that the defendant should appear before the Court either *voluntarily* or *in pursuance of a summons or warrant of arrest* issued against him under sub-R. (2).[1] If he is present in Court under circumstances which exempt him from arrest,[2] or if he appears under a protection order of the insolvency Court in his favour[3] the surety will not be entitled to be discharged from his obligation under this rule. Nor will the insolvency of the defendant release the surety from his obligation.[3-a]

Where the defendant appears before the Court under this rule, the Court should direct him to find fresh security; an order directing his detention without calling upon him to find fresh security is not legal and if the defendant leaves the Court in defiance of the order, he cannot be convicted for an offence under S. 225-B of the Penal Code.[4]

A surety for the *due performance* of any decree that may be passed against the defendant cannot apply under this rule for being discharged from his obligation.[5]

Order 38, Rule 3—Note 1.

[1] *Odayamangalath Appanni Nair* v. *Isaak Mackadam*, (1919) 53 Ind Cas 367 (370): 37 Mad L Jour 435: 10 Mad L W 533: 43 Mad 272; *Chandi Charan Chakravarthi* v. *Ram Kumar*, (1918) 23 Ind Cas 349 (351): 7 Bur L Tim 5.

[2] *Odayamangalath Appanni Nair* v. *Isaak Mackadam*, (1919) 53 Ind Cas 367 (370): 37 Mad L Jour 435: 10 Mad L W 533: 43 Mad 272.

[3] *Subramania Ayyar* v. *Abdul Rahman*, 1923 Rang 98 (99): 11 Bur L R 444: 1 Bur L Jour 196: 70 Ind Cas 129.

[3-a] *Sowdagar* v. *Shi*, 1928 Rang 184 (185): 6 Rang 241: 111 Ind Cas 15.

[4] *Gopal Singh* v. *Emperor*, 1929 Lah 163: (164): 30 Pun L R 147: 116 Ind Cas 709.

[5] *Arura* v. *Haveli Ram*, 1929 Lah 435 (436): 30 Pun L R 130: 11 Lah L Jour 141: 119 Ind Cas 419.

As to the maintainability of a *suit* for a discharge of the obligations under a surety bond, *see* Note 9 to S. 47 and Note 11 to S. 145, *ante* and the undermentioned case.[6]

2. **Appeal.**—An order under this rule is appealable under O. 43, R. 1 (*q*).

3. **Form.**—*See* Appendix F, Form No. 3.

O. 38, R.4, Notes 1—3.

Procedure where defendant fails to *furnish* security or find fresh security.

R. 4. [S. 481.] *Where* the defendant fails to comply with any order under *rule* 2 *or rule* 3, the Court may commit him to *the civil prison* until the decision of the suit or, *where a decree is passed* against the defendant, until the decree *has been satisfied*:

Provided that no person shall be *detained in prison* under this *rule* in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees:

Provided *also* that no person shall be detained in prison under this *rule* after he has complied with such order.

[1877—S. 481; 1859—S. 78.]

Synopsis.

1. **Scope of the rule.**
2. **Appeal.**
3. **Form—See Appendix F, Form No. 4.**

1. **Scope of the rule.**—It is only in the event of a failure to comply with any order under R. 2 or R. 3, *i.e.*, in the event of failure to furnish security or to make a sufficient deposit that the defendant can be committed to custody under this rule.[1] The whole period of detention before and after decree should not exceed six months.[2]

2. **Appeal.**—An order under this rule for the arrest of the defendant is appealable under S. 104, Cl. (*h*).

3. **Form.**—*See* Appendix F, Form No. 4.

ATTACHMENT BEFORE JUDGMENT.

O. 38, R.5.

Where defendant may be called upon to furnish security for production of property.

R. 5. [Ss. 483, 484.] (1) *Where*, at any stage of *a* suit,[3] the Court[9] *is satisfied*,[11] by affidavit or otherwise, that the defendant, with intent to obstruct or delay[13] the execution of any decree that may be passed against him,—

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[6] *Sadeck Abdulla* v. *Mahomed Abdulla Hasanalli*, 1929 Bom 190 (192): 31 Bom L R 225: 115 Ind Cas 407 [Only way is by application under this rule].

Order 38, Rule 4—Note 1.

[1] *Kelaram Mhajee* v. *Narain Das*, (1870) 13 Suth W R 278 (279): 5 Beng L R 215; *Syed Hossein* v. *S R M M C T Chettiar*, 1924 Rang 361 (361): 2 Rang 862: 3 Bur L Jour 159: 84 Ind Cas 270.

[2] *Ghanasham Das* v. *Joharimull*, (1883) 7 Bom 431 (436).

(*a*) *is about* to dispose of the *whole or any part of his property*[12], or

(*b*) *is about* to remove the *whole or any part of his property* from the *local limits of the* jurisdiction of the Court,[17]

the Court may *direct the defendant*, within a time to be fixed by *it*, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court,[14] when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The *plaintiff* shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment[23] of the whole or any portion of the property so specified.

[1877—Ss. 483, 484; 1859—Ss. 81 to 83. *See* Ss. 94 and 95—*Cf*. R. S. C., O. 50, R. 9.]

Synopsis.

1. **Legislative changes.**
2. **Scope, object and applicability of the rule.**
    3. **Mortgage suits.**
    4. **Divorce proceedings.**
    5. **Application for leave to sue in forma pauperis.**
6. **Applicability of O. 21, R. 63 to attachments under this rule—See Note 6 to O. 21, R. 63 and Notes to R. 8, below.**
7. **Applicability of S. 64 to such attachments.**
8. **Attachment before judgment if becomes attachment in execution—See R. 11, infra, and also Note 8 to O. 21, R. 57.**
9. **Power of Small Cause Court to attach before judgment—See R. 13, below.**
10. **Power of Insolvency Court to attach properties.**
11. **"Where the Court is satisfied."**
12. **"Is about to dispose of the whole or any part of his property."**
13. **"With intent to obstruct or delay."**
14. **"Court may direct security to be furnished for producing the attached property in Court."**
    15. **Extent of surety's liability.**
    16. **Whether the Court can extend time for furnishing security.**
17. **Property situated outside jurisdiction.**
18. **Effect of attachment.**
    19. **Money deposited into Court in pursuance of the attachment if liable to rateable distribution.**
    20. **Vesting order in insolvency how affects attachment before judgment.**
    21. **Right of survivorship if defeated by attachment.**
22. **Liability for wrongful attachment.**
23. **Conditional attachment.**
24. **Appeal.**
25. **Forms.**

1. Legislative changes.—

The following are the material changes effected in this Rule:—

1. The words "or has quitted the jurisdiction of the Court leaving therein property belonging to him" which formed part of S. 483, Cl. (*b*) of the old Code have been omitted.

O. 38, R.5, Notes 1—2.

2. The provision for the examination of the applicant which occurred in S. 484 of the old Code has been omitted.

2. Scope, object and applicability of the rule.—The object for the provisions for arrest and attachment before judgment is to *prevent* any attempt on the part of the defendant to defeat the realization of the decree that may be passed against him.[1] It follows that the rule applies only where the defendant is *about* to dispose of, or remove from the local limits of the jurisdiction of the Court, his properties, and not to cases where he has *already* disposed them of.[2] It is also necessary, before the rule can be applied, to show that the defendant has acted, or is about to act with the intent to obstruct or delay the execution of any decree that may be passed against him.[3]

The rule applies, in terms, to *suits*. An application to enforce an award under paragraph 20 of the second schedule to the Code, when numbered and registered as a suit, becomes a suit for the purposes of this order and the Court can pass an order for attachment before judgment under this rule.[4] It has been held by the High Court of Lahore that this rule may be applied to proceedings other than suits by virtue of S. 141 of the Code, and that therefore a liquidation Court dealing with the proceedings under the Companies Act can make an order under this rule for attachment before judgment.[5] According to the High Court of Calcutta an attachment before judgment is a matter of *relief* and not of procedure.[6] It would seem to follow from this that S. 141 under which the *procedure* provided in the Code in regard to suits should be followed in other proceedings also, will not enable the Court to apply this rule to such proceedings.

An application under this rule should specify the property to be attached and the estimated value thereof; an application generally for security being taken for the satisfaction of any decree that may be passed, without specifying any property is not one falling within the scope of the rule.[7] In the undermentioned case[8] where an application for injunction was made to restrain the defendant from withdrawing certain amounts standing to his credit, it was held that the order issued thereon really amounted to an attachment before judgment.

The Court can pass orders under this rule even if the trial of the suit has been stayed under S. 10 of the Code. (*See* Note 12 to S. 10, *ante.*) As to whether the Court has power in cases not covered by this rule, to pass orders for attachment before judgment, *see* Note 2 to S. 94.

The provisions of the Code relating to attachment before judgment apply to all proceedings referred to in S. 265 (3) of the Chota Nagpur Tenancy Act (VI of 1908) and in S. 16 of the Bengal Rent Act (VI of 1862).

Order 38, Rule 5—Note 2.

(1) *Sri Rammanik* v. *Tincowri Rai,* (1869) 13 Suth W R 9 (11): 4 Beng L R 63. See also *Ganu Singh* v. *Jangi Lal,* (1899) 26 Cal 531 (533).

(2) *Hari Bakhsh* v. *Babu Lal,* 1928 Lah 772 (772, 778): 112 Ind Cas 295.

(3) *See* Note 12, below.

(4) *Govind* v. *Venkatesh,* 1927 Bom 259 (260): 29 Bom L R 342: 101 Ind Cas 430.

(5) *Kanshi Ram* v. *Hindustan National Bank Ltd,* 1928 Lah 376 (377): 106 Ind Cas 808.

(6) *Phillips* v. *Phillips,* (1910) 7 Ind Cas 792 (793): 37 Cal 613.

(7) *Hari Bakhsh* v. *Babu Lal,* 1928 Lah 772 (772): 112 Ind Cas 295.

(8) *Maung Ba Kin* v. *Ma Pwa Thin,* 1929 Rang 94 (94): 116 Ind Cas 473.

O. 38, R.5, Notes 3—11.

3. **Mortgage suits.**—The provisions of this rule are not inapplicable to mortgage suits. Where there is a reasonable probability of the mortgaged property being insufficient to discharge the mortgage debt and of the mortgagee being entitled to get a personal decree in his favour for the balance, properties of the defendant other than those covered by the mortgage can be attached before judgment under this rule, if the requirements of the rule are satisfied.[1] The Courts should, however, act with extreme caution in such cases.[2]

4. **Divorce proceedings.**—It has been held by the High Court of Calcutta that an attachment before judgment is a matter of *relief* not of *procedure*, that therefore in divorce cases to which the Divorce Act, 1869 is applicable the Court is to be guided by S. 7 of that Act and that it cannot pass an order under this rule for attachment before judgment.[1]

5. **Application for leave to sue in forma pauperis.**—It has been held in the case cited below that an application to sue in *forma pauperis* does not become a "suit" until the same has been granted, and that, consequently, the Court has no jurisdiction to make an order for attachment before judgment under this rule.[1] The decision does not however, advert to the applicability or otherwise of S. 141 in such cases.

6. **Applicability of O. 21, R. 63 to attachments under this rule.**—*See* Note 6 to O. 21, R. 63 and Notes to R. 8 below.

7. **Applicability of S. 64 to such attachments.**—*See* Note 4 to S. 64, *ante* and the cases cited below.[1]

8. **Attachment before judgment if becomes attachment in execution.** *See* R. 11, *infra* and also Note 8 to O. 21, R. 57.

9. **Power of Small Cause Court to attach before judgment.**—*See* R. 13 below.

10. **Power of Insolvency Court to attach properties.**—Under S. 21, Cl. (2) of the Provincial Insolvency Act, 1920, the Insolvency Court can attach the property of the debtor under circumstances similar to those specified in this rule.[1]

11. **"Where the Court is satisfied."**—Under S. 484 of the old Code, the Court could issue an order for attachment before judgment where *after examining the applicant*, and making any further investigation which it

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Note 3.

[1] *Shridhar Ramchandra* v. *Lakshman Vinayak Bhave*, 1931 Bom 329 (329): 33 Bom L R 514: *Beshamber Sahai* v. *Sukh Devi*, (1894) 16 All 186 (188): 1894 All W N 20; *Sikarja Nath Roy* v. *Janaki Nath Roy*, (1932) 36 Cal W N 746 (747): 1932 Cal 790 (790): 140 Ind Cas 457: *Jogemaya Dassi* v. *Baidyanath Pramanick*, (1919) 50 Ind Cas 924 (925): 46 Cal 245; *Jai Parkash* v. *Basanta Kumari*, (1912) 15 Ind Cas 604 (604) Cal; *Muhammad Din* v. *Devi Das*, 1929 Lah 402 (403): 118 Ind Cas 446; *Jotirmoyee Debi* v. *Raghunath Pathak*, 1925 Pat 291 (291): 3 Pat 966: 1925 Pat H C C 63: 85 Ind Cas 94: 6 Pat L Tim 823; *K O M Syed Hoosein* v. *S R M M C T Chettiar Firm*, 1924 Rang 361 (361): 2 Rang 362: 3 Bur L Jour 159: 81 Ind Cas 270.

[2] *Beshambar Sahai* v. *Sukhdevi*, (1894) 16 All 186 (188): 1894 All W N 20.

Note 4.

[1] *Phillips* v. *Phillips*, (1910) 7 Ind Cas 792 (793): 37 Cal 613.

Note 5.

[1] *Purnachandra Chabri* v. *Taraprasad Maiti*, (1917) 38 Ind Cas 600 (601): 25 Cal L Jour 159: 21 Cal W N 870.

Note 7.

[1] *Sarkies* v. *Bundhoo Baee*, (1869) 1 N W P H C R 172, (186) [Private alienation pending attachment before judgment is void as against all claims enforceable thereunder]; *Raj Chunder* v. *Isser Chander*, 1898 Bourke (O C) 139, (Do).

Note 10.

[1] *Hashmat Bibi* v. *Bhagwan Das*, (1914) 24 Ind Cas 752 (753): 12 All L J 24: 36 All 65.

O. 38, R. 5, Notes 11—12.

thinks fit, it is satisfied that the defendant has removed or is about to remove or dispose of his property with the intention of obstructing or delaying the execution of any decree that may be passed against him. This provision has now been omitted and the Court can, without any such examination or investigation, act under this rule if it is satisfied by *affidavit or otherwise* of the existence of the specified circumstances.

The jurisdiction of Courts in attaching property before judgment is of an extraordinary nature and should be exercised sparingly and strictly in accordance with the procedure prescribed by the Code.[1] The Court should be satisfied on two points, namely:—

(1) that the defendant is about to dispose of the whole or part of his property, and

(2) that the disposal is with the intention of obstructing or delaying the execution of any decree that may be passed against him.[2]

There must be definite evidence on these points and not merely vague allegations.[3] But the Court is not restricted to examine attempts at alienations made after the commencement of the action; it is open to it to look to the conduct of the parties immediately before the suit and to examine also the surrounding circumstances.[4]

12. "Is about to dispose of the whole or any part of his property."—Before exercising jurisdiction under this rule and passing orders for the attachment of properties before judgment, the Court should satisfy itself of the practical certainty of the plaintiff's success and of the existence of a grave danger and of a real fear that a dishonest defendant, undoubtedly liable, is making away with the probable fruits of the judgment.[1] For this purpose it is not sufficient to merely allege that the defendant is *likely* to dispose of the property.[2] Nor is it sufficient to state that he is about to dispose it of, without stating the sources of such information.[3] The word "property" includes property of every description whether moveable or immoveable[4] and whether in the possession of

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Note 11.

(1) *Kanshi Ram* v. *Hindustan National Bank, Ltd,* 1928 Lah 376 (378): 106 Ind Cas 808.

(2) *Chandrika Prashad Singh* v. *Hira Lal,* 1924 Pat 312 (314): 5 Pat L Tim 124: 73 Ind Cas 721; *Khoka Marwari* v. *Ramchandra Marwari,* (1918) 44 Ind Cas 240 (241) Pat; *Soshee Shekoreswar* v. *Hargobind,* (1883) 13 Cal L Rep 356 (357); *Manmatha Nath* v. *Nagendra Nath,* 1926 Cal 855 (855): 94 Ind Cas 880; *Joynarain* v. *Shibpershad,* (1866) 6 Suth W R (Mis) 1 (1).

(3) *Khoka Marwari* v. *Ramchandra Marwari,* (1918) 44 Ind Cas 240 (241) Pat; *Senaji* v. *Pannaji Devichand,* 1922 Bom 276 (276): 46 Bom 431: 64 Ind Cas 580: 23 Bom L R 1228; *Chandrika* v. *Hira Lal,* 1924 Pat 312 (314): 5 Pat L Tim 124: 73 Ind Cas 721; *Narahari Iyyar* v. *Vaithinatha Iyer,* (1919) 49 Ind Cas 86 (87): 25 Mad L Tim 46: 9 Mad L W 69. See also *Muhammad Inam-Ul-Lah-Khan* v. *Narain Das.* (1915) 29 Ind Cas 601 (602): 13 All L J 565: 37 All 428; *Ahmed Ali* v. *Gladstone Wyllie,* (1867) 7 Suth W R 508 (509) [The most perfect good faith is necessary on the part of the plaintiff].

(4) *J D MacGregor* v. *Cawnpore Sugar Works Ltd,* (1909) 9 Cal L Jour 86-n; *MacGregor* v. *The Cawnpore Sugar Works,* (1910) 5 Ind Cas 181 (182): 11 Cal L Jour 19; *Donnan* v. *S P A C Sathappa Chetty,* (1892-96) U B R Vol II, 274.

Note 12.

(1) *Badri Prasad* v. *Choke Lal,* 1926 All 406 (408): 24 All L J 561: 95 Ind Cas 828: 48 All 510.

(2) *Kanshi Ram* v. *Hindustan National Bank, Ltd,* 1928 Lah 376 (378): 106 Ind Cas 808.

(3) *Manmatha* v. *Nagendra,* 1926 Cal 855 (855): 94 Ind Cas 880.

(4) *Beshambar* v. *Sukhdevi,* (1894) 16 All 186 (187): 1894 All W N 20; *Calcutta Docking Co* v. *Passmore,* Cor 151: Bourke O C 126 [Bills of Exchange]; *Ram Narain* v. *Levy,* 2 Hyde 183 (Goods); *Auhin* v. *Ahmed Mahomed,* (1866) 1 Ind Jur N S 241 (ship). See also *Dungarsi* v. *Ujamsi,* (1898) 22 Bom 727 (729).

the defendant or of some other person on his behalf.[5] It includes a debt[6] or a chose in action.[7] But the debt must be one that is accruing or has accrued.[8] Joint property belonging to a partnership of which the judgment-debtor is a member is not the property of the judgment-debtor and cannot be attached before judgment under this rule.[9]

13. **"With intent to obstruct or delay."**—The Court must be satisfied not only that the defendant is about to dispose of his property or to remove it from the jurisdiction of the Court, but also that his object in so doing, is to *obstruct or delay* the execution of any decree that may be passed against him.[1] Such an intention cannot be inferred merely from the fact that the defendant has entered into an agreement to sell a portion of his property[2] or that he has actually alienated a portion of his properties[3] or that he has allowed his properties to be sold in execution of decrees or for arrears of revenue[4] or that he is running into debts or is attempting to secure debts already incurred by executing a mortgage in respect thereof.[5] A man is not debarred from dealing with his property simply because a suit has been filed against him.[6] Nor can an attachment be ordered merely because the defendant has failed to give an undertaking.[7]

14. **"Court may direct security to be furnished for producing the attached property in Court."**—The expression has reference only to such property as is capable of being produced in Court.[1]

15. **Extent of surety's liability.**—*See* Note 9 to S. 145, *ante*.

The surety is liable whether the decree is passed on a compromise[1] or on an award.[2] In a recent Bombay case, however, where a decree was passed on the consent of parties allowing the payment of the decree amount in 9 monthly instalments, the Court applied the principles of S. 133 of the Contract Act and held that the surety was discharged from liability on the ground that

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(5) *Chedi Lal* v. *Kuarji*, (1895) 17 All 82 (85): 1895 All W N 14.

(6) *Sukhdeo Das* v. *Trikamdas Oallianji*, 1925 Cal 561 (563): 78 Ind Cas 881.

(7) *Ravji* v. *Narayan*, (1901) 3 Bom L R 462 (463).

(8) *Sukhdeo Das* v. *Trikumdas*, 1925 Cal 561 (563): 78 Ind Cas 881.

(9) *Damodar* v. *Pana Lal*, (1907) 9 Bom L R 540 (541).

Note 13.

(1) *Ohandrika Prasad Singh* v. *Hira Lal*, 1924 Pat 312 (314): 5 Pat L Tim 124: 73 Ind Cas 721; *Shoshee* v. *Hara Gobind*, (1888) 13 Cal L Rep 356 (357); *Muhammad Inam-ul-lah Khan* v. *Narain Das*, (1915) 29 Ind Cas 601 (602): 13 All L J 565: 37 All 423; *Jaiprakash Narain Singh* v. *Basanta Kumari Debi*, (1912) 15 Ind Cas 604 (604) Cal; *Mir Ali* v. *Bihari Lal*, (1897) 21 Bom 273 (278); *Khoka Marwari* v. *Ramachandra Marwari*, (1918) 44 Ind Cas 240 (241) Pat; *Chaudhri Kanhayaram* v. *Dina Nath Hardialmal*, 1926 Lah 330 (332): 8 Lah L Jour 125: 27 Pun L Jour 144: 93 Ind Cas 861.

(2) *Nowroji* v. *Deccan Bank*, 1921 Bom 69 (69): 45 Bom 1256: 23 Bom L R 550: 63 Ind Cas 958.

(3) *Sikaraja Nath Roy* v. *Raja Janaki Nath Roy*, 1932 Cal 790 (790, 791): 36 Cal W N 746: 140 Ind Cas 457; *Sourendra Nath Mitra* v. *Sreemati Tarubala Dasi*, 1927 Cal 354 (357): 31 Cal W N 432: 101 Ind Cas 9 (Mortgage); *Manmatha Nath* v. *Nagendra Nath*, 1926 Cal 855 (855): 94 Ind Cas 880.

(4) *Sikaraja Nath Roy* v. *Raja Janaki Nath Roy*, 1932 Cal 790 (791): 36 Cal W N 746: 140 Ind Cas 457.

(5) *Sourendra Nath Mitra* v. *Sreemati Tarubala Dasi*, 1927 Cal 354 (356): 31 Cal W N 432: 101 Ind Cas 9.

(6) *Nowroji Pudumjee Sirdar* v. *The Deccan Bank, Ltd*, 1921 Bom 69 (69): 45 Bom 1256: 23 Bom L R 550: 63 Ind Cas 958.

(7) *Ram Khelawan Singh* v. *Singheshwar Prasad Singh*, 1928 Pat 172 (173): 106 Ind Cas 532.

Note 14.

(1) *Ohedi Lal* v. *Kuarji*, (1895) 17 All 82 (85): 1895 All W N 14.

Note 15.

(1) *Shivappa* v. *Nagappa*, 1894 Bom P J 25.

(2) *Umermal Janimal* v. *Firm of Bhojraj Hassomal*, (1918) 45 Ind Cas 429 (430): 11 Sind L R 122.

O. 38, R. 5, Notes 15—18.

the compromise which was subsequently embodied in the decree prejudiced the rights of the surety against the debtor and that such a decree was not in the contemplation of the surety when he gave the bond.[3] Again where a surety for the production before the Court of property released from attachment before judgment was not put in possession of the property so released, it was held that he could not be proceeded against in the event of a decree being passed.[4]

But a mere notice given by the surety to the effect that he intends not to be surety any longer will not enable him to withdraw from the guarantee at any time.[5] Nor will the death of the defendant operate to discharge him.[6] It has been seen in Note 9 to S. 145 that the dismissal of a suit will put an end to the liability of the surety. But if the dismissal is one for *default* and the suit is immediately restored, the surety will remain liable under the bond.[7]

16. Whether the Court can extend time for furnishing security.—The Court may, under its general powers, extend the time for furnishing the security directed to be given under this rule.[1]

17. Property situated outside jurisdiction.—As has been seen in Note 7 to S. 136, *ante* there was a conflict of decisions under the old Code as to whether a Court could attach before judgment property situate outside its jurisdiction,[1] but in view of the omission in the present section of the words "within the jurisdiction of the Court," the Court can, now, order the attachment of properties whether situated within or without jurisdiction[2] though in the latter case, the proper procedure for attachment is to transmit the order to the Court in whose jurisdiction the property is situate.[3]

But a Court cannot order the attachment of properties outside British India.[4]

18. Effect of attachment.—*See* Note 5 to S. 64 and Note 11 to O. 21, R. 54. An attachment of property involves the attachment of the profits of that property; but the creditor does not thereby become entitled to such profits. The debtor who collects such profits cannot be called upon to account for the

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(3) *Mahomedalli* v. *Lakshmibai*, 1930 Bom 122 (124): 31 Bom L R 1442: 54 Bom 118: 124 Ind Cas 227.

(4) *Ranglal* v. *S T M Chetty*, (1919) 52 Ind Cas 930 (931): 12 Bur L Tim 89.

(5) *Abdul Bary* v. *Belayat Ali*, (1917) 37 Ind Cas 919 (920) Cal.

(6) *Chandulal Dalsukhram* v. *Jeshangbhai Chhotalal*, (1917) 39 Ind Cas 88 (89): 19 Bom L R 112: 41 Bom 402.

(7) *Chhotelal* v. *Sorab Ali Khan*, 1925 Oudh 592 (592): 12 Oudh L J 521: 2 Oudh W N 372: 89 Ind Cas 17.

Note 16.

(1) *Haji Mahamuddin & Co* v. *The Eastern Japan Trading Co*, 1923 Cal 639 (641): 50 Cal 215: 79 Ind Cas 242.

Note 17.

(1) *Nur Muhammad* v. *Abubakar*, (1871) 8 Bom H C R 29 (No); *Kedar Nath* v. *Suva Veyana*, (1878) 1 Cal L Rep 336 (338) (No); *Bala Ram Mullick* v. *E R Solano*, (1872) 8 Beng L R 335, (No); *Kin Kin* v. *Nga Kyaw We*, (1907) U B R Civ Pro 13, (No.); *Sivaswami Sitia* v. *Suliman Dawoodji Pareek*, (1905-06) 3 L B R 255 (256), (No.). *See also* the cases cited in foot-notes (1) and (2) of Note 7 to S 136.

(2) *Chandri* v. *Firm Dina Nath*, 1926 Lah 330 (331): 8 Lah L Jour 125: 27 Pun L R 144: 93 Ind Cas 361; *Somasundaram Chetty* v. *Muthuveerappa*, (1911) 10 Ind Cas 794 (795): 4 Bur L Tim 89; *Kanshi Ram* v. *Hindustan National Bank, Ltd*, 1928 Lah 376 (378): 106 Ind Cas 808; *M S M M Chettiar Firm* v. *Maung Sein*, 1931 Rang 279 (280): 9 Rang 561: 135 Ind Cas 326. But see *Bhai Khan* v. *Des Raj*, (1914) 25 Ind Cas 771 (772): (1914) 2 U B R 16; *Surendra Nath* v. *Bansi Badan*, (1916) 36 Ind Cas 457 (458): 24 Cal L Jour 533: 22 Cal W N 160.

(3) *Gajanan* v. *Bhaskar*, 1926 Bom 278 (278): 28 Bom L R 380: 94 Ind Cas 116. See also In re *R J Abraham*, (1869) 6 Bom H C R 170.

(4) *Mela Mal* v. *Bishan Das*, 1931 Lah 723 (724): 32 Pun L R 645: 134 Ind Cas 822; *Zubeda Begam* v. *Kommanna Kanniah*, 1925 Mad 1100 (1101): 48 Mad L Jour 680: 88 Ind Cas 430.

profits received by him.[1] An attachment of a debt, does not prevent the creditor from *suing* for the debt.[2] *See also* Note 16 to O. 21, R. 46. An attachment before judgment without complying with the provisions of R. 5 is *ultra vires* and does not come in the way of an alienation pending such attachment.[3]

19. **Money deposited into Court in pursuance of the attachment if liable to rateable distribution.**—Where money and moveables are attached before judgment by several creditors in various suits and they are realised by Court before any of them has obtained a decree, they should be held to the credit of all the suits and distributed rateably among all the creditors who have obtained decrees, before any of the others apply for payment.[1] Attachment before judgment does not give any priority over another who attaches in execution and may be defeated by a decree-holder who attaches in execution and applies for payment.[2] Money paid by a surety after the decree-holder takes out execution is also liable to rateable distribution.[3] (*See also* Notes to O. 21, R. 52 and Note 4 to S. 73.) Where, however, property attached before judgment is released on the defendant giving *security* of some of the items attached, the plaintiff on obtaining the decree is entitled to a preferential right and can execute against the security.[4]

20. **Vesting order in insolvency how affects attachment before judgment.**—Where the property of the defendant is attached before judgment and subsequently the defendant becomes insolvent, the attachment will not give any priority to the plaintiff over the Official Receiver or Official Assignee in respect of such properties.[1] If the defendant pays money into Court as security for raising the attachment and subsequently becomes insolvent, the plaintiff will not get any charge over the money as against the Official Assignee.[2] (*See also* Notes 10 and 14 to S. 64 and the case noted below.[3])

21. **Right of survivorship if defeated by attachment.**—There is a conflict of opinion as to the effect of attachment before judgment on the right of survivorship among members of a joint Hindu family. According to the

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Note 18.

(1) *Ram Coomar* v. *Gobindnath Sandyal*, (1869) 12 Suth W R 391 (392).

(2) *The Collector of Etawah* v. *Beti Maharani*, (1892) 14 All 162 (168): 1892 All W N 27; *Beti Maharani* v. *The Collector of Etawah*, (1895) 17 All 198 (211): 22 Ind App 31: 6 Sar 551 P C; *Munsoor* v. *Abhoy*, (1917) 40 Ind Cas 816 (818): 21 Cal W N 1147.

(3) *Bansi Lal* v. *Sitaram*, 1922 Nag 238 (239): 68 Ind Cas 188.

Note 19.

(1) *Subramaniyam Chetty* v. *Sankara Iyer*, 1922 Mad 236 (236): 15 Mad L W 531: 1922 Mad W N 262: 31 Mad L Tim 70: 68 Ind Cas 714; *Mulji Telsej* v. *Ramsey Devraj*, (1909) 3 Ind Cas 836 (837): 13 Cal W N 1177; *Sri Rammanik* v. *Tincowri Rai*, (1869) 4 Beng L R 63 (69): 13 Suth W R 9 F B.

(2) *Sewdut* v. *Sreecanto*, (1906) 33 Cal 639 (643): 10 Cal W N 634; *Bisheshar Das* v. *Ambika Prashad*, (1915) 29 Ind Cas 622 (623): 13 All L J 732: 37 All 578; *Nachiappa Chettiar* v. *Subbier*, 1923 Mad 505 (509): 44 Mad L Jour 413: 17 Mad L W 390: 32 Mad L Tim 198: 72 Ind Cas 820: 46 Mad 506; *Pallonji Shapurji Mistry* v. *Jordan*, (1888) 12 Bom 400 (406, 407).

(3) *Ghisu Lal* v. *Todarmall*, 1922 Cal 19 (20): 26 Cal W N 169: 70 Ind Cas 539.

(4) *Janaki Nagaswamy Iyer* v. *T S Ramaswamy Iyengar*, (1920) 56 Ind Cas 267 (268): 11 Mad L W 6: 1920 Mad W N 204.

Note 20.

(1) *Rampersaud* v. *Callachund*, (1866) 1 Ind Jur N S 325 (373); *Gamble* v. *Bholagir*, (1864) 2 Bom H C R 146; *Damodar Das* v. *Official Receiver*, 1930 Sind 127 (128): 117 Ind Cas 145.

(2) *Errikulappa Chetty* v. *The Official Assignee, Madras*, (1916) 32 Ind Cas 190 (191): 39 Mad 903; *Promotha Nath* v. *Mohini Mohun Sen*, (1915) 31 Ind Cas 573 (574): 19 Cal W N 1200.

(3) *Anand Chandra Pal* v. *Panchilal Sarma*, (1870) 5 Beng L R 691: 14 Suth W R 33 (36) F B [Attachment in execution previous to vesting order under Code of 1859—Vesting order did not prevail over the attachment].

High Courts of Bombay and Patna, where the judgment-debtor dies after an attachment before judgment but before it is converted into an attachment in *execution,* the right of survivorship would prevail over the attachment.[1] The High Court of Madras has dissented from the said view and has held that as soon as a *decree* is passed in the suit the attachment before judgment would operate so as to defeat the right of survivorship, and that it is not necessary that any steps need be taken for converting the attachment into one in execution.[2] Where the judgment-debtor dies *before* decree the attachment before judgment will not have the effect of defeating the right of survivorship.[3] *See also* Note 10 to S. 64, *ante.*

22. **Liability for wrongful attachment.**—The general principle is that it is not an actionable wrong to institute Civil Proceedings. But proceedings taken for the arrest of the defendant or for the attachment of his property form an exception to the general rule and a suit is maintainable for damages for wrongful arrest or attachment.[1] In such a suit the plaintiff must show that the defendant was actuated by *malice,* that the proceedings were *without reasonable and probable cause* and that damages have been sustained thereby.[2] It should also be shown that the attachment was withdrawn in plaintiff's favour.[2-a] General and special damages may be awarded according to the circumstances of the case.[3]

The cause of action for the suit is the date of the wrongful seizure and not the date when the seizure is declared wrongful.[4]

See also Note 20 to S. 9; Note 4 to S. 62; and S. 95.

23. **Conditional attachment.**—"Conditional attachment" means an immediate attachment of a provisional kind conditioned to become plenary if security should not be furnished or cause shown according to the terms of the order.[1] The power given by O. 38, R. 5 to make an alternative order directing the defendant within a specified time to furnish security or to appear and show cause carries with it, as an incident, the power to confirm the order that security be furnished.[2] A conditional order of attachment cannot be made without at the same time making an order directing the defendant to furnish security or to show cause why he should not furnish security; without such an

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Note 21.

[1] *Subrao Mangesh Chandavarkar* v. *Mahadevi Manji Bhatta,* (1913) 21 Ind Cas 330 (331): 15 Bom L R 848: 38 Bom 105; *Sunder Lal* v. *Raghunandan Prasad,* 1924 Pat 465 (467): 3 Pat 250: 5 Pat L Tim 135: 83 Ind Cas 413.

[2] *Sankaralinga* v. *Official Receiver of Tinnevelly,* 1926 Mad 72 (77): 49 Mad L Jour 616: 1925 Mad W N 832: 92 Ind Cas 504; *Muthuswamy Chetty* v. *Chunammal,* (1914) 24 Ind Cas 320 (320): 26 Mad L Jour 517.

[3] *Muthaiya Chettiar* v. *Lekshumanan Chettiar,* 1931 Mad W N 1015 (1016): 1931 Notes 24 (b); *Ramanayya* v. *Rangappayya,* (1890) 17 Mad 144 (145); *Sundar Lal* v. *Raghunandan Prasad,* 1924 Pat 465 (467): 3 Pat 250: 5 Pat L Tim 135: 83 Ind Cas 413 [The defendant died before decree].

Note 22.

[1] *Devi Chand* v. *Alaf Khan,* 1895 Pun Re No 86.

[2] *See* cases cited in Foot Note (7) to Note 13 of S 95 *ante.*

[2-a] *Satish Chandra Banarjee* v. *Munilal,* 1932 Cal 821 (822): 36 Cal W N 447: 59 Cal 1073.

[3] *Palani Kumarasamy Pillai* v. *Udayar Nadan,* (1909) 2 Ind Cas 345 (346): 32 Mad 170.

[4] *Pannaji Devi Chand & Co* v. *Sanji Kapur Chand,* 1930 Mad 635 (637): 31 Mad L W 675: 1930 Mad W N 305: 53 Mad 621: 126 Ind Cas 721: 59 Mad L Jour 859.

Note 23.

[1] *Lotlikar* v. *Lotlikar,* (1880-81) 5 Bom 643 (644, 646).

[2] *Haji Muhammadin & Co* v. *The Eastern Japan Trading Co,* 1923 Cal 639 (641): 50 Cal 215: 79 Ind Cas 242.

O. 38, R.5, Notes 23—25.

order the order of attachment will be invalid.[3] A conditional order of attachment pending the disposal of an application for the appointment of a guardian cannot be said to be invalid merely because the guardian proposed subsequently comes and states that he is unwilling to act.[4] When, after a conditional order is passed under this rule the suit is transferred to another Court the latter Court can pass further necessary orders in the matter.[5]

A conditional order has effect only till the defendant shows cause or furnishes security.[6]

24. **Appeal.**—No appeal is provided for, against orders under this rule in O. 43, R. 1. An order made under the provisions of O. 38, R. 5 is not a "Judgment" within the meaning of the Letters Patent and is not appealable as such under the Letters Patent.[1]

25. **Forms.**—For form of attachment before judgment with order to call for security *see* Appendix F, Form 5.

For form of security *see* Appendix F, Form 6.

O. 38, R.6, Note 1.

Attachment *where* **cause not shown or security not furnished.**

R. 6. [S. 485.] (1) *Where* the defendant fails to show cause why he should not furnish security, or *fails* to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) *Where* the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, *or make such other order as it thinks fit.*

[1877—S. 485; 1859—S. 84.]

Synopsis.

1. Scope of the rule.
2. Property specified—See Notes 1 and 17 to R. 5, above.
3. Appeal.
4. Form—See Appendix F, Form No. 7.

"Effect of Attachment." See R. 5, Note 18.

1. **Scope of the rule.**—A *conditional* order of attachment passed under R. 5 above has effect only until the defendant furnishes security or appears to

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[3] *Abdul Karim Dhali* v. *Nur Muhammad,* (1920) 57 Ind Cas 907 (908) Cal.

[4] *Batchu Perraju* v. *Bachu Venkataratnam,* 1928 Mad 1 (2): 106 Ind Cas 142.

[5] *Arunachala Nadan* v. *Kandaswamy Pillai,* (1910) 6 Ind Cas 746 (746): 1910 Mad W N 212: 20 Mad L Jour 980.

[6] *Nathu Mal* v. *Kishore Lal,* (1914) 23 Ind Cas 107 (108) All.

Note 24.

[1] *Mengha Singh* v. *Sucha Singh,* 1925 Rang 267 (268): 4 Bur L Jour 108: 3 Rang 307: 90 Ind Cas 995; *Ahmed Ali* v. *Gladsone Wyllie,* (1867) 7 Suth W R 508 (508); *Amba Prasad* v. *Narain Das,* (1898) All W N 18 (19).

O. 38, R. 6, Notes 1—4.

show cause.[1] An *unconditional* order of attachment under this rule can be passed only if the defendant fails to show cause why he should not furnish security or on his failure to furnish the security required.[2] The question whether there has been a failure to do so is one that must be judicially determined before drawing up the writ of attachment.[3]

Where, in order to avert an attachment, security is furnished, the Court has got power under this rule to cancel the security on cause being shown why the security should not be furnished.[4]

2. **Property specified.**—*See* Notes 1 and 17 to R. 5 above.

3. **Appeal.**—This rule contemplates orders of two kinds:—

1. An unconditional order directing attachment under Cl. 1 on the defendant's failure to furnish security or to show cause against the order for security, and
2. An order withdrawing a conditional attachment made under R. 5 on the defendant furnishing security or showing cause.

Both these orders are appealable under O. 43, R. 1 (*q*)[1]. But an order directing security to be furnished is not appealable.[2] Similarly where on an application for attachment under R. 5, the Court issued notice to the defendant *without ordering any conditional attachment* and, on the defendant's showing cause, in answer to the notice, the Court dismissed the application, it was held that the order of dismissal was not one under Cl. 2 of this rule and is therefore not appealable.[3] But where the defendant appears in answer to the notice and gives an undertaking not to alienate certain properties and the petition is thereupon closed, it has been held by the High Court of Madras that there is an order under this rule from which an appeal lies.[4]

4. **Form.**—*See* App. Form No. 7.

Order 38, Rule 6—Note 1.

(1) *Nathu Mal* v. *Kishore Lal*, (1914) 23 Ind Cas 107 (108) All.

(2) *Sourendra Nath* v. *Sreemati Tarubala Dasi*, 1927 Cal 354 (355): 31 Cal W N 432: 101 Ind Cas 9; *Abdul Karim Dhali* v. *Nur Mahomed*, (1920) 57 Ind Cas 907 (908) Cal; *Jai Parkash* v. *Basanta Kumari*, (1912) 15 Ind Cas 604 (605) Cal; *Nathu Mal* v. *Kishore Lal*, (1914) 23 Ind Cas 107 (108) All.

(3) *Sourendra* v. *Tarubala*, 1927 Cal 354 (355): 31 Cal W N 432: 101 Ind Cas 9.

(4) *Lolitkar* v. *Lolitkar*, (1880-81) 5 Bom 643 (644, 646).

Note 3.

(1) *Mengha* v. *Sucha*, 1925 Rang 267 (268): 4 Bur L Jour 108: 3 Rang 307: 90 Ind Cas 995; *Jhanday Lal* v. *Sarman Lal*, (1899) 21 All 291 (292): 1899 All W N 68; *Chokhey Lal* v. *Sri Kishen*, 1932 All 269 (270): 1932 All L J 228: 140 Ind Cas 95 [Withdrawal of attachment]; *Mir Ali* v. *Bihari Lal*, (1897) 21 Bom 278 (278) [Order of attachment]; *Haji Mohamuddin and Co* v. *The Eastern Japan Trading Co*, 1923 Cal 639 (640): 50 Cal 215: 79 Ind Cas 242, (Do.). See also *Sourendra Nath Mitra* v. *Sreemati Javubala Dasi*, 1927 Cal 354 (356): 31 Cal W N 432: 101 Ind Cas 9 [Order for security and order for attachment combined—Combined order is not always proper—If combined order leads to doubt as to competency of appeal, benefit of doubt goes to appellant]; *Jai Dev Singh* v. *Jai Singh*, 1928 Lah 445 (445): 107 Ind Cas 276 [An order for attachment before judgment which is unconditional must be deemed to be an order under O 38, R 6 of the Civil Procedure Code even though it is stated to be passed under R 5].

(2) *Haji Mohamuddin and Co* v. *The Eastern Japan Trading Co*, 1923 Cal 639 (640): 50 Cal 215: 79 Ind Cas 242.

(3) *Mahendra Narain Saha* v. *Gurudas Bairagi*, (1916) 33 Ind Cas 689 (690): 23 Cal L Jour 392.

(4) *Seetarama Chettiar* v. *Sellathammal*, (1928) Mad W N 125 (127).

O. 38, R. 7, Note 1.

R. **7.** [S. 486.] *Save as otherwise expressly provided,* the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

Mode of making attachment.

[1877—S. 486; 1859—S. 85.]

Synopsis.

1 Mode of making attachment.

Attachment before judgment, if becomes one in execution. See R. 5, Note 8.

1. **Mode of making attachment.**—This rule provides that the attachment before judgment shall be made in the manner provided for the attachment of property in *execution* of a decree, *i.e.*, in the manner provided in O. 21.

Thus an attachment before judgment of immovable property must be effected in the manner provided by O. 21, R. 54 by a *prohibitory* order. Where no such order is passed or published, there is no legal attachment.[1] Similarly an attachment before judgment of a debt must be made in the manner prescribed by O. 21, R. 46, and, as in cases under that rule, the Court cannot enquire into the truth or genuineness of the debt.[2] *See also* Note 7 to O. 21, R. 46.

Where there is no positive evidence that the attachment was not effected in accordance with the law, the Court should give effect to the presumption regarding the regularity of official acts.[3] *See* S. 114 of the Evidence Act, Note 3 to S. 64 and Note 5 to O. 21, R. 54.

An attachment ordered before judgment cannot be treated as a nullity merely because it is not *completed* till after judgment.[4]

O. 38, R. 8.

R. **8.** [S. 487.] *Where* any claim *is* preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for *the payment of* money.

Investigation of claim to property attached before judgment.

[1877—S. 487; 1859—S. 86. *See* O. 21, R. 58.]

Synopsis.

1. **Investigation of claims to property attached before judgment.**
2. **Revision.**

Order 38, Rule 7—Note 1.

[1] *Bharat Chandra Pal* v. *Gouranga Chandra Pal,* 1927 Cal 885 (886): 104 Ind Cas 340.

[2] *Alwar Ayyangar* v. *Subramania Dikshathar,* 1932 Mad 169 (169): 61 Mad L Jour 868: 34 Mad L W 906: 1932 Mad W N 820: 136 Ind Cas 337.

[3] *O L Kiernander* v. *Benimadhab Khettri,* 1931 Cal 763 (766): 58 Cal 598: 134 Ind Cas 561.

[4] *Rudravaram* v. *R Venkata Seshaiya,* (1918) 48 Ind Cas 232 (234): 24 Mad L Tim 346: 1918 Mad W N 606: 35 Mad L Jour 887: 8 Mad L W 369: 42 Mad 1.

O. 38, R. 8, Notes 1—2.

1. Investigation of claims to property attached before judgment.—*See also* Note 6 to O. 21, R. 63.

The procedure to be followed in the investigation of claims under this rule is the same as that provided by O. 21, Rr. 58 to 63, for the investigation of claims to property attached in *execution* of a decree.[1] Thus the claimant to a property attached before judgment must show that, at the date of attachment he had some interest in or was possessed of the property attached.[1-a] If it is not possible to decide the question without going into the question of *title*, the Court can go into that question also.[2] Orders passed on claims under this rule are governed by O. 21, R. 63 of the Code.[3]

The Official Assignee of the property of a defendant who has become insolvent[4] or the assignee of a decree attached before judgment,[5] can prefer a claim under this rule.

The omission to object to the validity of the attachment before judgment at the time of the application for such attachment is no bar to such objection being taken when an application is made for execution of the decree in the suit.[6]

As to the effect of the dismissal of the suit on the attachment before judgment *see* Note 9 to S. 64, *ante* and notes to R. 9, *infra*.

2. Revision.—An order refusing to release property attached before judgment is not revisable inasmuch as another remedy by suit is open.[1]

O. 39, R. 9.

Removal of attachment when security furnished or suit dismissed.

R. 9. [S. 488.] *Where* an order is *made* for attachment before judgment, the Court shall *order* the attachment *to be withdrawn* when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

[1877—S. 488; 1859—S. 87.]

Synopsis.

1. Scope of the rule.

Revival of attachment. See Note 1, Pt. (1).

Order 38, Rule 8—Note 1.

(1) *Ram Ruttan* v. *Gobind*, (1867) 2 Agra 141; *George* v. *Ram Ruttan*, (1868) 3 Agra 272. See also *Hashmat Bibi* v. *Bhagwan Das*, (1914) 24 Ind Cas 752 (753): 12 All L J 24: 36 All 65 [Attachment of properties of insolvent—Investigation should be as provided by the Code].

(1-a) *Sashi Dulal Pyne* v. *Nanda Lal Das*, 1920 Cal 162 (162): 48 Cal L Jour 594: 115 Ind Cas 268. *See also* Note 6 to O 21, R 58.

(2) *Sunder Koer* v. *Janki Das Kandhya Lal*, 1929 Pat 747 (748): 119 Ind Cas 555: 11 Pat L Tim 50; *Osman Sleth Mahomed* v. *Khanoomal Satramadas*, 1927 Sind 114 (115): 98 Ind Cas 888. *See also* Note 20 to O 21, R 58.

(3) *M S M M Chettiar Firm* v. *Maung Sein*, 1931 Rang 279 (280): 9 Rang 561: 135 Ind Cas 326; *Bisheshar* v. *Ambika Prasad*, (1915) 29 Ind Cas 622 (624): 13 All L J 732: 37 All 575.

(4) *Turner* v. *Pestonji*, (1895) 20 Bom 403 (407).

(5) *Sadagopachariar* v. *Raghunath*, (1909) 3 Ind Cas 938 (939): 6 Mad L Tim 273: 33 Mad 62.

(6) *Basiram* v. *Kattyayini*, (1911) 10 Ind Cas 305 (307): 15 Cal W N 795: 38 Cal 448.

Note 2.

(1) *J J Guise* v. *Jaisraj*, (1893) 15 All 405 (407): 1893 All W N 172.

O. 38, R.9, Note 1.

1. Scope of the rule.—Sub-R. (2) of R. 6 refers to the withdrawal of a *conditional* attachment made under R. 5 while this rule refers to the withdrawal of an *unconditional* attachment effected under R. 6, and provides that the Court shall order such attachment to be withdrawn where

(*a*) the defendant furnishes the security required together with security for the costs of attachment, or,

(*b*) the suit is dismissed.

This does not mean, however, that where the suit is dismissal that attachment continues in the absence of an *order* of withdrawal. Even without any such order, where the suit is dismissed, the attachment before judgment like all other ancillary and interim orders in the proceedings, falls with it and is not revived by the subsequent restoration of the suit or by the dismissal being reversed in appeal.[1] On the same principle when a suit abates, the attachment ceases and the subsequent setting aside of the abatement has not the effect of reviving the attachment.[2]

A files a suit against *B* and attaches certain properties before judgment. *C* prefers a claim thereto but the claim is dismissed on 28-2-1914; the suit is dismissed subsequently but the dismissal is set aside on appeal and a decree is passed in the suit. *A* again attaches the same property in *execution* of the decree. *C* again prefers a claim to the property and his claim is disallowed on 2-8-1921. He is entitled to file a suit under O. 21, R. 63 within one year from 2-8-1921. It is not barred by his not having brought the suit within one year of the former dismissal inasmuch as the attachment came to an end by the dismissal of the suit and it was unnecessary to file a suit under O. 21, R. 63 then.[3]

A claim suit under O. 21, R. 63 in respect of an attachment before judgment does not abate by reason of the dismissal of the suit in which the attachment was effected.[4]

O.38, R.10.

Attachment *before judgment* not to affect rights of strangers *nor* bar decree-holder from applying for sale.

R. **10.** [S. 489.] Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree

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Order 38, Rule 9—Note 1.

[1] *Balaraju Chettiar v. Masilamani Pillai*, 1930 Mad 514 (520): 31 Mad L W 643: 58 Mad L Jour 675: 53 Mad 334: 126 Ind Cas 614 [Overruling 1928 Mad 940]; *Seethai Ammal v. Narayan*, 1928 Mad 976 (977): 1928 Mad W N 710: 113 Ind Cas 63; *Ram Chand v. Pitam Mal*, (1888) 10 All 506 (511, 513): 1888 All W N 195; *Abdur Rahman v. Amir*, (1918) 45 Cal 780 (784): 22 Cal W N 927: 44 Ind Cas 229; *Shaik Mohideen v. Shaikh Ahmed Hossein*, (1870) 14 Suth W R 384 (385); *Sailesh Chandra v. Joychandra Roy*, 1925 Cal 1147 (1148): 87 Ind Cas 756; *Protap Chandra Gope v. Sarat Chandra Gangopadhyaya*, 1921 Cal 101 (103): 25 Cal W N 544: 33 Cal L Jour 201: 62 Ind Cas 348; *Susirama Kumari v. Meherban Khan*, (1911) 9 Ind Cas 918 (920): 13 Cal L Jour 243; *Maung Ba Kin v. Ma Pwa Thin*, 1929 Rang 94 (94): 116 Ind Cas 473; *Maneckjee v. R M N Chettiar Firm*, 1927 Rang 310 (311): 5 Rang 492: 105 Ind Cas 540; *Pindi v. U Tha Ma*, 1931 Rang 281 (282, 283): 9 Rang 472: 134 Ind Cas 748. See however *Chhotey Lal v. Sohrab Ali*, 1925 Oudh 592 (592): 12 Oudh L J 521: 2 Oudh W N 372: 89 Ind Cas 17 [Security bond by surety for due compliance by judgment-debtor—Dismissal for default—Restoration—Surety's liability continues].

[2] *Jotish Chandra Sen v. Harchandra Saha*, 1928 Cal 234 (235): 47 Cal L Jour 282: 109 Ind Cas 164.

[3] *Sailesh Chandra v. Joy Chandra Roy*, 1925 Cal 1147 (1148): 87 Ind Cas 756.

[4] *Ramaswami Chetty v. Alagiri Chetty*, (1915) 27 Ind Cas 800 (800) Mad.

against the defendant from applying for the sale of the property under attachment in execution of such decree.

[1877—S. 489; 1859—S. 89.]

Synopsis.

1. **Right of third persons not affected by attachment before judgment.**
2. **Other decree-holders' rights to execute their decree not affected.**
3. **Effect of adjudication on attachment before judgment—See Note 20 to R. 5 and Note 14 to S. 64, ante.**

Attachment before judgment and right of survivorship in Hindu law. See Note 21 to R. 5.

1. Rights of third persons not affected by attachment before judgment.—An attachment before judgment does not affect the rights of persons not parties to the suit. Thus a stranger to whom the property has been transferred before attachment[1] or a receiver of the property who is not a party to the suit[2] is not affected by the attachment. Where an agreement for sale has been entered into in respect of a property before the attachment thereof, the right of the purchaser to have the conveyance executed is not affected by the attachment.[3] A puisne mortgagee has a charge over the surplus sale proceeds in Court after the property was sold at the instance of the prior mortgagee. He is not affected by an attachment before judgment effected subsequent to the mortgage.[4]

As to the effect of attachment on the right of survivorship in a joint Hindu family *see* Note 21 to R. 5.

2. Other decree-holders' rights to execute their decree not affected.—It has been seen in Note 5 to S. 64 and Note 11 to O. 21, R. 54 that an attachment does not confer any title, charge, lien or priority in the property in favour of the person attaching it. It will not therefore, prevent the property from being attached and sold in execution of any other decree against the same judgment-debtor.[1] Where *A* attaches before judgment money deposited in Court to satisfy *B's* decree, he does not thereby get any right or title to the money and cannot apply to the Court holding the money for payment. He must apply for execution of his decree and for transfer of the money to his own suit.[2]

Order 38, Rule 10—Note 1.

[1] *Chindha Rupla Patil* v. *Chhaganlal Shivlal Shetti*, 1928 Bom 545 (546): 30 Bom L R 1488; *Ebrahim Haji Mahomed* v. *Noor Mahomed*, 1931 Rang 49 (50): 8 Rang 494: 128 Ind Cas 839 [Mortgage].

[2] *Nadir Shaw Jamshedji Mody* v. *Purshottamdas Ganpat Das Gajjar*, 1929 Bom 279 (280): 31 Bom L R 320: 118 Ind Cas 694.

[3] *Deoki Nandan Singh* v. *Jawad Hussain*, 1928 Pat 199 (200): 9 Pat L Tim 5: 106 Ind Cas 356; *Madan Mohan De Sarkar* v. *Rebati Mohan Poddar*, (1916) 34 Ind Cas 953 (954): 23 Cal L Jour 115: 21 Cal W N 158. *See also* Note 15 to S 64 for a fuller discussion.

[4] *Prabhala Narasimha Somayajulu Garu* v. *Muthury Somappa*, (1916) 32 Ind Cas 944 (945) Mad.

Note 2.

[1] *Bishesar Das* v. *Ambika*, (1915) 29 Ind Cas 622 (623): 13 All L J 732: 37 All 575; *Vishnu Dhonddev Palkar* v. *Rampratap Daulatram Marwadi*, 1921 Bom 219 (219): 45 Bom 360: 59 Ind Cas 713: 22 Bom L R 1407; *Madhusudan* v. *Rash Mohan*, (1915) 30 Ind Cas 38 (39): 21 Cal L Jour 614; *Sewdut* v. *Sree Canto*, (1906) 33 Cal 639 (643), 10 Cal W N 634. R C No 11 of 1871 (1870-71) 6 Mad H C R 135 (136); *Harnandan Marwari* v. *Pran Nath Ray*, 1921 Pat 409 (409): 1921 Pat H C 205: 2 Pat L Tim 240: 61 Ind Cas 922; *Cassim* v. *Abdul Kader*, 1926 Rang 85 (87): 91 Ind Cas 93 [Under the Code of 1859, the creditor who first attached was entitled to priority, *see* Note 2 to S 73 and the following cases *Dwarka Nath Shaw* v. *Pran Kristo Pal*, Bourke O C 260; *Jugger Nath* v. *Issurchunder*, Bourke O C 146; *Lutchmeeput* v. *Kenaram*, 1 Ind Jur N S 393: Bourke O C 92; *Narsingdas Multanchand* v. *Nahanubai* and *Sumarmal Joharimal* v. *Nahanubai*, (1870) 7 Bom H C (O C) 188.

[2] *Ramanatha Chettiar* v. *Karuppaya Nadar*, 1926 Mad 1104 (1105): 51 Mad L Jour 436: 1926 Mad W N 683: 97 Ind Cas 1020.

O 38.R.10, Note 3.

3. **Effect of adjudication on attachment before judgment.**—*See* Note 20 to R. 5 and Note 14 to S. 64, *ante.*

O.38,R.11, Notes 1—2.

Property attached *before judgment* **not to be re-attached in execution of decree.**

R. **11.** [S. 490.] Where property is under attachment by virtue of the provisions of this *Order* and a decree is *subsequently passed* in favour of the plaintiff, it shall not be necessary *upon an application for* execution of such decree to *apply for a re-attachment of the* property.

[1877—S. 490.]

Synopsis.

1. **Legislative changes.**
2. **Scope of the rule.**
3. **Re-attachment, if operates as waiver of attachment.**
4. **Objection that property is not attachable can be raised after decree.**

1. **Legislative changes**:—

The words "upon an application for the execution of such decree to apply for a re-attachment of the property" have been substituted for the words "to re-attach property in execution of such decree". The words "upon an application" make it clear that after decree the plaintiff must apply like any other execution creditor.

2. **Scope of the rule.**—Where an attachment before judgment has been made the decree passed in the suit does not determine the attachment. It, therefore, continues to remain in force in the absence of a specific order of the Court raising it.[1] Upon an application for execution of the decree, it is not necessary to re-attach the properties.[2]

But as has been seen in Note 10 to S. 73 an attachment before judgment confers no right on the party who obtains the attachment, and he will not thereby become entitled to get rateable distribution under S. 73 unless, like other decree-holders, he *applies for execution* after getting his decree.[3]

Order 38, Rule 11—Note 2.

(1) *Shivlal Gulabchand* v. *Janiram Sadashiv,* 1928 Bom 444 (446): 30 Bom L R 1136; *Rasappa Pillai* v. *Doraiswami Reddiar,* 1925 Mad 1041 (1043): 49 Mad L Jour 88: 1925 Mad W N 486: 90 Ind Cas 545; *Heramba Nath Bando Padhya* v. *Surendra Nath Mitra,* (1919) 53 Ind Cas 20 (30): 1919 Pat H C C 465; *Ganu Singh* v. *Jangi Lal,* (1899) 26 Cal 531 (534).

(2) *Ardeshir Nusserwanji Dossabhoy* v. *Usman Gani Menon,* 1929 Bom 455 (455): 31 Bom L R 1101; *Sarkies* v. *Budhoo Beee,* (1869) 1 N W P H C 172; *Sherinivas* v. *Hari,* 1929 Bom 321 (323): 31 Bom L R 652: 53 Bom 549: 119 Ind Cas 769; *Chindha Rupla Patil* v. *Chhaganlal Sheralal,* 1928 Bom 545 (547): *Pallonji* v. *Edward Vaughan,* (1888) 12 Bom 400 (405); *Firm of Chaitanya Krishna Mandal* v. *Jagat Chandra Banikya,* 1927 Cal 240 (242): 44 Cal L Jour 553: 99 Ind Cas 895; *Sewdut* v. *Sree Canto,* (1906) 33 Cal 639 (643): 10 Cal W N 634; *Bhagwan Chandra* v. *Chandra Mala,* (1902) 1 Cal L Jour 97 (100): 29 Cal 773: 6 Cal W N lxvii (S N); *Arunachalam* v. *Haji Sheek,* (1910) 7 Ind Cas 856 (857): 8 Mad L Tim 226: (1910) Mad W N 688: 34 Mad 25; *Ramaswami Udayar* v. *Chakrapany Chettiar,* (1907) 17 Mad L Jour 488 (489); *Mustan Sahib* v. *Benjamin Brooks,* (1871-74) 7 Mad H C 347 (348); *Dropati Bibi* v. *Ram Raj Pal,* (1909) 3 Ind Cas 31 (32): 6 All L J 703: 31 All 527; *Vellayan Asari* v. *Sivgnanam Asari,* 1925 Mad 49 (49): 34 Mad L T 193: 79 I C 917; *Arunachalam* v. *Periaswami,* 1921 Mad 163 (167): 44 Mad 902: 41 Mad L Jour 252: 14 Mad L W 645: 1921 Mad W N 569: 70 Ind Cas 439; *Ram Hari Lal* v. *Nathu Ram,* 1921 Pat 140 (141): 6 Pat L Jour 332: 2 Pat L Tim 719: 62 Ind Cas 33; *Manyam Surayya* v. *Sunkavallo,* 1924 Mad 210 (211): 47 Mad 176: 45 Mad L Jour 822: 19 Mad L W 20: 79 Ind Cas 779. The following cases are no longer law:—*Sri Rammanik* v. *Tincowri Rai,* (1869) 4 Beng L R 63 (68): 13 Suth W R 9 F B; *Mt Satbhavan* v. *Sahoo Banarsee Das,* (1870) 2 N W P H C 365.

(3) *Bisheshar Das* v. *Ambika Pershad,* (1915) 29 Ind Cas 622 (623): 13 All L J 732: 37 All 578; *Arunachalam Chettiar* v. *Haji Sheikh Meera,* (1910) 7 Ind Cas 856 (857): 8 Mad L Tim 226: 1910 Mad W N 688: 34 Mad 25; *Amara Veerayya* v. *Annamalai Chetty,* (1908) 31 Mad 502 (504): 4 Mad L Tim 348; *Pallonji*

O.38, R.11, Notes 3—4.

3. **Re-attachment, if operates as waiver of attachment.**—If an attachment is made before judgment it does not terminate with the decree unless there is proof of an intention on the part of the plaintiff to abandon it. The mere fact that the properties were re-attached after judgment is no proof of such abandonment.[1]

4. **Objection that property is not attachable can be raised after decree.**—When attachment before judgment is asked for, the defendant is not bound to take exception to the validity of the attachment on the ground the property is inalienable. He could take such objection when an application is made for execution of the decree passed in the suit.[1]

O.38, R.12.

Agricultural produce not attachable before judgment.

R. 12. [New.] *Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.*

O.38, R.13, Note 1.

Small Cause Court not to attach immoveable property.

R. 13. [New.] *Nothing in this Order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immoveable property.*

Synopsis.

1. **Attachment of immoveable property— Small Cause Courts.**

1. **Attachment of immoveable property—Small Cause Courts.**—As has been seen in the Notes to S. 7, *ante*, that before Act, I of 1926 was passed it had been held that an attachment of immoveable property before judgment could be passed by a Small Cause Court.[1] This rule newly introduced in this order now makes it clear that such an order cannot now be passed by a Small Cause Court.[2]

It has been held in the undermentioned case[3] that Act. I of 1926 operates retrospectively and that an order for conditional attachment before judgment made before the Act came into force cannot be confirmed and made absolute after the Act came into force.

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v. *Edward Vaughan Jordan*, (1888) 12 Bom 400 (406); *Butloo Khan* v. *Gomani Singh*, (1909) 3 Ind Cas 836 (837): 18 Cal W N 1177; *Sewdut Roy* v. *Sreecanto Maity*, (1906) 33 Cal 639 (643): 10 Cal W N 634; *Sri Rammanik* v. *Tincowri Rai*, (1869) 4 Beng L R 63 (67): 13 Suth W R 9 F B.

Note 3.

(1) *Shirnath* v. *Seberudin*, 1929 Cal 465 (467): 56 Cal 416: 119 Ind Cas 113; *Kosuri Suraparaju* v. *Mandapaka Narasimham*, (1915) 26 Ind Cas 81 (82): 1 Mad L W 932; *Alwar Chetty* v. *Povala Varadappa Naicker*, (1912) 16 Ind Cas 887 (887) Mad; *Henamba* v. *Surendra*, (1919) 53 Ind Cas 20 (30): 1919 Pat H C C 465.

Note 4.

(1) *Basiram* v. *Kattyayani*, (1911) 10 Ind Cas 305 (306): 15 Cal W N 795: 38 Cal 449.

Order 38, Rule 13—Note 1.

(1) See also *Kanchedi* v. *Kanchedi*, (1918) 43 Ind Cas 123 (124): 14 Nag L R 1. See cases cited in foot-note (3) to Note 6 of S 7.

(2) See Note 2 to S 7, *ante*.

(3) *Muthukrishna Pillai* v. *Ayyaswami Aiyar*, 1928 Mad 1173 (1174): 55 Mad L Jour 382: 28 Mad L W 344: 113 Ind Cas 416.

O. 39, R. 1.

ORDER XXXIX.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

Temporary Injunctions.

Cases in which temporary injunction may be granted.

R. 1. [S. 492.] *Where* in any suit it is proved by affidavit or otherwise—

(*a*) that any property in dispute in a suit[5] is in danger of being wasted, damaged or alienated by any party to the suit,[6] or wrongfully sold in execution[10] of a decree, or

(*b*) that the defendant threatens, or *intends*, to remove or dispose of his property with *a view* to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or *make* such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, *until the disposal of the suit or until further orders.*[16]

[1877—Ss. 492, 503, 504; 1859—S. 92. *See* S. 45 of the Supreme Court of Judicature Act, 1925 and R. S. C., O. 50, R. 6.]

Local Amendments.

ALLAHABAD.

Delete the word "sale" *after* the words "damaging, alienation".

NAGPUR.

In Cl. (*a*), *omit* the words "or wrongfully sold in execution of a decree".

Omit the word "sale", and after the words "further orders" *insert* the following proviso:—

> "Provided that, if it appears to the Court that the property in suit is in danger of being wrongfully sold in execution of a decree, the Court may also by order grant a temporary injunction restraining the Court executing the decree from confirming the sale held in execution of the decree until the disposal of the suit or until further orders."

OUDH.

In R. 1, *delete* the words "or wrongfully sold in execution of a decree" in Cl. (*a*) and *delete* the word "sale" after the words "damaging, alienation", and *add* the following proviso to the rule:—

> "Provided that, if it appears to the Court that the property in suit is in danger of being wrongfully sold in execution of a decree, the Court may also by order grant a temporary injunction restraining the Court executing the decree from confirming the sale held in execution of the decree until the disposal of the suit or until further orders."

RANGOON.

In Cl. (*a*) of R. 1, the words "or wrongfully sold in execution of a decree" shall be *deleted.*

In the last sentence of R. 1, the word "sale", occurring between the words "alienation" and "removal", shall be *deleted.*

Synopsis.

1. Legislative changes.
2. Injunctions, temporary and perpetual.
3. Scope and principle of the rule.
4. Applicability of the rule to probate proceedings.
5. "Any property in dispute in a suit."
6. "In danger of being wasted, damaged or alienated by any party to the suit."
7. Injunctions in respect of judicial proceedings.
8. Right to worship.
9. Religious office.
10. "Wrongfully sold in execution of a decree."
11. Execution of decree of Revenue Court.
12. Disposal of property in fraud of creditors.
13. Against whom injunction can be granted.
14. Injunctions will be granted only in any suit.
15. Injunction in suit for declaration only.
16. Duration of temporary injunction.
17. Effect of temporary injunction.
18. Breach of injunction.
19. Injunction to restrain marriage.
20. Appeal.
21. Revision.
22. Powers of High Court—General.
23. Power to restrain party from proceeding with suit in another Court.
24. Power to stay proceedings pending in subordinate Court.
25. Form of temporary injunctions.

Breach of contract—Suit for. See Note 2, F.-N. (7) and Note 3, F.-N. (6).
Criminal proceedings—Stay of. See Note 24, F.-N. (1).
Defendant residing outside jurisdiction, but having property within jurisdiction—Power to issue injunction. See Note 13, F.-N. (4).
Delay in applying for injunction—Effect of. See Note 3, Pt. (13).
Dismissal of suit—Whether injunction subsists after. See Note 16. Pt. (2).
Notice. See R. 3.
Order of the High Court—Appeal from. See Note 20, Pt. (6).
Powers of High Court to restrain acts of public functionaries. See Note 13, Pts. (7) and (8) and Note 22, F.-N. (1).
Preventing obstruction to rights of property—Suit for. See Note 3, F.-N. (6) and Note 5.
Proper Court to grant injunction. See Note 14, Pt. (2).
Restraining defendant from using a trade-mark—Suit for. See Note 3, F.-N. (7). and O. 39, R. 2, Note 4, Pt. (2).
Restraining execution of decree—Suit for. See Note 7, F.-N. (1) and Note 7, Pt. (6) and Note 10.
Suit by reversioner to prevent waste by a Hindu widow. See Note 6, F.-N. (4).
Terms—Power to put the applicant on. See Note 3, F.-Ns. (6) and (15).

1. Legislative changes.—

In the last paragraph of the rule, the words "(or refuse such injunction or other order)" which occurred at the end of the old section have been omitted and the words "until disposal of the suit or until further orders" have been newly added.

2. Injunctions, temporary and perpetual.—An injunction is a judicial process whereby a party is required to do, or to refrain from doing, any particular act.[1] It is in the nature of a preventive relief granted to a litigant *quia timet, i.e.*, because he fears future possible injury.[2] Its main purpose is to preserve the subject-matter of the suit in *status quo* for the time being.[3]

Order 39, Rule 1—Note 2.

(1) See also *The Firm, Raghbir Singh Jaswant v. Narayan Singh*, 1923 Lah 48 (50): 72 Ind Cas 569 [An order to a defendant to prepare an inventory and to keep accounts is an order under this rule].

(2) Woodroffe's Law of Injunctions, 3rd Ed, p 15.

(3) *The Lahore Electric Supply Co. Ltd v. Bombay Motor Cycle Co.* (1922) 67 Ind Cas 743 (743): 107 Pun L R 1919 [It must not therefore go further and create a totally new state of things].

Injunctions are of two kinds, temporary and perpetual. A perpetual injunction restrains a party *for ever* from doing the act specified. It is regulated by Ss. 54 to 57 of the Specific Relief Act, I of 1877,[4] and can be granted only by a decree passed after the hearing of the suit on the merits. A temporary injunction, on the other hand, enures only until the disposal of the suit in which it is granted or until the further orders of Court. It is regulated by the provision of O. 39 of the Code[5] and can be granted on an interlocutory application *at any stage* of the suit. Although temporary injunctions are regulated by the Code, the general principles governing their grant have been held to be the same as those governing the grant of perpetual injunctions[6] though in the undermentioned case,[7] the rule was held to be too broadly stated. An injunction whether temporary or perpetual, compelling a party to do a particular act is called a *mandatory* injunction. In a Bombay case,[8] Beaman, J., doubted whether a *mofussil* Court in India had power to issue a temporary injunction in a *mandatory* form. Such a power has, however, been recognised in the undermentioned cases.[9]

3. **Scope and principle of the rule.**—This rule lays down the circumstances under which a temporary injunction can be granted,[1] and unless those circumstances exist, a Court has no jurisdiction to grant it.[2] But the fact that those circumstances exist, does not *compel* the Court to grant it in all cases inasmuch as the rule only says that in the cases mentioned therein, the Court *may* grant an injunction. Thus, the granting of an injunction under the rule is purely within the *discretion* of the Court.[3] This discretion, however, should, like other cases of discretion vested in Courts, be exercised in accordance with reason and on sound judicial principles.[4]

What, then, are the principles which govern the exercise of the discretion conferred by this rule? They are set out in the undermentioned cases[5] and are to the effect that a person who seeks a temporary injunction must satisfy the Court:—

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(4) *Ram Sadhan* v. *Mathura Mohan*, 1925 Cal 233 (235): 81 Ind Cas 2.

(5) *Ram Sadhan* v. *Mathura Mohan*, 1925 Cal 233 (235): 81 Ind Cas 2.

(6) *Nusserwanji Merwanji Panday* v. *Gordon*, (1881) 6 Bom 266 (279): 7 Ind Jur 535; *Malik Sohara Khan* v. *Ahmad Khan*, 1899 Pun Re No 57. But see *District Board of Farrukhabad* v. *Ikhlaque Husain*, 1933 All 86 (88): 1932 All L J 803 [Conditions and principles applicable to perpetual injunctions under the Specific Relief Act are not applicable to temporary injunctions under the Code].

(7) *Subba Naidu* v. *Haji Badsha*, (1903) 26 Mad 168 (175): 13 Mad L Jour 13 [Suit for breach of contract].

(8) *Basul Karim* v. *Pirubhai Amirbhai*, (1914) 24 Ind Cas 625 (626, 627, 628 and 629): 16 Bom L R 288, 38 Bom 381

(9) *Chamsey Bhimji* v. *Jamna Flour Mills Co*, (1915) 28 Ind Cas 121 (122): 16 Bom L R 566; *Firm of Haroon Brothers* v. *Cowasji Bezonji Agha*, 1926 Sind 201 (202): 94 Ind Cas 840.

Note 3.

(1) *Lalbharathi* v. *Panchayat Akhada*, (1928) 110 Ind Cas 621 (622): 1928 Notes 18 (e); *Mun Mohinee Dossee* v. *Ichamoyee Dossee*, (1870) 13 Suth W R 60 (60).

(2) *Tita Ram* v. *Cohen*, (1906) 33 Cal 203 (218): 32 Ind App 185: 7 Bom L R 920: 9 Cal W N 1073: 2 Cal L Jour 408: 15 Mad L Jour 379: 3 All L J 59: 8 Sar 908 P C; *Subramania Nayanar* v. *Vengu Iyer*, (1908) 18 Mad L Jour 302 (304): 4 Mad L Tim 91; *Karori Chand* v. *Maharaj Bahadur Singh*, (1917) 38 Ind Cas 48 (49): 1 Pat L Jour 560: 3 Pat L W 98 [Right to worship—Injunction to restrain plaintiff from preventing defendants entering and worshipping in certain temples].

(3) *Deutsche Dampschif Fahrts* v. *Pestonji Bikhaji, Firm of*, 1925 Sind 347 (348): 89 Ind Cas 321.

(4) *Subba* v. *Haji Badsha*, (1903) 26 Mad 168 (174); *Kanshi Ram* v. *Sharf Din*, 1922 Lah 356 (356): 66 Ind Cas 161; *District Board of Farrukhabad* v. *Ikhlaque Husain*, 1933 All 86 (90): 1932 All L J 803.

(5) *Ismail* v. *Tayaballi Essaji*, 1929 Sind 182 (190); *Daily Gazette Press, Ltd* v. *Karachi Municipality*, 1930 Sind 287 (288): 127 Ind Cas 690.

O 39, R. 1, Note 3.

Firstly that there is a serious question to be tried in the suit and that on the facts before the Court there is a probability of his being entitled to the relief, asked for by him.

Secondly that the Court's interference is necessary to protect him from that species of injury which the Court calls irreparable, before his legal right can be established on trial, and

Thirdly that the comparative mischief or inconvenience which is likely to issue from withholding the injunction will be greater than that which is likely to arise from granting it.

The first of the above conditions is what is generally termed "a *prima facie* case." In other words, the *prima facie* existence of a right and its infringement are the first condition for the grant of a temporary injunction[6]

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(6) *Bahadur Singh* v. *Seth Hukumchand*, 1923 Pat 209 (211): 4 Pat L Tim 48: 71 Ind Cas 11; *Amolak Ram* v. *Sahib Singh*, (1895) 7 All 550 (553); 5 All W N 128; *Shadi Ram* v. *Abdul Ali*, (1904) 1 All L J 527 (528) [Court can put the applicant on terms to abide by the order]; *Bhikaji Sabaji* v. *Bapu Saju*, (1875-77) 1 Bom 550 (554) [Suit in respect of breach of agreement]; *Shankar* v. *Sadashiv*, (1905) 7 Bom L R 925 (927); *Kalidas* v. *Probal Chandra*, (1913) 18 Ind Cas 394 (397): 17 Cal W N 964; *Begg Dunlop and Co* v. *Satish Chandra*, (1920) 54 Ind Cas 862 (866): 23 Cal W N 677: 29 Cal L Jour 584: 46 Cal 1001; *Upendra Nath Brahmachari* v. *Union Drug Co, Ltd*, 1926 Cal 837 (841): 43 Cal L Jour 405: 95 Ind Cas 667; *Kanshi Ram* v. *Sharf Din*, 1922 Lah 356 (356): 66 Ind Cas 161; *Sunder Singh* v. *Ram Saran Das*, 1923 Lah 227 (228): 5 Lah L Jour 262: 81 Ind Cas 322; *Mt Ishri* v. *Shib Ram*, 1923 Lah 239 (241): 71 Ind Cas 743; *Rameshwar Das* v. *Yakinuddin Khan*, 1924 Lah 633 (633-634): 75 Ind Cas 428; *Ram Rakhi* v. *Brij Bhusan*, 1928 Lah 235 (236): 29 Pun L R 50: 110 Ind Cas 118; *Nawal Kishore Khairati Lal* v. *Santosh Singh*, 1930 Lah 108 (109): 123 Ind Cas 527: 31 Pun L R 587; *Muttaya* v. *Sivaraman*, (1883) 6 Mad 229 (237): 7 Ind Jur 240; *Sivaraman* v. *Muthaya*, (1889) 12 Mad 241 (249): 16 I A 48: 5 Sar 331 P C [Suit to prevent defendants from obstructing the plaintiffs in the enjoyment of a tank]; *Vathiar Ramanuja Aiyangar* v. *Aianachariar*, (1912) 17 Ind Cas 219 (220): 23 Mad L Jour 316; *Kenneth Arthur Hill* v. *Ranjan Bardhan*, 1924 Pat 526 (527): 5 Pat L Tim 196: 75 Ind Cas 859; *Sheodhar Prasad Singh* v. *Ramasaroop Singh*, 1926 Pat 318 (319): 7 Pat L Tim 337: 96 Ind Cas 623; *Deutsche D G Hansa of Bremen* v. *Pestonji Bikhaji*, 1925 Sind 347 (348): 89 Ind Cas 321; *Preston* v. *Luck*, (1884) 27 Ch D 497 (506): 33 W R 317 (C A); fol: 18 Ind Cas 394, Ref: 7 Bom L R 319: 17 Cal W N 964; Relied upon 16 Ind Cas 359 (361); *Maharajadhiraj Sir Rameshwar Singh Bahadur* v. *Kumar Ganganand Singh*, 1925 Pat 337 (338): 6 Pat L Tim 121: 1 Pat L R (Civ) 462: 75 Ind Cas 381 [On an application for a temporary injunction to restrain a sale in execution of a decree, pending a suit, the applicant must show a *prima facie* case]; *Vithal* v. *Dawoo*, 1931 Nag 106 (107): 127 Ind Cas 345 [In a suit by the sons for partition and declaration that the debts incurred by the father were illegal and immoral, and so not binding, where the sons applied for a temporary injunction to stop the sale threatened by some of the creditors, the chief ground for granting or refusing an injunction in such a case was held to be whether the plaintiffs have or have not a *bona fide* claim]; *Ganga Singh* v. *Prithi Chand Lal*, 1922 Pat 34 (36): 1 Pat 356: 4 Pat L Tim 10: 69 Ind Cas 891 [Suit on basis of compromise decree not binding on minors—Compromise apparently beneficial to minor—Injunction to restrain the decree from being executed cannot be granted]; *Bhabhikan Singh* v. *Chakradhar Pershad*, (1911) 9 Ind Cas 227 (228) Cal [Suit by minor to impeach a decree on ground of fraud—Application for injunction to restrain execution pending suit—*Held*, that the *bona fides* of the suit should be looked into before granting the injunction]; *Butchamma* v. *D Ponnama*, 1925 Mad 896 (896): 21 Mad L W 698: 91 Ind Cas 307 [Order granting injunction without finding of possession or of danger of waste is unsustainable—Existence of allegation in affidavit is not enough]; *Subramania Nayanar* v. *Vengu Iyer*, (1908) 18 Mad L Jour 302 (304): 4 Mad L Tim 91 [S 493 of Civil Procedure Code has no application when the defendant is in possession and the plaintiff out of possession, and a Court will be acting without jurisdiction if it grants an injunction in favour of plaintiff out of possession out of the property in dispute]; *Abdul Rahim* v. *Raghbir Chand*, 1929 Lah 161 (163): 112 Ind Cas 689, (Do.); *Sewaram Singh* v. *Sardarni Maya Devi*, 1925 Lah 167 (168): 80 Ind Cas 727 [Though an injunction will be refused where plaintiff is out of possession, an injunction can be granted even in such a case where the threatened injury will be irreparable]; *Prammotha Nath Roy* v. *Jagannath Kishore Lal Singh*, (1912) 16 Ind Cas 359 (360): 17 Cal L Jour 427 [Pending a suit for the specific performance of an agreement to grant a lease of certain property to the plaintiff, the Court should grant a temporary injunction to restrain the defendant from granting the lease of the same property to any other person during the pendency of the litigation]; *Sadhukhan* v. *Birendra Nath Dutt*, (1920) 57 Ind Cas 847 (848) Cal [A temporary injunction will be granted to a plaintiff restraining defendants from selling property to a third person during the pendency of a suit for specific performance of contract for sale, where permission necessary to sell the property was obtained owing to certain facts not being brought to the notice of the Court granting it]; *Bishambar Nath Jaithy* v. *The Municipal Committee, Delhi*, 1926 Lah 589 (590): 96 Ind Cas 286 [The rule that before the issue of a temporary injunction, the Court must satisfy itself that the plaintiff has a *prima facie* case, does not mean that the Court should examine the merits of the case closely and come to a conclusion that the plaintiff has a case in which he is likely to succeed, but only has to see that on the face of it, the person applying for an injunction has a case, which needs consideration and which is not bound to fail by virtue of some apparent defects]; *Election Officer* v. *Abdul Ghani*, 1923 Lah 47 (48): 79 Ind Cas 233 [No injunction should be granted where its effect would be to virtually decide the suit for plaintiff]; *Danish*

O. 39, R. 1, Note 3.

But the existence of a *prima facie* case is not by itself sufficient. The applicant should further satisfy the second condition by showing that *irreparable injury* will accrue to him if the injunction is not granted[7] and that there is no other remedy open to him by which he could protect himself from the consequences of the apprehended injury.[8] "Irreparable injury", however, does not mean that there must be no physical possibility of repairing the injury but means only that the injury must be a *material* one, *i.e.*, one, that cannot be adequately compensated for in damages.[9] The third condition is what is called the principle of the "balance of convenience". In applying this principle, the Court should weigh the amount of substantial mischief that is likely to be done to the applicant if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted.[10] If, on such a consideration, the Court thinks that pending the determination of the suit, the subject-matter should be maintained in *status quo*, an injunction for that purpose should be issued.[11]. It must, however, be remembered that a tempo-

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Dairies Milk Export v. *Muridhar & Co*, 1932 Sind 84 (86): 26 Sind L R 51 [Trade mark]; *Mulji Haridas* v. *Sir Ibrahim Rahimtullah*, 1932 Bom 166 (167): 34 Bom L R 281: 56 Bom 254: 137 Ind Cas 379 [Suit for declaration that a *Bill* is *ultra vires* and to restrain the president of the Legislative Assembly from proceeding with the Bill—A Bill has no effect until passed as an Act, and the declaration sought for not likely to be granted in suit—Act complained of is no legal wrong against plaintiff—Hence no temporary injunction].

[7] *Kesho Prasad* v. *Srinibash*, (1911) 10 Ind Cas 256 (257): 18 Cal L Jour 394: 38 Cal 791; *Reddaway & Co* v. *Schroder Smidt & Co*, (1904) 8 Cal W N 151 (152) [Suit in respect of a trade mark]; *Begg Dunlop & Company* v. *Satish Chandra*, (1920) 54 Ind Cas 862 (868): 23 Cal W N 677: 29 Cal L Jour 584: 46 Cal 1001; *Chet Ram* v. *Hari Baksh*, 1926 Lah 435 (436): 93 Ind Cas 848; *Gopal Krishan Konar* v. *Vilunga Konar*, 1926 Mad 132 (132): 90 Ind Cas 819; *Deutche Dampschiffahrts Gesselschaft Hansa* v. *Firm of Pestonji Bhicaji*, 1925 Sind 347 (348): 89 Ind Cas 321; *Brojendra Kishore Roy Chowdhury* v. *Abdus Sobhan*, (1915) 27 Ind Cas 647 (649) Cal; *Firm of Shan Lal* v. *Jai Narain*, (1920) 54 Ind Cas 546 (547): 2 U P L R (Lah) 30: 25 Pun W R 1920: 81 Pun L R 1920.

[8] *Firm of Sohanal Chiman Lal* v. *Jai Narain Babu Lal*, (1920) 54 Ind Cas 546 (547): 2 U P L R (Lah) 30: 25 Pun W R 1920: 81 Pun W R 1920; *The Firm of Manohar Lal Mahabir Prasad, Delhi* v. *The Firm of Jai Narain Babu Lal of Delhi*, (1920) 55 Ind Cas 403 (405): 2 Lah L Jour 283; *Ramsa* v. *Rana Sheonath Singh*, 1921 Nag 90 (91): 4 Nag L J 207; *Narsingdas* v. *Damdoolal*, 1928 Nag 222 (223): 107 Ind Cas 908 [If the object of the application for injunction is to avoid having to sue for possession and having to pay to Court-fee accordingly injunction will be refused].

[9] *Messrs Begg Dunlop & Co* v. *Satish Chandra Chatterjee*, (1920) 54 Ind Cas 862 (868): 23 Cal W N 677: 29 Cal L Jour 584: 46 Cal 1001; *Vathiar Ramanuja Aiyangar* v. *Aiyanachariar*, (1912) 17 Ind Cas 219 (221): 23 Mad L Jour 316 [It does not mean mere annoyance to a class of people]; *Behari Lal* v. *Ghisa Lal*, (1902) 24 All 499 (500): 1902 All W N 169 [No injunction will be granted against the exercise of a legitimate right merely because it offends the religious feelings of certain individuals].

[10] *Jamnadas Shankarlal and Vrijbhukhan Shankarlal* v. *Atmaram Harjivan*, (1877-78) 2 Bom 133 (139): 2 Ind Jur 257; *Shadi Ram* v. *Abdul Ali*, (1904) 1 All L J 527 (528); *Shamnugger Jute Factory Co* v. *Ram Narain Chatterjee*, (1887) 14 Cal 189 (200); *Baddan* v. *Dhunput Singh*, (1897) 1 Cal W N 429 (431); *Chandra Nath* v. *Sree Gobind*, (1902) 6 Cal W N 308 (310); *Singaram Coal Syndicate Co, Ltd* v. *Indra Nath Chatterjee*, (1906) 10 Cal W N 173 (176); *Dwijendra Narain Roy* v. *Purnandu Narain Roy*, (1910) 5 Ind Cas 171 (175): 11 Cal L Jour 189; *Israil* v. *Samsit Rahman*, (1913) 21 Ind Cas 861 (863): 18 Cal W N 176: 19 Cal L Jour 47: 41 Cal 436; *Begg Dunlop and Co* v. *Satish Chandra*, (1920) 54 Ind Cas 862 (872): 23 Cal W N 677: 29 Cal L Jour 584: 46 Cal 1001; *Upendranath Brahmachari* v. *The Union Drug Co, Ltd*, 1926 Cal 837 (841): 43 Cal L Jour 405: 95 Ind Cas 667; *Macneil & Co* v. *Debendra Nath*, 1928 Cal 293 (295); *Kanshi Ram* v. *Sharf Din*, 1922 Lah 356 (356): 66 Ind Cas 161; *Subba Naidu* v. *Haji Badsha Saheb*, (1903) 26 Mad 168 (175): 13 Mad L Jour 13; *Kenneth Arthur Hill* v. *Ranjan Bardhan*, 1924 Pat 526 (527): 5 Pat L Tim 196: 75 Ind Cas 859 [If the other party has already invested lots of money on the project which is sought to be restrained but he is a man of means who can easily pay any damages that may ultimately be awarded against him, no *interim* injunction should be granted]; *Firm of Kirpaldas* v. *Firm of Gajan Mal*, 1921 Sind 114 (117): 15 Sind L R 5; 70 Ind Cas 864; *Doherty* v. *Allman*, (1878) 3 App Cas 709, Appl 14 Cal 189 (200); *Krishnachandra Shaha Sardar* v. *Hem Chandra Rai*, (1915) 29 Ind Cas 855 (856); 21 Cal L Jour 469 [Where the plaintiff fails to prove that the damage he might sustain if the injunction is refused and he should ultimately turn out to be right, is likely to be greater than the damage, which the defendants would suffer if the injunction were granted and they should finally turn out to be right, the balance of convenience is against the grant of an injunction]; *Yoshimi Boshaka Ka Sha, Ltd* v. *Firm of Dwarkadas Fatehchand*, 1933 Sind 26 (26): 26 Sind L R 335: 139 Ind Cas 490, (Do.); *Allah Din* v. *Shankar Das*, (1922) 66 Ind Cas 599 (600) Lah.

[11] *Hindu Panchayat of the Village of Laki* v. *Muhammadan Community of the Village of Laki*, 1928 Sind 82 (83): 21 Sind L R 368: 108 Ind Cas 167; *Chandra Nath Pal* v. *Sree Gobind Chowdhuri*, (1900) 6 Cal W N 308 (310); *Israil* v. *Shamser Rahman*, (1913) 21 Ind Cas 861 (862): 18 Cal W N 176: 19 Cal L Jour 47: 41 Cal 436; *Krishan Chandra Saha Sardar* v.

O. 39, R. 1, Note 3.

rary injunction should not be granted on the balance of convenience alone without there also being a *prima facie* case in favour of the applicant.[12]

Even where all the above conditions are satisfied, a temporary injunction may nevertheless be refused for other reasons. Thus it can be refused on the ground of delay.[13] For other circumstances justifying such refusal, *see* the undermentioned cases.[14]

Where the suit itself is one for a perpetual injunction, a temporary injunction ought not to be refused where such refusal would defeat the object of the suit.[15] In such a case, the mere possibility of a perpetual injunction being refused ultimately will be no ground for refusing a temporary injunction.[16] Where, however, there is no chance *at all* of a perpetual injunction being granted in the suit, a temporary injunction during the pendency of the suit may be refused.[17]

The power to grant temporary injunctions under O. 39 extends to an appellate Court in regard to appeals pending before it.[18] The provisions of O. 39 apply also to proceedings in liquidation.[19]

Has a Court *inherent jurisdiction* to grant a temporary injunction? It has been held that the inherent jurisdiction of the High Courts, as Courts of equity, to grant such injunctions independently of the Civil Procedure Code, is, beyond all doubt.[20] (*See also* Notes under Note No. 22, *infra.*) As regards other Courts there is a conflict of opinion for which, *see* Note 2 to S. 94, *ante.*

Hem Chandra Rai, (1915) 29 Ind Cas 855 (856): 21 Cal L Jour 469; *Kanshi Ram* v. *Sharf Din,* 1922 Lah 856 (856): 66 Ind Cas 161; *Sri Paramahamsa Sriranga Narayana Jeer Swamigal* v. *Sri Parmahamsa Ahobila Jeer Swamigal,* 1926 Mad 166 (167): 22 Mad L W 837: 91 Ind Cas 651; *Hood* v. *Aston,* 1 Russ 412; Rel upon 16 Ind Cas 359 (360); *The Lahore Electric Supply Co, Ltd* v. *Bombay Motor Cycle Co,* (1922) 67 Ind Cas 742 (743): 107 Pun L R 1919 [The order should not go beyond preserving the *status quo.* It should not create a totally new state of things]; *Gopayya* v. *Subhanadri,* 1927 Mad 188 (189): 24 Mad L W 839: 99 Ind Cas 383 [*Status quo* means status and at time of suit and not at some time anterior to it].

(12) *Gopayya* v. *Sobhanadri,* 1927 Mad 188 (189): 24 Mad L W 839: 99 Ind Cas 383.

(13) *Krishan Chandra* v. *Hem Chandra,* (1915) 29 Ind Cas 855 (856): 21 Cal L Jour 469; *Amlock Ram* v. *Sahib Singh,* (1895) 7 All 550 (553); *Haji Syed Muhammad* v. *Gulab Rai,* (1898) 20 All 345 (349): 1898 All W N 68; *Benode Coomaree Dossee* v. *Soudhaminey Dossee,* (1899) 16 Cal 252 (265); *Tikamchand Santokchand* v. *Santokchand Singhi,* (1921) 59 Ind Cas 218 (218): 24 Cal W N 735; *Messrs Begg Dunlop & Co* v. *Satish Chandra Chatterjee,* (1920) 54 Ind Cas 862 (866): 23 Cal W N 677: 29 Cal L Jour 584: 46 Cal 1001; *Yoshimi Boshaka Ka Sha, Ltd* v. *Firm of Dwarkadas Fatehchand,* 1933 Sind 26 (26): 26 Sind L R 335: 139 Ind Cas 490 [Improper delay in asking for injunction against infringement of trade-mark. *See also* cases in R 2, N 2, F N 8, below].

(14) *Navroji* v. *Dastur,* (1903) 28 Bom 20 (57): 5 Bom L R 745 [A mandatory injunction cannot be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him]; *D D G Hansa of Bremen* v. *Firm of Pestomji Bhikaji,* 1925 Sind 347 (348): 89 Ind Cas 821 [Courts of equity will not give an order over the execution of which they cannot watch and which they cannot enforce. A contract by which one party is required to do numerous and delicate services for the other, the performance of which need a particular amount of skill and fidelity is one which cannot be specifically enforced, by threats of penalty]; *Damodharan Namboodri* v. *Govindan Nair Pattukottai,* (1919) 53 Ind Cas 229 (230): 37 Mad L Jour 307 [An injunction cannot be asked for against a person, whose employment, whatever its exact nature, so long as it continued entitled him to the exercise of the rights proposed to be restrained].

(15) *Gunabala Chowdhurini* v. *Hem Nalini,* (1918) 43 Ind Cas 24 (25) Cal.

(16) *Teja Singh* v. *Rani Harnam Kaur,* 1925 Lah 628 (629): 89 Ind Cas 678; *Nanda Lal Mukherji* v. *Kalipada Mukherji,* 1932 Cal 353 (356): 54 Cal L Jour 317: 36 Cal W N 291: 137 Ind Cas 519 [Withdrawal of the relief for permanent injunction as unnecessary cannot preclude the plaintiff from asking for a temporary injunction—Applicant put on terms].

(17) *Bishun Prasad Pathak* v. *Sashi Bhusan Mitra,* 1923 Pat 133 (133): 73 Ind Cas 294: 2 Pat L R 17 See also *Mulji Haridas* v. *Sir Ibrahim Rahimtulla,* 1932 Bom 166 (167): 34 Bom L R 231: 56 Bom 254: 137 Ind Cas 379.

(18) *Kirpa Dayal* v. *Rani Kishori,* (1888) 10 All 80 (82): 1888 All W N 7; *Janki Prasad* v. *Jugal Kishore,* (1888) 8 All W N 46 (46). *See* S 102, O 22, R 11; S 108, O 45, R 13; O 44, R 1; *Hansraj* v. *Nand Ram,* 1887 All W N 197 (198) [The application should be made to the Court in which the suit or appeal is pending].

(19) *De Souza* v. *Billimoria,* 1926 Lah 525 (527): 26 Pun L R 803: 98 Ind Cas 310.

(20) *Uderam* v. *Hyderally,* (1909) 3 Ind Cas 990 (992): 33 Bom 469: 10 Bom L R 1141; *Munni Begum* v. *Dooli Chand,* (1909) 2 Ind

O. 39, R. 1, **Notes** 4—6.

4. **Applicability of the rule to probate proceedings.**—It has been held by the High Court of Bombay that the rule does not apply to probate proceedings on the ground that the provisions of the Probate and Administration Act, 1881, indicate the intention of the Legislature that *that act itself* should be looked to, for the powers necessary for the proper custody of property pending the proceedings instead of leaving the Court to act under the Civil Procedure Code.[1] The High Court of Calcutta has held that, assuming that the provisions of O. 39 apply to such cases, there could be no "property in dispute" in such a proceeding and that, therefore, no injunction can be issued under this rule, though, in proper cases, the Court could act under R. 7, *infra.*[2]

5. "**Any property in dispute in a suit.**"—The rule contemplates cases where the property in dispute in a suit is in danger of being wasted, damaged *etc.*[1] "Property in dispute in the suit" means only such property as is the *subject-matter* of the suit.[2] For cases of suits for partition of joint estates, *see* the undermentioned cases.[3]

6. "**In danger of being wasted, damaged or alienated by any party to the suit**".—An injunction can be granted under this rule only if there is a real danger of the subject-matter of the suit being wasted, or damaged, *etc.*, by a party to the suit.[1] Where there is no allegation of danger of such waste or damage, the application should be rejected.[2] But a mere allegation is not enough. There must be proof of actual or reasonably apprehended danger of such waste or damage, before an injunction can be granted.[3] The question as to what constitutes sufficient danger of waste or damage will depend upon the facts and circumstances of each case. For illustrative cases, *see* the undermentioned cases.[4]

Cas 266 (267) Cal.

Note 4.

(1) *Madhava Rao* v. *Manekial*, (1900) 2 Bom L R 797 (798).

(2) *Nirod* v. *Chamatkarini*, (1914) 27 Ind Cas 617 (619): 19 Cal W N 205.

Note 5.

(1) *Raja Ram* v. *Dharam Das*, (1905) 2 All L J 601 (601); *Sant Lal* v. *Ishar Das*, (1919) 51 Ind Cas 108 (108): 46 Pun L R 1919: 71 Pun W R 1919 [An injunction respecting property which is not the subject-matter of the suit is illegal].

(2) *Teja Singh* v. *Harnam Kaur*, 1925 Lah 628 (629): 89 Ind Cas 678; *Kadir Jahan Begam* v. *Nathu* alias *Udit Narain*, (1902) 5 Oudh Cas 65 (68) [A claim for mesne profits is not a claim for specific moveable property, but one for damages. In such a suit defendant cannot be restrained by an injunction from dealing with money in his hands. For such money is not in dispute in the suit]; *Muhammad* v. *Naraindas*, (1915) 29 Ind Cas 601 (602): 13 All L J 565: 37 All 423 [Where a decree has been passed for the sale of a malikana, the Court cannot before the sale grant an injunction restraining the judgment-debtor from receiving the allowance. Because it is not property in dispute in the suit].

(3) *Pareshnath* v. *Omerto Nath*, (1890) 17 Cal 614 (618); *Joynarain* v. *Shib Pershad*, (1866) 6 Suth W R Mis 1 (2).

Note 6.

(1) *Mun Mohinee Dossee* v. *Ichamoyee Dossee*, (1870) 13 Suth W R 60 (60); *Mahadev* v. *Narayan*, (1904) 6 Bom L R 123 (124); *Tita Ram* v. *Cohen*, (1906) 33 Cal 203 (218): 32 Ind App 185: 7 Bom L R 920: 9 Cal W N 1078: 2 Cal L Jour 408: 15 Mad L Jour 379: 3 All L J 59: 8 Sar 908 P C; *Anant Ramrav* v. *Gopal Balvant*, (1895) 19 Bom 269 (271); *Begg Dunlop & Company* v. *Satish Chandra*, (1920) 54 Ind Cas 862 (869): 23 Cal W N 677: 29 Cal L Jour 584: 46 Cal 1001; *Sundar Singh* v. *Ram Saran Das*, 1923 Lah 227 (228): 5 Lah L Jour 262: 81 Ind Cas 322 [When there is a real danger of damage or waste to the suit property which is in defendant's possession, an order for temporary injunction restraining defendant from using the property is good]; *Mt Maharup Kuer* v. *Mahabir Singh*, 1928 Pat 111 (112): 105 Ind Cas 131: 9 Pat L Tim 325, (Do.).

(2) *S Subramania Nayinar* v. *S Vengu Iyer*, (1908) 18 Mad L Jour 302 (304): 4 Mad L Tim 91; *Ahmad Mujtaba Khan* v. *Pirthipal Singh*, 1925 Oudh 698 (698): 88 Ind Cas 581.

(3) *Prosunno Moyee* v. *Wooma Moyee*, (1870) 14 Suth W R 409 (409); *Kadir Jahan Begam* v. *Nathu* alias *Udit Narain*, (1902) 5 Oudh Cas 65 (68); *Guruswami Pandiyan* v. *Chinna Thambiran*, (1919) 53 Ind Cas 760 (761): 10 Mad L W 551; *Butchamma* v. *Punnamma*, 1925 Mad 896 (896): 21 Mad L W 698: 91 Ind Cas 307 [Order without finding of danger of waste is unsustainable].

(4) *Goluk Chunder* v. *Mohim Chander*, (1870) 13 Suth W R 95 (96) [Suit for specific sum of money. Defendants admission that he intends to invest it in trade is sufficient evidence of its being in danger of being alienated]; *A B Miller* in

O. 39, R. 1.
Note 7.

7. **Injunctions in respect of judicial proceedings.**—An injunction can be granted to restrain a party from proceeding with judicial proceedings (other than execution proceedings) pending in the same or in another Court if such injunction is necessary to prevent multiplicity of proceedings and not otherwise.[1] It can be issued even in respect of proceedings pending in a foreign Court if the party to be so restrained resides within the jurisdiction of the Court issuing the injunction.[2] In Madras, however, it has been held that such a power exists only in the High Court under its equity jurisdiction and not in the mofussil Courts.[3] Speaking generally, a civil Court in the mofussil, cannot issue an injunction restraining proceedings in a criminal Court,[4] though the High Courts, can do so in proper cases.[5] *Vide also* notes under Note Nos. 22, 23 and 24.

As regards *proceedings in execution* of a decree, it is clear that the High Courts have the power, under their equity jurisdiction to restrain a party by a temporary injunction from executing his decree in another Court of even co-ordinate jurisdiction.[6] But the mofussil Courts have no such power unless the case comes within the terms of O. 39, Rr. 1 and 2 or unless they could act under their *inherent* powers. As to whether and where the Court can restrain a party from taking such proceedings under the provisions of O. 39, Rr. 1 and 2, *see* Note 3 above and also the undermentioned cases.[7] As to the inherent powers of the Court to grant temporary injunctions, *see* Note 2 to S. 94, *ante*.

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the matter of, (1869) 12 Suth W R 103 (104): 4 Beng L R A C 72 (N) [Insolvent's money in Court—Court ordering payment to creditors instead of to Official Assignee—Remedy is temporary injunction]; *Teja Singh* v. *Bani Harnam*, 1925 Lah 628 (628): 89 Ind Cas 678 [Danger to estate by extravagant alienation by the life-holder apparent]; *Gopee Nath* v. *Kally Dass*, (1884) 10 Cal 225 (231): 8 Ind Jur 302 [Nearest reversioner entering into compromise decree with Hindu widow—Suit by remote reversioner to set aside]; *Jagjivan Nanabhai* v. *Shridhar Balkrishna Nagarkar*, (1877-78) 2 Bom 252 (255, 256) [Suit for redemption of English Mortgage—Sale of the property by defendant under his power of sale]; *Muhammad Ismail Khan* v. *Kishan Sahai*, 1887 All W N 42 (42); *Muhammad Rustan Ali Khan* v. *Muhammad Mushta Hussain*, (1916) 35 Ind Cas 718 (724): 14 All L J 554 [Appointment of *co-muttawalli* by the first *muttawalli grantor of waqf* does not invite the application of the rule as it is not an alienation or waste of property]; *Roy Luchmiputt Singh Bahadoor* v. *Secretary of State for India*, (1873) 20 Suth W R 11 (11): 11 Beng L R App 27 [Property held not to be in danger of being wasted, etc]; *Darab Kuer* v. *Gomti Kuer*, 1900 All W N 159 (160), (Do): *Sachindra Lal Mitter* v. *Panchanon Mitter*, 1926 Cal 604 (605): 30 Cal W N 214: 94 Ind Cas 871, (Do.).

Note 7.

[1] *Venkatesa* v. *Ramasami*, (1895) 18 Mad 338 (341) [Suit to restrain the defendant from executing or proceeding to execute a decree—Specific Relief Act, 1877, S 56, Cl (*a*)]. But see *Kedarnath Thakur* v. *Md Ali Khan*, 1921 Pat 92 (93): 6 Pat L Jour 268: 2 Pat L Tim 716: 63 Ind Cas 465 [In this case one subordinate Court issued an order requesting another Court of co-ordinate jurisdiction to prevent the Receiver appointed by the latter Court from interfering with the taking of possession of certain properties. *Held* the order was without jurisdiction. The ruling can be supported on the principle that injunction can be directed only to a party and not to a Court and on the ground that the receiver was not party in the suit]; Woodroffe's Law of Injunctions, 4th Ed, p 157: [Such injunctions can be granted not only in respect of judicial proceedings pending at the time of the institution of the suit in which the injunctions are prayed for but also in respect of proceedings not so instituted but threatened]; *Moran* v. *The River Steam Navigation Co*, (1875) 14 Beng L R 352, (Do.).

[2] *Vulcan Iron Works Co, Ltd* v. *Bissumbhur Pershad*, (1909) 1 Ind Cas 927 (928): 13 Cal W N 346: 36 Cal 233; *Tikamchand Santokchand* v. *Santokchand Singh*, (1921) 59 Ind Cas 218 (218): 24 Cal W N 735 [But an application for an injunction restraining the defendant, in a pending suit, from prosecuting an action in a Foreign Court must be made at a very early stage of the proceedings].

[3] *Periakaruppan Chettiar* v. *Ramasami Chettiar*, 1928 Mad 491 (492): 27 Mad L W 418: 109 Ind Cas 281.

[4] *Navab* v. *Seth Dooli Chand*, (1909) 2 Ind Cas 266 (268) Cal; *Deraji Malinga* v. *Marati Kaveri*, (1907) 30 Mad 400 (401): 2 Mad L Tim 344

[5] *Queen* v. *Achut Lall*, (1872) 17 Suth W R Cr 46 (46); *Raja Kumari* v. *Bama Sundari*, (1896) 23 Cal 610 (613, 617); *Dwarka Nath* v. *Emperor*, (1904) 31 Cal 858 (862).

[6] *Dhuronidhar* v. *Agra Bank*, (1880) 5 Cal 86 (96): 4 Cal L Rep 434 [On review from 4 Cal 380].

[7] *Singaravelu Mudali* v. *Balasubramania Mudali*, 1926 Mad 1126 (1127): 24 Mad L W 421: 1926 Mad W N 708: 97 Ind Cas 938 [Execution in breach of compromise arrived at—R 2 applies]; *Anantnath Dey* v. *Mackintosh* (1871) 6 Beng L R 571 [A obtaining decree

O. 39, R. 1, Notes 7—10.

Courts cannot be too careful as to the mode in which their machinery is used to delay a decree-holder in another suit in obtaining the fruits of his decree.[8] Consequently an injunction in respect of a judicial proceeding should not be issued except in strong cases or unless the facts fall within the express provisions of O. 39.[9]

A permanent injunction can, of course, be granted under the provisions of the Specific Relief Act, restraining a party from proceeding with the execution of a decree in another Court.[10]

8. **Right to worship.**—No person is entitled to enforce his religious views upon another, or to restrain that other from doing any lawful act or from making any lawful use of his property, simply because it would not fit in with the religious tenets of that person; so long as the right to worship is not interfered with, the owner of a property can do what he likes with it.[1] Where, however, such act or user amounts to an actionable wrong, it can be restrained by an injunction.[2]

9. **Religious office.**—An injunction can be granted restraining obstruction to a person's performing his religious duty.[1] But no injunction will be granted which would have the effect of forcing upon a section of the community the services of a priest whom they are unable to recognise, or forbidding them to employ a priest whose ministration they desire.[2]

The trustee of a temple may be restrained by injunction from making unjustifiable changes which would affect the character of the temple.[3] Similarly where a new seal sought to be used in connection with a religious office had the effect of extending rights which, according to the old seal, had been limited, the use of such seal was held restrainable by injunction.[4]

10. **"Wrongfully sold in execution of a decree."**—The provisions of this rule will not apply unless the property is in danger of being *wrongfully* sold in execution of a decree. *A* obtains a decree against *B* and in execution thereof proceeds to sell properties belonging to *B*. *B* thereupon files a suit for a declaration that the *decree* is not binding on him for various reasons. He also prays for a temporary injunction under this rule.

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against *B* for partition and possession, and, in execution, trying to oust *C* from possession—*C* can sue, and pray for temporary injunction].

(8) *Kirpa Dayal* v. *Rani Kishori*, (1888) 10 All 80 (82): 1888 All W N 7.

(9) *Mt Rohimunnissa* v. *Nowab Leakut Ali Khan*, [illegible] 22 Suth W R 506 (507): *Chhotalal Hirachand* v. *Jethalal Tarajbhai*, (1914) 27 Ind Cas 56 (56): 16 Bom L R 676 [Suit under O 21, R 103—Injunction restraining delivery of possession should not be granted]; *Nasarvanji Cawasji* v. *Shahjadi Begam*, 1922 Bom 385 (386): 24 Bom L R 378: 66 Ind Cas 768: 46 Bom 939.

(10) *Kunhamad* v. *Kutti*, (1891) 14 Mad 167 (168): 1 Mad L Jour 338; *Sultan Ali* v. *Balaji*, 1924 Nag 413 (415): 80 Ind Cas 59; *Appu* v. *Raman*, (1891) 14 Mad 425 (431).

Note 8.

(1) *Maharajah Bahadur Singh* v. *Seth Hukum Chand*, 1923 Pat 209 (211): 4 Pat L Tim 48: 71 Ind Cas 11.

(2) *The Hindu Panchayat of Laki* v. *The Mahomedan Community of Laki*, 1928 Sind 82 (84): 21 Sind L R 368: 108 Ind Cas 167 [Application for injunction—Use of building as masjid and giving "bang" by Mulla in the vicinity of Hindu temple is an actionable wrong which can be restrained by an injunction].

Note 9.

(1) *Maro* v. *Anant*, (1897) 21 Bom 821 (823); *Srinivasa* v. *Tiruvengada*, (1888) 11 Mad 450 (452).

(2) *Raja Valad Shivapa* v. *Krishnabhat*, (1878-79) 3 Bom 232 (234); *Jana Muhammad Suliman* v. *Kadirsa Levvai*, 1927 Mad 1070 (1070): 106 Ind Cas 523.

(3) *Krishnasami* v. *Samaram*, (1907) 30 Mad 158 (162, 165, 166): 17 Mad L Jour 1: 2 Mad L Tim 69.

(4) *Ramanuja* v. *Rama Kishore*, (1899) 22 Mad 189 (193).

Does such an application lie? No. The reason is that until the decree is set aside it is binding on the parties thereto, and *A* has every right to execute it. There is thus no danger of property being *wrongfully* sold in execution of the decree.[1] But suppose *A*, in execution of a decree obtained by him against *B*, attaches or otherwise proceeds against properties which belong to *C*, and the latter thereupon files a suit for declaration of his rights thereto and prays for a temporary injunction restraining *A* from executing his decree. This is a case of properties being *wrongfully* sold in execution of a decree and the application for injunction is maintainable under this rule.[2] The words "or wrongfully sold in execution of a decree" were deleted from sub-R. (1) by the Allahabad High Court by rules framed under S. 122 of the Code, with the result that an application under this rule was held not maintainable in Allahabad on the ground that any property is in danger of being wrongfully sold in execution of a decree.[3] The said words have, however, now been restored. *See also* the Local Amendments for Rangoon, Nagpur and Oudh.

Where a case comes under this rule, an application for injunction is the proper remedy, and not an application to the executing Court for stay of execution.[4]

Where the sale has already taken place no injunction will be granted restraining such sale.[5] But an injunction can be granted, even in such a case, restraining the *delivery of possession*.[6]

In granting injunctions restraining sales in execution, Courts should exercise their discretion cautiously and wisely, and *see* that the machinery of the Court is not abused, for fraudulent purposes.[7]

A Court is not debarred from restraining a party, in cases covered by Rr. 1 and 2 from executing his decree in another Court merely by reason of

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Note 10.

[1] *Vadapalli Varadacharlu* v. *Khandavilli Narasimhacharlu*, 1926 Mad 258 (258): 23 Mad L W 85: 1925 Mad W N 886: 92 Ind Cas 615; *Khabhikan Singh* v. *Chakra Dhar Persad Singh*, (1911) 9 Ind Cas 227 (228). See also *Chhotalal* v. *Jethalal*, (1915) 27 Ind Cas 56 (56): 16 Bom L R 676. [Plaintiff defeated under O 21 R 99 and seeing under R. 103—Not entitled to injunction against taking of possession].

[2] *Molar* v. *Kanhaya Lal*, 1922 Lah 58 (58): 4 Lah L Jour 188: 77 Ind Cas 116. [Claim suit]; *Narendra Bahadur Singh* v. *Abdul Haq*, (1914) 25 Ind Cas 9 (11) Oudh [Sons of Jodi suing for declaration that property is joint family property and cannot be proceeded against]; *Hazi Fate Mahomed Mia* v. *Ebrahim Biswas*, (1931) 35 Cal W N 910 (911): 1931 Notes 18 (d). [Claim suit—The language of O 39, R 1, C P C is wide enough to cover the case of a sale in execution of a mortgage decree]; *Ram Sadan Biswas* v. *Mathura Mohan Hazra*, 1925 Cal 233 (235): 81 Ind Cas 2; *Amir Dulhin* v. *Administrator General of Bengal*, (1896) 23 Cal 351 (356). [Claim suit]; *Kirpa Dayal* v. *Rani Kishori*, (1888) 10 All 80 (83): 1888 All W N 7. [Claim suit]; *Abdullah* v. *Banke Lal*, (1910) 7 Ind Cas 183 (184): 7 All L Jour 932: 33 All 79: (Do 26 All 311 must be taken to be overruled); *Nawal Kishore Khairati Lal* v. *Santosh Singh*, 1930 Lah 108 (109); 123 Ind Cas 527: 31 Pun L R 587; (Do); *Ruplal Khettry* v. *Mahima Chandra Roy*, (1870) 5 Ben L R 254 (Note). [Suit to set aside a mortgage executed to the defendant and to restrain the sale of the mortgaged property in execution of decree obtained by him on the mortgage—A temporary injunction was granted restraining the defendant from selling the property till disposal of the suit]; *Ganga Nand* v. *Balgobind Das*, (1884) 4 All W N 349 (349), (Do.); *Amolak Ram* v. *Sahib Singh*, (1885) 7 All 550 (553): 1885 All W N 128 [Suit by son of judgment-debtor that property is not saleable]; *Luchmiput Singh* v. *Secretary of State*, (1873) 20 Suth W R 11 (11): 11 Beng L R App 27 [Claim suit]; *Doorga Churn Chatterjee* v. *Ashootosh Dutt*, (1875) 24 Suth W R 70 (71), (Do.); *Kirpa Dayal* v. *Rani Kishore*, (1888) 10 All 80 (82): 1888 All W N 7, (Do.).

[3] *Gomti* v. *Kanhaiya Lal*, 1929 All 115 (116): 1929 All L J 214: 116 Ind Cas 794.

[4] *Kumar* v. *Ruplal*, (1886) 12 Cal 515 (518) [Claim suit]; *Purshottom Vithal* v. *Purshottom Ishwar*, (1884) 8 Bom 532 (534), (Do.).

[5] *Dharam Chand* v. *Mitsui Bussa Kaisha & Co*, (1920) 54 Ind Cas 928 (930) Nag.

[6] *Inayat Ullah* v. *Gur Dit Singh*, 1930 Lah 850 (851): 31 Pun L R 972: 127 Ind Cas 360.

[7] *Bhabikhan Singh* v. *Chakradhar Singh*, (1911) 9 Ind Cas 227 (228) Cal.

O. 39, R. 1, Notes 10—13.

the fact, that such Court is of a *superior grade* to that of the Court which issues the injunction inasmuch as the latter Court has jurisdiction over the *suit* and to pass orders on all interlocutory applications.[8]

11. Execution of decree of Revenue Court.—The High Court of Allahabad has held that the word "decree" does not include the decree of a Revenue Court, and that an injunction cannot be granted restraining the sale in execution of such a decree.[1] Where, however, the decree of a Revenue Court is being executed by a civil Court, the High Court of Calcutta has held that an injunction restraining its execution can be granted under this rule on the ground that the decree in such a case should be treated as a decree of a civil Court for purposes of execution.[2]

12. Disposal of property in fraud of creditors.—An injunction can be granted to restrain a threatened disposal of property in fraud of creditors whether the property is movable or immovable.[1] But in either case, the threat or intention to remove or dispose of property to defraud creditors must be proved by definite evidence.[2]

13. Against whom injunction can be granted.—An injunction can be issued only against a *party* to the suit and not against either a *Court*[1] or a *stranger* to the suit.[2]

Nor can an injunction be ordinarily granted against a person residing *outside the jurisdiction* of the Court granting it, and against whom the order cannot be enforced within that Court's jurisdiction.[3] Where, however, the order can be so enforced,[4] or, where the person has submitted to the jurisdiction of the Court,[5] it can be issued against him. No injunction will ordi-

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(8) *Amir Dulhin* v. *Administrator-General of Bengal,* (1896) 23 Cal 851 (355, 356); *Ram Sadan Biswas* v. *Mathura Mohan Hazra,* 1925 Cal 233 (235): 81 Ind Cas 2. See also *Brojendra Kumar* v. *Rup Lall,* (1886) 12 Cal 515 (518, 519).

Note 11

(1) *Onkar Singh* v. *Bhub Singh,* (1894) 16 All 496 (498): 1894 All W N 180.

(2) *Ram Lochan Singh* v. *Beni Prasad Kuari,* (1909) 1 Ind Cas 933 (935): 9 Cal L Jour 125: 36 Cal 252: 13 Cal W N 791; *Jit Lal* v. *Raja Kamaleswari,* (1912) 15 Ind Cas 614 (615): 16 Cal L Jour 555: 18 Cal W N 92.

Note 12.

(1) *Bishamber Sahai* v. *Sukhdev,* (1897) 16 All 186 (187): 1894 All W N 20.

(2) *Kalian Singh* v. *Musst Shanno,* 1924 Lah 718 (718): 6 Lah L Jour 298: 85 Ind Cas 88; *Zahir Hussain Khan* v. *Kaniz Fatima,* (1917) 39 Ind Cas 922 (925) All; *Ahmad Mujtaba Khan* v. *Pirthipal Singh,* 1925 Oudh 698 (698): 88 Ind Cas 581.

Note 13.

(1) *Raja Ram* v. *Dharm Das,* (1905) 2 All L J 601 (601). But a Court is bound to carry out an order by another Court for injunction against a party:—*Amir Dulhin* v. *Administrator-General of Bengal,* (1896) 23 Cal 851 (356) [District Judge bound to postpone execution sale on an injunction by Subordinate Judge in claim suit]. See also *Brojendro Kumar* v. *Rup Lall,* (1886) 12 Cal 515 (518, 519) [Second Sub-Judge can order stay of sale to be held by first Sub-Judge—*Obiter*]. See also the Local Amendments in R 1 for Nagpur and Oudh.

(2) *Mulhiuddin* v. *Athar Hossain,* (1918) 44 Ind Cas 496 (496) Pat; *Ram Sundar Raj* v. *Ram Dheyan,* (1918) 46 Ind Cas 224 (225): 3 Pat L Jour 456: 5 Pat L W 250: 1918 Pat H C C 302; *Sant Lal* v. *Ishar Das,* (1919) 51 Ind Cas 108 (108): 46 Pun L R 1919; *Muhammad Yamin* v. *Razia Begam,* (1920) 54 Ind Cas 223 (224): 17 All L J 1138: 1 U P L R (H C) 185; *The Election Officer, Gujrat* v. *Abdul Ghani,* 1923 Lah 47 (48): 79 Ind Cas 233; *Ram Saran* v. *Maulu,* 1926 Lah 284 (284): 27 Pun L R 11: 96 Ind Cas 540; *Sahib Thambi Marakayar* v. *Hamid Marakayar,* (1911) 12 Ind Cas 1006 (1007): 36 Mad 414: 22 Mad L Jour 109: 10 Mad L Tim 515: (1911) 2 Mad W N 534; *Harendra Nath Chowdhury* v. *Brinda Rani Dassi,* (1898) 2 Cal W N 521 (523) [But in a proceeding under the Guardian and Wards Act an injunction can be issued to a person who is not a party].

(3) *Maharajah Bahadur Singh* v. *Hukum Chand,* 1923 Pat 209 (210): 4 Pat L Tim 48: 2 Pat L R Cr 159: 71 Ind Cas 11.

(4) *Rameshwar Singh* v. *Kumar Gangan and,* 1925 Pat 337 (339): 5 Pat L Tim 121: 1 Pat L R Civ 462: 75 Ind Cas 381 [If he has property within the jurisdiction which can be proceeded against if he disobeys the Court's order, the Court has jurisdiction to pass an order of temporary injunction against him].

(5) *Kumar Ganga Singh* v. *Pirthichand Lal,* 1922 Pat 34 (35): 1 Pat 356: 4 Pat L Tim 10: 69 Ind Cas 891; *Goswami* v. *Radhey Lal,* 1926 Pat 171 (173): 6 Pat 540: 85 Ind Cas

narily be issued against Government Officers *bona fide* exercising rights or alleged rights in the course of their duty,[6] nor against public bodies under similar circumstances,[7] unless it would amount to a manifest injury to refuse to do so.[8]

An injunction does not run with the land and cannot, therefore, avail against property in the hands of a purchaser.[9] But when it has been issued against a defendant, it can, if the defendant dies, be enforced against his legal representatives.[10]

An injunction can be granted against a co-owner or a co-sharer in possession restraining him from using the property in a manner which will change the nature of the property.[11] Great caution should, however, be exercised in such cases.[12]

14. Injunctions will be granted only in any suit.—Before an injunction can be granted under this rule:—

(*i*) A suit must, in the first place, be *pending*. Thus no injunction can be granted if the suit has not yet been filed or if the suit has been disposed of.[1]

(*ii*) It must be pending on the file of the *Court granting the injunction*.[2]

15. Injunction in suit for declaration only.—It would appear that a temporary injunction can be granted even in a suit for mere declaration;[1] but not where the plaintiff, if successful in the suit, will have to bring another suit for enforcing the right which he seeks to keep undisturbed by the injunction.[2] It is also not proper, in a suit for mere declaration, to grant an injunction staying another suit pending in another Court.[3]

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852 [Pleading in a Court is submitting to jurisdiction of that Court as well as of the appellate Court].

(6) *Hormasji* v. *Pedder*, (1875) 12 Bom H C R 199.

(7) *Municipal Commissioners of Madras* v. *Branson*, (1878) 3 Mad 201 (212): 6 Ind Jur 188; *Bholaram* v. *Corporation of Calcutta*, (1909) 3 Ind Cas 341 (342): 36 Cal 671: 13 Cal W N 740: 6 Mad L Tim 251.

(8) *Surat Municipality* v. *Tyabli*, (1908) 32 Bom 460 (466): 10 Bom L R 622 [An injunction to restrain the Municipality from cutting off pipe water connection from the plaintiff's house is maintainable]; *Lalbhai* v. *Municipal Commissioner of Bombay*, (1909) 3 Ind Cas 361 (374): 33 Bom 334: 10 Bom L R 821 [An injunction will issue against a public body exercising its discretion in an arbitrary manner]; *Chabildas* v. *Municipal Commissioners, Bombay*, (1871) 8 Bom H C R (O C) 85.

(9) *Dayabhai* v. *Bapalal*, (1901) 26 Bom 140 (141): 3 Bom L R 564.

(10) *Sakar Lal* v. *Bai Parvatibai*, (1901) 26 Bom 283 (287, 288): 4 Bom L R 14.

(11) *Israil* v. *Samset Rahman*, (1913) 21 Ind Cas 861 (863): 41 Cal 436: 18 Cal W N 176: 19 Cal L Jour 47; *Hemantha* v. *Baranagore*, (1914) 24 Ind Cas 313 (315): 20 Cal L Jour 441: 19 Cal W N 442.

(12) *Macneil & Co* v. *Debendra Nath*, 1928 Cal 293 (294).

Note 14.

(1) *Yaminud Dowlah* v. *Ahmad Ali*, (1894) 21 Cal 561 (566); *Ram Sarup* v. *King-Emperor*, 1924 Oudh 345 (347): 77 Ind Cas 238 [A Court cannot grant a temporary injunction in a suit which has been dismissed for default but for the restoration of which an application is pending]; *Kunwar Raghubir Singh* v. *Moti Kunwar*, (1910) 7 Ind Cas 188 (189) All [High Court cannot grant injunction after special leave has been granted for appeal to the Privy Council]; *Gosain Money* v. *Guru Pershad*, (1885) 11 Cal 146 (149) [Appellate Court can give injunction but not original Court after its decree].

(2) *Dhundiram* v. *Chandana Bai*, (1864-66) 2 Bom H C R 98.

Note 15.

(1) *Bantu* v. *Lehna Das*, 1926 Lah 523 (523): 92 Ind Cas 723 [1922 Pat 356 followed]; *Sheodhar* v. *Ramsaroop*, 1926 Pat 318 (320): 7 Pat L Tim 337: 96 Ind Cas 623 [Left undecided as plaintiff volunteered to amend plaint asking for injunction].

(2) *Shiroman* v. *Banta*, 1926 Lah 504 (504): 8 Lah L Jour 289: 27 Pun L R 453: 96 Ind Cas 439.

(3) *Samandar* v. *Fazal*, 1925 Lah 242 (243): 78 Ind Cas 802.

O. 39, R. 1,
Notes
16—18.

16. **Duration of temporary injunction.**—An order of temporary injunction takes effect only from the time when it is communicated to the party.[1] It terminates as soon as the suit in which it is granted terminates[2] even though it may have been stated to be "until further orders".[3]

17. **Effect of temporary injunction.**—An alienation made contrary to an order of injunction is not, on that account, void.[1] But the party guilty of the breach will be liable for contempt of Court or damages.[2] (*Vide also* notes under Note No. 18, "Breach of injunction", *infra.*)

18. **Breach of injunction.**—An injunction although subsequently discharged must be obeyed while it lasts.[1] When the injunction is disobeyed, the party guilty of such disobedience can be proceeded against for contempt under the provisions of R. 2, Cl. 3.[2] The Court which granted the injunction will be the Court competent to punish disobedience,[3] but it must be set in motion by the aggrieved party and cannot act *suo motu* in the matter.[4]

Apart from the provisions of the Code, the High Courts have, under authority conferred by Charters of the Supreme Court and continued by

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Note 16.

(1) *Nand Kishore* v. *Shadi Ram*, 1926 All 457 (458): 24 All L J 519: 96 Ind Cas 137; *Dharam Chand* v. *Mitsui Bhusan*, (1920) 54 Ind Cas 928 (929) Nag; *Pichuvayengar* v. *Oliver*, (1903) 26 Mad 260 (262) [But the facts that a vakil appeared for the party and opposed the grant and that a telegram from the opposite party was sent intimating the grant of an injunction are sufficient proofs of communication]; *Ram Prasad Singh* v. *Benares Bank, Ltd*, (1920) 58 Ind Cas 600 (602): 42 All 98: 17 All L J 1127, (Do.).

(2) *Ramchand* v. *Pitam Mal*, (1888) 10 All 506 (511): 1888 All W N 195; *Mohecooddeen* v. *Ahmad*, (1870) 14 Suth W R 384 (385); *Mohini Mohan Misser* v. *Surendra Narayan Singh*, (1915) 26 Ind Cas 296 (298): 42 Cal 550: 18 Cal W N 1189: 21 Cal L Jour 68; *Madho Prasad* v. *Draupadi*, 1921 All 99 (101): 43 All 388: 19 All L J 174: 61 Ind Cas 417; *Pars Ram* v. *Hargolal & Sons*, 1925 Lah 258 (258): 79 Ind Cas 444.

(3) *Chunni* v. *Dwarka*, (1887) 7 All W N 297 (297); *Ayisa Umma* v. *P K Abdulla*, 1924 Mad 178 (179): 1923 Mad W N 670: 76 Ind Cas 126: 19 Mad L W 613: 1924 Mad W N 636; *Balbhaddar* v. *Balla*, 1930 All 387 (388): 127 Ind Cas 577 [The words "until further orders" do not extend its duration beyond the date of decree].

Note 17.

(1) *Delhi and London Bank* v. *Ram Narain*, (1887) 9 All 497 (500): 1887 All W N 107; *Kale Khan* v. *Kirpal Singh*, 1889 Pun Re No 144; *Manohar Das* v. *Ram Autar Pande*, (1903) 25 All 431 (433): 1903 All W N 92; *Bhagwan Das* v. *Kanshi Ram*, (1914) 25 Ind Cas 180 (181): 253 Pun L R 1914: 145 Pun W R 1914; *Puzhakkal Edom* v. *Mahdeva*, (1918) 47 Ind Cas 778 (779, 780): 35 Mad L Jour 96; *Beli Ram* v. *Ram Lal*, 1925 Lah 644 (645): 6 Lah 380: 90 Ind Cas 937; *Kamakhya Dutt Ram* v. *Shyam Lal*, 1929 Oudh 235 (237): 117 Ind Cas 471: 4 Luck 635: 6 Oudh W N 226; *Balbhaddar* v. *Balla*, 1930 All 387 (388): 127 Ind Cas 577; *Darbari Ram* v. *Ghulam Farid Fazal Karim*, 1930 Lah 858 (859): 128 Ind Cas 304; *Dharamchand* v. *Messrs Mitsui Bussan Kaisha & Co*, (1920) 54 Ind Cas 928 (930) Nag [A sale held in ignorance of an order by way of injunction staying the sale is an irregularity but the sale will not be set aside unless the judgment-debtor has sustained substantial injury by reason of such irregularity]. See also *Babu Sitapat Ram* v. *Lala Mahabir Prasad*, 1925 Oudh 424 (425): 88 Ind Cas 532: 2 Oudh W N 315: 12 Oudh L J 331.

(2) *Hakim Singh* v. *Wasan Singh*, 1928 Lah 639 (639): 108 Ind Cas 395.

Note 18.

(1) *Eastern Trust Co* v. *McKenzie Mann & Co*, (1916) 35 Ind Cas 378 (388): 20 Cal W N 457: 1915 P C 106 P C; *Subhadra Koer* v. *Dhajadhari Goswami*, (1912) 14 Ind Cas 380 (382): 15 Cal L Jour 147: 16 Cal W N 447. [But unless the Court has jurisdiction over the subject-matter of the controversy disobedience of its injunction is not punishable. An injunction in matters beyond the jurisdiction of a Court is void and need not to be obeyed].

(2) *Pranjivan Das* v. *Mayaram*, (1862) 1 Bom H C R 148; In the matter of the petition of *Chandrakanta De*, (1881) 6 Cal 445 (446): 7 Cal L Rep 350: 5 Ind Jur 412; *Sadagopachari* v. *Krishnamachari*, (1889) 12 Mad 356 (365) [But a person not named in the pleading cannot be committed for breach of an injunction]; *John Innes* v. *Grandhi Venkata Ratnam*, (1915) 30 Ind Cas 4 (7): 21 Cal L Jour 578: 42 Cal 1169 [When an injunction was issued restraining the defendant Company from disposing, selling or dealing in any manner with certain goods, in the absence of a mention of servants and agents in the order, an assistant in the firm not named in the order cannot be punished for contempt of Court but for assisting in a contempt of Court]; *Delhi and London Bank* v. *Ram Narain*, (1887) 9 All 497 (499, 500): 1887 All W N 107; *Vidyapurna Thirthaswami* v. *The Vicar of Suratkal Church*, (1918) 44 Ind Cas 56 (56): 7 Mad L W 328; *Balbhaddar* v. *Balla*, 1930 All 387 (388): 127 Ind Cas 577 [Amendment of Cl (3) of R 2 suggested to make its applicability to R 1 also clear].

(3) *Shaikh Jaharuddin* v. *Hari Charan*, (1914) 22 Ind Cas 499 (500): 18 Cal W N 470 [Even though the suit may have been subsequently transferred to another Court].

(4) *Kochappa* v. *Sachi Devi*, (1903) 26 Mad 494 (495).

their own Letters Patent, power of enforcing obedience of their orders by committing the delinquent for contempt.[5]

19. Injunction to restrain marriage.—An injunction may be granted to prevent the marriage of a bride for a second time to another husband.[1] But if the bride is a Mahomedan of age and has ceased to be the wife of her former husband, no injunction to restrain the second marriage will be granted either against herself or against her relations.[2]

An injunction will not be granted to restrain a Hindu woman from marrying her minor daughter to a third party pending a suit for specific performance of a contract to marry.[3] But where the father of the bride files a suit for injunction against his wife restraining her from giving away the bride in marriage, a temporary injunction may be granted inasmuch as the father has the predominant right to give his girl in marriage.[4]

20. Appeal.—An appeal lies from an order granting as well as from an order refusing a temporary injunction under this rule.[1] An appeal will also lie if the order *purports* to be made under this rule even though the Court had no jurisdiction to pass it.[1-a]

It is for the appellant to show in appeals against orders under this rule that the Lower Court acted wrongly in the exercise of its discretion.[2] The mere fact that the appellate Court might have come to a different conclusion is not enough.[3] No second appeal lies from an order under this rule.[4] As has been seen in the Notes to Ss. 96 and 104, those sections only apply to appeals from Courts of *inferior* jurisdiction to Courts of *superior* jurisdiction and not to appeal within the High Court, *i.e.*, from one or more Judges of the High Court to other Judges of the same Court.[5] No appeal will, therefore, lie under O. 43, R. 1 from an order of a single Judge of a High Court, refusing to grant a temporary injunction. Nor will an appeal lie under

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[5] *Hassonbhoy* v. *Cowasji Jehangir Jussawalla*, (1881) 7 Bom 1 (4); *Navivahoo* v. *Narotamdas Candas*, (1882) 7 Bom 5 (12). See Notes, *post*. Woodroffe, 71 et seq.

Note 19.

[1] *Venkatacharyulu* v. *Rangacharyulu*, (1891) 14 Mad 316 (324).

[2] *Muhammad Yamin* v. *Razia Begam*, (1920) 54 Ind Cas 223 (224): 17 All L J 1138: 1 U P L R (All) 185.

[3] *Ganput Narain* v. *Rajun Koer*, (1876) 1 Cal 74 (78).

[4] *Nanabhai* v. *Janardhan*, (1888) 12 Bom 110 (121): 12 Ind Jur 349. See also *Deokishan* v. *Asaram*, 1933 Nag 62 (64, 66): 28 Nag L R 332: 141 Ind Cas 170 [Injunction against a minor's marriage under S 12 of the Guardian and Wards Act—Deemed as one under this order and breach punished under R 2, sub-R (3) below].

Note 20.

[1] *Ganesh Prashad* v. *Dukh Haran*, 1922 All 441 (441): 66 Ind Cas 509; *Hari Lal* v. *Pryag Ram*, (1918) 19 Ind Cas 553 (555): 18 Cal L Jour 39: 17 Cal W N 996; *Lachmi* v. *Ram Charan*, (1913) 20 Ind Cas 653 (654): 35 All 425: 11 All L J 613; *Shyam Behari Singh* v. *Biseswar Dayal Singh*, 1924 Pat 713 (714): 1924 Pat H C C 169: 83 Ind Cas 48: 6 Pat L Tim 201; *District Board of Farrukhabad* v. *Ikhlaque Husain*, 1933 All 86 (86): 1932 All L J 803. But see *New Delhi Theatres, Ltd* v. *Kailash Chand*, 1933 Lah 73 (74): 140 Ind Cas 843: 34 Pun L R 51 [Injunction granted under inherent powers without irreparable injury—No appeal lies but see aside in revision].

[1-a] *Abdul Rahiman* v. *Ganpathi*, (1900) 23 Mad 517 (521): 10 Mad L Jour 305.

[2] *Umesh Chandra Mukhopadhya* v. *Nibaran Chandra Konwar*, (1914) 22 Ind Cas 710 (712): 19 Cal L Jour 305.

[3] *Daily Gazette Press, Ltd* v. *Karachi Municipality*, 1930 Sind 287 (288): 127 Ind Cas 690.

[4] *Ramchandra* v. *Janardhan*, (1870) 4 Bom L R 138 (139); *Venkatapathi* v. *Tirumalai Chetti*, (1901) 24 Mad 447 (449).

[5] *Bhuta Jayatsingh* v. *Lakadu Dhansing*, (1919) 50 Ind Cas 715 (721): 43 Bom 433 (492): 21 Bom L R 157 F B.

Cl. 15 of the Letters Patent against such an order inasmuch as such an order is not a "judgment" within the meaning of Cl. 15.[6]

An order directing the furnishing of security or the submission of accounts passed or directing notice to the opposite party on an application for temporary injunction is not an order under O. 39, R. 1 and is not, therefore, appealable.[7]

21. Revision.—An order passed without jurisdiction is liable to revision. But no revision will lie on the mere ground of an error of judgment of the Lower Court in the exercise of its jurisdiction.[1]

Where a Court on appeal renews a temporary injunction dissolved by the first Court, a revision may lie against it.[2]

22. Powers of High Court—General.—Apart from the provisions of the Civil Procedure Code, the High Courts have jurisdiction to grant temporary injunctions in suitable cases.[1] The order of injunction will, however, be directed to a party and not to a Court.[2]

23. Power to restrain party from proceeding with suit in another Court.—Apart from the provisions of the Code, the High Courts have, by virtue of their equity jurisdiction, power to restrain a party before them from proceeding with a suit in another Court.[1] Such power extends to restraining a party from proceeding with a suit in a foreign Court, but the power in such cases should be exercised with the greatest caution.[2] An order to the said effect cannot, however, prevent the party from proceeding with

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(6) *Vanichand Rajpal v. Lachmichand Maneckchand*, (1919) 53 Ind Cas 395 (396): 21 Bom L R 955: 44 Bom 272.

(7) *Sito Mahton v. F F Christien*, (1912) 17 Ind Cas 361 (362); 17 Cal W N 318; *Luis v. Luis*, (1888) 12 Mad 186 (187) [No orders passed before notice—Does not amount to refusal].

Note 21.

(1) *Ganesh Prasad v. Dukh Haran*, 1922 All 441 (441); 66 Ind Cas 509; *District Board of Farrukhabad v. Ikhlaque Husain*, 1933 All 86 (88, 90): 1932 All L J 803. See also *New Delhi Theatres, Ltd v. Kailash Chand*, 1933 Lah 73 (74): 140 Ind Cas 813, 34 Pun L R 51 [Injunction granted under inherent powers—No irreparable injury—Compensation by damages possible—No jurisdiction to grant injunction—Revision allowed].

(2) *Bai Atrani v. Deep Singh*, (1916) 33 Ind Cas 358 (360): 40 Bom 86: 17 Bom L R 1097.

Note 22

(1) In the matter of *Corkhill*, (1895) 22 Cal 717 (720) [High Court has power to restrain a person who has not been duly elected from exercising the functions of a duly elected Commissioner]; *Rash Behary v. Bhawani Churn*, (1907) 34 Cal 97 (99); *Mungle Chand v. Gopal Ram*, (1907) 34 Cal 101 (103); *Uderam v. Hyderally* (1909) 3 Ind Cas 990 (992): 33 Bom 469: 10 Bom L R 1141; *Samandar v. Fazal*, 1925 Lah 242 (243): 78 Ind Cas 802; *Singaravelu v. Balasubramania*, 1926 Mad 1126 (1127): 24 Mad L W 421: 1926 Mad W N 708: 97 Ind Cas 938; *Milton Co v. Ojha Automobile Co*, 1931 Cal 279 (281): 57 Cal 1280: 130 Ind Cas 252; *Periakaruppan Chettiar v. Ramasamy Chettiar*, 1928 Mad 491 (492): 27 Mad L W 418: 109 Ind Cas 281; *Govindarajulu Naidu v. Imperial Bank of India*, 1932 Mad 180 (181): 35 Mad L W 168: 136 Ind Cas 346 [Appeal from *ex parte* decree—Execution of decree restrained]; *Nandalal Mukherji v. Kalipada Mukherji*, 1932 Cal 353 (356): 54 Cal L Jour 317: 36 Cal W N 291: 137 Ind Cas 518.

(2) *Narayan v. Jankibai*, (1915) 30 Ind Cas 560 (563, 564): 39 Bom 604: 17 Bom L R 655 [Judge sitting on the original side has no power to stay proceedings pending in a subordinate Court]; *Mulchandraichand v. Gill & Co*, (1919) 53 Ind Cas 518 (520, 522): 44 Bom 283: 21 Bom L R 963; *Amar Kumar v. Coventry*, 1925 Pat 710 (711): 6 Pat L Tim 524: 85 Ind Cas 551; *Jumna Dass v. Harcharan Dass*, (1911) 11 Ind Cas 416 (416, 417): 38 Cal 405: 16 Cal W N 4 [But the High Court can restrain a person from proceeding with a suit outside its jurisdiction only if he is within the jurisdiction of the High Court, and not merely where he has property therein].

Note 23.

(1) *Hart v. Grosser*, (1905) 9 Cal W N 748 (749); *Panchanan v. Dwarka Nath*, (1906) 3 Cal L Jour 29 (31, 34); *Narayan v. Jankibai*, (1915) 30 Ind Cas 560 (563, 564): 39 Bom 604: 17 Bom L R 655; *Mulchand Raichand v. Gill & Co*, (1920) 53 Ind Cas 518 (520, 522): 44 Bom 283: 21 Bom L R 963; *Muhamada v. Jhanda*, 1931 Lah 65 (66): 129 Ind Cas 889: 31 Pun L R 550. But see *Jairamdas Ganesh Das v. Zamonlal Kishorilal*, (1903) 27 Bom 357 (361): 5 Bom L R 201 [An application before the High Court for termporary injunction restraining defendant from proceeding with a suit in the small cause court was held not to be contemplated by section 492 and it was held that no such temporary injunction could be granted].

(2) *Naik v. Balwant*, 1927 Bom 135 (137, 138): 29 Bom L R 138: 100 Ind Cas 951.

the suit in the foreign Court, but, if he comes within the jurisdiction of the Court ordering the injunction, he can be committed for contempt.[3]

24. Power to stay proceedings pending in subordinate Court.—If sufficient grounds are made out, a High Court has also power to stay proceedings in a Court subordinate to it,[1] but there is no such power if the latter Court is not so subordinate to it.[2]

25. Form of temporary injunctions.—*See* App. V. Form No. 8.

Injunction to restrain repetition or continuance of breach.

R. **2.** [S. 493.] (1) In any suit for restraining the defendant from committing a breach of contract or other injury *of any kind*, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) In case of disobedience, *or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison* for a term not exceeding six months, *unless in the meantime the Court directs his release.*

(4) No attachment under this *rule* shall remain in force for more than one year, at the end of which time, if the *disobedience or breach continues*, the property attached may be sold, and out of the proceeds the Court may award such compen-

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[3] *Lakhmiram* v. *Poonam Chand*, 1921 Bom 128 (129): 45 Bom 550: 59 Ind Cas 444: 22 Bom L R 1173.

Note 24.

[1] *Bahuria Manraj Kuari* v. *Maharaja Radha Prasad Singh*, 1884 All W N 352 (353); In re *Balgangadhar Tilak*, (1902) 26 Bom 785 (790): 4 Bom L R 618 [The High Court has power to direct that criminal proceedings in the Court of a Magistrate should be stayed, until the disposal of a Civil Suit, in which the question at issue in the criminal proceedings shall have been decided]; In re *Shri Nana Maharaj*, (1892) 16 Bom 729 (731), (Do.): In re *Deeji Valad Bhavani*, (1894) 18 Bom 581 (584), (Do.); *Anna Ayyar* v. *Emperor*, (1907) 30 Mad 226 (227), (Do.); *Jogiah* v. *Emperor*, (1908) 31 Mad 510 (511): 18 Mad L Jour 466: 4 Mad L Tim 186, (Do.); *Samandar* v. *Fazal*, 1925 Lah 242 (243): 78 Ind Cas 802 [But in a suit for a mere declaration it is not proper to grant an injunction staying proceedings in another suit pending in another Court].

[2] *Matloob Hasan* v. *Kalawati*, 1931 All 57 (58): 11 L R All Rev 305: 1930 All L J 1469: 132 Ind Cas 42: 53 All 180.

O. 39, R. 2, Notes 1—2.

sation as it thinks fit, and *shall* pay the balance, if any, to the *party entitled thereto.*

[1877—Ss. 493, 496; 1859—S. 93; R. S. C., O. 50, R. 12.]

Synopsis.

1. **Legislative changes.**
2. **Scope and principle of the rule.**
3. **Injunctions to restrain breach of contract.**
4. **"Or other injury of any kind."**
5. **Grant of injunction on terms.**
6. **Disobedience to injunction—Effect. See also Note 18 to R. 1.**
7. **Power to grant temporary injunction in mandatory form.**
8. **Appeal.**

Injunction in election suits. See Note 2, F.-N. (8) and Pts. (11) and (12).

1. Legislative changes:—

The words "of any kind" after the words "or other injury" are new. *See* Note 4 below.

2. Scope and principle of the rule.—This rule deals with the grant of injunctions in a particular class of cases not covered by the provisions of R. 1, *viz.*, cases of apprehended *breach of contract* or *other injury of any kind.* Where, therefore, there is no such apprehended breach of contract or other injury of any kind, this rule will not apply.[1]

As has been seen in Note 2 to R. 1 above, the general principles governing the grant of temporary injunctions is the same as those governing the grant of *perpetual injunction.* Now S. 56, Cl. (*f*) of the Specific Relief Act, 1877 provides that an injunction cannot be granted "to prevent the breach of a contract the performance of which would not be specifically enforced", and under S. 21, Cl. (*a*) of that Act, a contract will not be specifically enforced when the non-preformance of it can be adequately compensated for, by the award of damages. This therefore furnishes an important test to see whether temporary injunction should be granted in cases of breaches of contract. Further the general principles governing the grant of an injunction under R. 1, also govern the grant of an injunction under this rule. Thus:—

(*i*) Before the granting of an injunction under this rule, the Court should be satisfied that the plaintiff has a *prima facie* case;[2] that the Court's interference is necessary to protect him from irreparable or at least serious injury;[3] and that there is no other sufficient remedy open to him by which to protect himself.[4] For cases where such injunction was granted, *see* the undermentioned cases.[5]

Order 39, Rule 2—Note 2.

[1] *Krishna Gobinda* v. *Mt Kishoribala,* 1930 Cal 758 (753, 754): 129 Ind Cas 103: 1930 Cr Cas 1153: 32 Cr L Jour 232. But see *New Delhi Theatres, Ltd* v. *Kailash Chand,* 1933 Lah 73 (74): 140 Ind Cas 843: 34 Pun L R 51 [Breach of contract already committed—Court can act *ex debito justitiae* and grant injunction under S 151 on proof of strong *prima facie* case and irreparable injury or inconvenience].

[2] *Bishambar Nath* v. *Delhi Municipality,* 1926 Lah 589 (590): 96 Ind Cas 286 [But the rule does not mean the Court should examine the merits of the case closely and come to a conclusion that the plaintiff has a case in which he is likely to succeed]: *Danish Dairies Milk Export* v. *Murlidhar & Co,* 1932 Sind 84 (86): 26 Sind L R 51: 140 Ind Cas 160.

[3] *Nanabhai* v. *Janardhan,* (1888) 12 Bom 110 (116): 12 Ind Jur 349.

[4] *Sohan Lal Chiman Lal* v. *Jai Narain Babu Lal,* (1920) 54 Ind Cas 546 (547): 2 U P L R (Lah) 30.

[5] *Madras Railway Co* v. *Thomas Rust,* (1891)

(*ii*) Where a perpetual injunction has not been asked for in the suit[6] or where the facts show *prima facie*, that there is no chance of a perpetual injunction or specific performance being granted,[7] a temporary injunction will be refused.

(*iii*) Delay in bringing the suit or applying for the injunction will be a ground for refusing the same.[8]

An injunction under this rule also, can be issued only against the *defendant* in the suit and none else.[9] It is not necessary that the defendant should be living within the Court's jurisdiction.[10]

Generally speaking, Courts will not issue an injunction restraining a candidate from partaking in an election.[11] Further a Court holding an enquiry into the validity of an election under the District Municipalities Act, has no jurisdiction to grant an injunction restraining the candidate from taking his seat.[12] The rule extends to proceedings under the Guardian and Wards Act.[13]

This rule applies to proceedings under the Chota Nagpur Tenancy Act, VI of 1908. *See* S. 265 (3) thereof.

3. **Injunction to restrain breach of contract.**—Pending a suit relating to a contract, the Court can, under this rule, grant an injunction restraining the commission of any Act which will involve a breach of the contract.[1] Before such injunction is granted, however, the applicant must satisfy the Court that there is a *completed* contract under which he has acquired a right[2] and that *irreparable injury* will be sustained by him unless the injunction is granted.[3] Further, as has already been noticed under the previous Note, no injunction will be granted in respect of a contract *of which specific performance will be refused*. Thus,

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14 Mad 18 (21); *Subba* v. *Haji Badsha*, (1903) 26 Mad 168 (175): 13 Mad L Jour 13.

(6) *Jital Singh* v. *Kamaleswari Prosad*, (1912) 15 Ind Cas 614 (615): 16 Cal L Jour 555: 18 Cal W N 92.

(7) *Bhikaji* v. *Bapu*, (1877) 1 Bom 550 (554): 1 Ind Jur 632; *Haji Abdul* v. *Haji Abdul*, (1882) 6 Bom 5 (7); *Nussurwanji Marwanji Panday* v. *Gordon*, (1882) 6 Bom 266 (283); *Assur* v. *Ratan Rai*, (1889) 13 Bom 56 (57).

(8) *Haji Syed Muhammad* v. *Gulab Rai*, (1898) 20 All 345 (348): 1898 All W N 68; *Bhupendra Nath* v. *Ranjit Singh*, (1913) 20 Ind Cas 676 (677): 41 Cal 384 [Suit to declare the election of the defendant to the Bengal Legislative Council as void]; *Yoshtmi Boshaka Ka Sha, Ltd* v. *Firm of Dwarakadas Fate Chand*, 1933 Sind 26 (26): 26 Sind L R 335: 139 Ind Cas 490 [Improper delay in applying for injunction against infringement of trade-mark. *See also* cases in R 1, N 8, F N (13) above].

(9) *The Election Officer, Gujrat* v. *Abdul Gani, etc*, 1923 Lah 47 (48): 79 Ind Cas 233; *Mal-Hi ud-Din Ahmed* v. *Athar Hossain*, (1918) 44 Ind Cas 496 (496) Pat.

(10) *A Milton & Co* v. *Ojha Automobile Engineering Co*, 1931 Cal 279 (280): 57 Cal 1280: 130 Ind Cas 252.

(11) *The Election Officer, Gujrat* v. *Abdul Gani, etc*, 1923 Lah 47 (48): 79 Ind Cas 233; *Mahamed Meera Sahib* v. *Duraisamy Naidu*, 1926 Mad 1147 (1147): 1926 Mad W N 582: 97 Ind Cas 172. See also In re *Balaji Rao*, 1933 Mad 103 (103): 140 Ind Cas 441 [Injunction stopping elections to a District Board—Not to be granted except in exceptional circumstances]. 1923 Mad 475 dist.

(12) *Venkatasubbaiah* v. *Sesha Iyer*, 1924 Mad 797 (799): 47 Mad L Jour 201: 20 Mad L W 148: 1924 Mad W N 538: 80 Ind Cas 664: 47 Mad 700.

(13) *Ganda Mal* v. *Ramji Das*, (1914) 23 Ind Cas 351 (351): 20 Pun L R 1914: 12 Pun W R 1914.

Note 3.

(1) *Pramathanath* v *Jagannath*, (1912) 16 Ind Cas 359 (361): 17 Cal L Jour 427 [The fact of operation of *lis pendens* is no answer to the application]; *Singaravelu Mudali* v. *Balasubramaniya Mudali*, 1926 Mad 1126 (1127): 24 Mad L W 421: 1926 Mad W N 708: 97 Ind Cas 938.

(2) *Haji Abdul* v. *Haji Abdul*, (1881-82) 6 Bom 5 (7); *Bhikaji Sahaye* v. *Bapu Sayer*, (1877) 1 Bom 550 (554): 1 Ind Jur 632.

(3) *Manohar* v. *Jai Narain*, (1920) 55 Ind Cas 403 (406): 2 Lah L Jour 283.

(*i*) no injunction will be granted to restrain marriage[4] or adoption[5] in breach of an agreement to marry or adopt respectively,

(*ii*) no injunction will be granted to restrain breach of a contract in restraint of trade or profession. But a contract to supply goods exclusively to the promisee[6] and a contract to serve the promisee exclusively for a period[7] are not contracts in restraint of trade or profession and an injunction can, therefore, be granted to restrain breaches of such contracts,

(*iii*) no injunction will be granted which will have the effect of compelling the employment of any person, in matters requiring services of a personal nature,[8]

(*iv*) no injunction will be given where the circumstances under which the contract was made are such, as to give the plaintiff an unfair advantage over the defendant.[9]

(*v*) no injunction will be given where money compensation will afford an adequate relief for the non-performance of the contract.[10]

Where the defendant alleges a breach of contract and refers the matter to arbitration under a provision contained in the contract, and the plaintiff thereupon files a suit attacking the contract and asks for an injunction restraining the arbitration proceedings pending disposal of the suit, the injunction asked for will *not* be granted if the suit is based on a denial of the existence of the contract, but will be granted if the suit is based on an attack of the contract on equitable grounds like fraud or misrepresentation on the part of the other party.[11]

4. **"Or other injury of any kind".**—Under the old Code, the words 'of any kind' were absent. It was held by the High Court of Allahabad that the word 'injury' referred only to injuries *akin to breaches of contract* and that, therefore, no injunction could be granted in respect of other kinds of injury such as trespass or nuisance.[1] The addition of the words 'of any kind'

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(4) In the matter of *Ganpat Narain*, (1876) 1 Cal 74 (78).

(5) *Assur* v. *Rutanbai*, (1889) 13 Bom 56 (57).

(6) *Subba Naidu* v. *Haji Badsha Sahib*, (1903) 26 Mad 168 (175): 13 Mad L Jour 13.

(7) *Madras Railway Co* v. *Rust*, (1891) 14 Mad 18 (22); *Callianji Harjivan* v. *Narsi Tricum*, (1894) 18 Bom 702 (708); *Charlesworth* v. *Macdonald*, (1899) 23 Bom 103 (113, 118).

(8) *Nusservanjee* v. *Gordon*, (1882) 6 Bom 266 (282).

(9) *Callianji* v. *Narsi*, (1891) 18 Bom 702 (716).

(10) *Ryan* v. *Mutual Tontine & Co*, (1893) 1 Ch 116 Ref. 18 Bom 702 (715); *Yoshimi Boshaku Ka Sha, Ltd* v. *Firm of Dwarakadas Fatechand*, 1933 Sind 26 (26): 26 Sind L R 335: 139 Ind Cas 490. See also *New Delhi Theatres, Ltd* v. *Kailash Chand*, 1933 Lah 73 (75): 140 Ind Cas 843: 34 Pun L R 51 [Injunction under inherent powers—No danger of irreparable injury —Compensation in damages possible—Injunction not to be granted—Disobedience of prior injunction—No ground for grant of injunction again].

(11) *Gajanand* v. *Jalal Uddin*, (1918) 46 Ind Cas 173 (174): 22 Cal W N 585; *Sardarmull Jassraj* v. *Agar Chand Mahta & Co*, (1919) 52 Ind Cas 588 (590): 23 Cal W N 811; *Baij Nath* v. *Mansukrai Panna Lall*, (1919) 49 Ind Cas 988 (990): 23 Cal W N 258; *Sohan Lal Chiman Lal* v. *Jai Narain Babu Lal*, (1920) 54 Ind Cas 546 (548): 2 U P L R (Lah) 30. See also *Joylall & Co* v. *Gopiram Bhotica*, (1920) 55 Ind Cas 778 (781): 31 Cal L Jour 167: 24 Cal W N 612; *Kuverji Devchand* v. *David Sassoon & Co*, 1927 Sind 182 (186): 101 Ind Cas 160: 21 Sind L R 306.

Note 4.

(1) *Darab Kuar* v. *Gomti*, (1900) 22 All 449 (450): 1900 All W N 170.

O. 39, R. 2, Note 4.

after the words 'or other injury' in the present section, makes it clear that an injunction can be granted to restrain *any kind* of legal injury. The word 'injury' connotes an act or omission contrary to law, resulting in an infringement of a right vested in a person.[1-a] Thus an infringement of a copyright or of a trade-mark,[2] or an obstruction to a right of easement[3] or to the exercise of rights of property[4] or of a right of public worship[5] or the commission of a waste or of a nuisance[6] are all injuries in respect of which an injunction may be granted under this rule. But the lawful exercise of a right vested in a person cannot furnish a ground for granting an injunction restraining such persons from exercising it.[7]

(1-a) *Manohar Lal* v. *Jai Narain*, (1920) 55 Ind Cas 403 (404): 2 Lah L Jour 283; *Venkatachalam* v. *Zamindar of Sivaganga*, (1904) 27 Mad 409 (415, 417): 14 Mad L Jour 162. See also *Deokishen* v. *Asaram*, 1933 Nag 62 (66): 28 Nag L R 332: 141 Ind Cas 170 [Injunction against marriage of a minor—Under S 12 of Guardian and Wards Act—Deemed as under this rule taken with S 141—Injury is to the person of the minor by a permanent marriage to unsuitable husband]; *Kuverjee Devchand* v. *David Sassoon & Co*, 1927 Sind 182 (186): 101 Ind Cas 160: 21 Sind L R 306 [Arbitration proceedings null and void and not therefore causing any 'injury'].

(2) *Badische Aniline* v. *Maneckjee*, (1893) 17 Bom 584 (597, 600) [Trade-mark]; *Heiniger* v. *Droz*, (1901) 25 Bom 433 (462): 3 Bom L R 1, (Do.); *Oriental Government Security Life Assurance Co, Ltd* v. *Oriental Assurance Co, Ltd*, (1913) 21 Ind Cas 258 (262): 40 Cal 570 [Trade name]; *Danish Dairies* v. *Murlidhar & Co*, 1932 Sind 84 (86): 26 Sind L R 51: 140 Ind Cas 160, (Do.); *Lawrence* v. *Bushnell*, (1908) 35 Cal 463 (468): 12 Cal W N 753 [Copyright].

(3) *Yaro* v. *Sana Ullah*, (1897) 19 All 259 (260): 1897 All W N 43 [Obstruction to light and air through a window]; *Nandkishore* v. *Bhagubai*, (1884) 8 Bom 95 (98): 8 Ind Jur 260, (Do.); *Ratanji Hormasji* v. *Edalji Hormasji*, (1871) 8 Bom H C R 181, (Do.); *Kallian Das* v. *Tulsi Das*, (1899) 23 Bom 786 (788): 1 Bom L R 459, (Do.); *Bai Hariganga* v. *Tricamlal*, (1902) 26 Bom 374 (378): 4 Bom L R 34, (Do.); *Jethalal* v. *Lalbai*, (1904) 28 Bom 298 (303): 6 Bom L R 86, (Do); *Chota Lal* v. *Lallubhai*, (1905) 29 Bom 157 (160): 6 Bom L R 633, (Do.) [An injunction is not to be given when the remedy in damages is considered adequate]; *Boyson* v. *Deane*, (1899) 22 Mad 251 (255), (Do.); *Delhi & London Bank* v. *Hem Lall*, (1887) 14 Cal 839 (855), (Do.); *Rama* v. *Subramaniya*, (1908) 31 Mad 171 (173, 176): 3 Mad L Tim 273: 18 Mad L Jour 178 [Blocking up the entrance of a channel]; *Rajah of Venkatagiri* v. *Rajah Muddukrishna*, (1905) 28 Mad 15 (16, 17) [Obstruction to watercourse or right to flow of water]; *Balbhadra Pershad* v. *Barkat Ali*, (1906) 4 Cal L Jour 370 (388): 11 Cal W N 85 [Interference with the natural flow of water]; *Desai Bhaoorai* v. *Desai Chunilal*, (1900) 24 Bom 188 (192): 1 Bom L R 658 [An injunction will be granted to restrain a person from using a way for a purpose different from that for which it was granted]; *Lakshmi Narain* v. *Tara Prasanna*, (1904) 31 Cal 944 (950): 8 Cal W N 710 [Trees overhanging neighbour's land].

(4) *Shadi* v. *Anup Singh*, (1890) 12 All 436 (437): 1890 All W N 95 F B [Joint owner excluding the co-owner from possession]; *Israil* v. *Samset*, (1913) 21 Ind Cas 861 (863): 18 Cal W N 176: 19 Cal L Jour 47: 41 Cal 436 [One co-sharer using property in a manner which will change the nature of the property or the use to which it had hitherto been put]; *Ramanadhan* v. *Zamindar of Ramnad*, (1893) 16 Mad 407 (409): 3 Mad L Jour 185 [Erection by tenant of house on land desired and changing character of land]; *Surendra Narain* v. *Hari Mohan*, (1904) 31 Cal 174 (178): 9 Cal W N 87 [Erection of an indigo factory by tenant on part of land desired rendering it unfit for purpose of tenancy]; *Joy Chunder* v. *Bipro Churn*, (1887) 14 Cal 236 (239) [Co-sharer misused joint property]; *Watson & Co* v. *Ramchand Dutt*, (1891) 18 Cal 10 (20): 17 Ind App 110: 5 Sar 535 P C, (Do.); *Soshi Bhusan Ghose* v. *Ganesh Chunder Ghose*, (1902) 29 Cal 500 (502) [Illegitimate use of the family property or acts amounting to ouster]; *Bindu Basini* v. *Jannabi Chowdhrani*, (1897) 24 Cal 260 (264) [Act threatening danger to a person's land]; *Jaggamoni Dasi* v. *Nilmoni Ghosal*, (1883) 9 Cal 75 (79): 11 Cal L Rep 502: 7 Ind Jur 252 [Defendants using ghat belonging to petitioner for landing goods]; *Ganpat* v. *Annaji*, (1899) 23 Bom 144 (145) [One member of the family prevented from taking part in the business of the family firm]; *Virudachala* v. *Ramaswamy*, (1862) 1 Mad H C R 341 (348) [Partner excluding his co-partner from the partnership business].

(5) *Fazal Karim* v. *Maula Baksh*, (1891) 18 Cal 448 (462): 18 Ind App 59: 6 Sar 19: 15 Ind Jur 153 P C.

(6) *Ram Lall* v. *Dalganjan*, (1883) 5 All 369 (371): 1883 All W N 58 [A plaintiff has no right to the removal of trees planted by the defendant on his own land until the plaintiff's enjoyment of his own land is directly and immediately interfered with by the growth of the trees]; *Glastaun* v. *Doonia Lal*, (1905) 32 Cal 697 (709): 9 Cal W N 612 [Defendant, the owner of a Shellac factory discharging into Municipal drain refuse liquid of offensive character interfering with the ordinary comfort of the plaintiff's occupation of property]; *Durganath* v. *Chintamoni*, (1904) 31 Cal 214 (221): 8 Cal W N 11 [Waste by a Hindu widow].

(7) *Nasserwanjee* v. *Shahjadi Begam*, 1922 Bom 385 (386): 24 Bom L R 878: 66 Ind Cas 768: 46 Bom 939 [Rightful execution of decree cannot be prevented]; *The Election Officer, Gujrat* v. *Abdul Ghani, etc*, 1923 Lah 47 (48): 79 Ind Cas 233 [A suit for a declaration that a certain person is not eligible to stand as a candidate, cannot be said to be a suit for restraining him from committing an injury of any kind]; *Mrs Amai Fakirji Cowasji* v. *Pearson*, 1926 Sind 295 (296): 97 Ind Cas 84 [Injunction for stopping a meeting of share-holders—Company acting within powers—Court will not interfere]; *Muhammad Meera Sahib Bahadur* v. *Duraisamy Naidu*, 1926 Mad 1147 (1147): 1926 Mad W N 582: 97 Ind Cas 172 [Holding of election under the rules]; *Gopalakrishna Konar* v. *Vilanga Konar*, 1926 Mad 132 (132): 90 Ind Cas 819 [Injunction to restrain elected candidate from taking his seat];

O. 39, R. 2, Notes 4—6.

It is not necessary that the injury should have been *actually suffered*, though it is essential that the Court should be satisfied that there is a real or reasonable apprehension of such injury.[8] An injunction will be refused if the applicant has acquiesced in the act or omission complained of.[9]

5. **Grant of injunction on terms.**—Sub-R. (2) empowers the Court in granting injunctions to impose such conditions as it deems necessary. Thus it may call for an undertaking from the plaintiff that he will abide by any order which the Court may make as to damages.[1] Or, where the plaintiffs are a foreign firm and do not carry on business in British India it is reasonable that they should be put on terms.[2]

6. **Disobedience to injunction—Effect.**—*See also* N. 18 to R. 1.—A disobedience of an order of injunction is a contempt of Court. Sub-R. (3) confers on Courts the *power* to punish such contempt and, further, *prescribes the punishment* to be awarded therefor.[1] While the High Courts, as Courts of record, have *inherent jurisdiction* to commit for contempt, the other Courts have no such power apart from the provisions of this rule.[2]

The provisions of the sub-rule apply not only to disobedience of an order issued under Cls. (1) and (2) of R. 2 but has a more general application and applies equally to disobedience of all injunctions issued under S. 94 of the Code.[3]

As regards the *power* conferred by this sub-rule for punishing disobedience of injunctions, the following points must be noted:—

(1) The Court *which ordered the injunction* is the Court which can punish its disobedience. Thus where an order of injunction was passed by a particular Court and the suit was thereupon

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Muhammad Mohiddin v. Municipal Commissioners for the City of Madras, (1902) 25 Mad 118 (143) [Using land as a burial and burning ground—Injunction refused as it was not proved to be actionable nuisance]; *Ranchod Shamji v. Abdulabhai*, (1904) 28 Bom 428 (431): 6 Bom L R 356; *Prankisto v. Huro Chunder*, (1868) 10 Suth W R 435 (435) [Obstruction to watercourse—Plaintiff bound to make out injury]; *Ponnusamy Thevar v. Collector of Madura*, (1869-70): 5 Mad H C R 6 (24) [Obstruction to watercourse or right to flow of water—Injury must not be trivial].

(8) *Firm of Manohar Lal Mahabir Prasad v. Firm of Jai Narain Bapu Lal*, (1920) 55 Ind Cas 403 (406): 2 Lah L Jour 283; *Gangabai v. Purushotham*, (1908) 32 Bom 146 (148, 149): 9 Bom L R 912. See also *Bulakhidas Jamardas v. Shah Ganpatram*, 1923 Bom 281 (283): 77 Ind Cas 412 [Threatened nuisance].

(9) *Noyna Misser v. Rupikuan*, (1883) 9 Cal 609 (612): 12 Cal L Rep 300 [Tenant of an agricultural holding planted his land with mango trees to the knowledge, but without the consent of his landlord—Landlord standing by for more than 3 years is not entitled to injunction for removing the trees]; *Ulagappan v. Chidambaram*, (1906) 29 Mad 497 (498) [Acquiescence to erection of building].

Note 5.

(1) *Kripa Dayal v. Rani Kishori*, (1887) 10 All 80 (83): 1888 All W N 7; *Chandra Nath Pal v. Sree Gobind Chowdhury*, (1900) 6 Cal W N 308 (310).

(2) *Danish Dairies Milk Export v. Murlidhar & Co*, 1932 Sind 84 (87): 26 Sind L R 51 [Suit in re: trade-mark—Injunction—Plaintiff a foreign firm—Security taken for possible loss to defendant by injunction].

Note 6.

(1) *Ram Charan v. Chatar Singh*, (1901) 23 All 465 (466): 1901 All W N 142; *The Eastern Trust Company v. Mackenzie Mann & Co*, (1916) 35 Ind Cas 378 (383): 20 Cal W N 457; *Wadava Singh v. Ladha Singh*, 1931 Lah 201 (202): 12 Lah L Jour 309: 131 Ind Cas 348 [Where a party to an appeal disobeys an injunction order restraining him from alienating certain property pending decision of the appeal the Court can punish the party in contempt under O 39, R 2 (3)].

(2) *Kochappa v. Sachi Devi*, (1903) 26 Mad 494 (495).

(3) *Adaikala Thevan v. Imperial Bank, Madura Branch*, 1926 Mad 574 (575): 50 Mad L Jour 401: 95 Ind Cas 196; *Vidyapurna Thirthaswamy v. The Vicar of Suratka Church*, (1918) 44 Ind Cas 56 (56): 7 Mad L W 328; *Salamchand Kanyaram v. Jogul Kishore Ram Deo*, 1928 Cal 462 (463): 32 Cal W N 114: 107 Ind Cas 65: 55 Cal 777 [The appointment of a receiver operates as an injunction so far as the parties bound by the order, are concerned]. See also *Deokishen v. Asaram*, 1933 Nag 62 (64-66): 28 Nag L R 332: 141 Ind Cas 170 [Injunction against a minor's marriage—Under S 12 of Guardian and Wards Act—Deemed as under this rule taken with S 141].

transferred to another Court it was held that the latter Court had no power to punish disobedience of the injunction passed by the former Court.[4] It has also been held that an interlocutory application to punish for contempt under this sub-rule cannot be transferred to another Court and thus give that Court jurisdiction to deal with it.[5] But a Court to which the business of the Court granting the injunction has been transferred under S. 150 of the Code, can exercise the power of punishment under this sub-rule.[6] The appellate Court has the same power to order punishment as the original Court.[6-a]

(2) In taking action under this sub-rule, the Court cannot act *suo motu* but only on the application of the aggrieved party.[7]

As regards the *penalty* for disobedience of an injunction it has been held that the sub-rule should be strictly construed and that cannot be read as providing any penalty other than that *specifically* mentioned in it.[8] Thus the disobedience will not render any transaction void,[9] nor can a separate suit be filed for damages for non-compliance with an order of injunction,[10] the six months' period of detention prescribed in the sub-rule cannot even indirectly be added to.[11] But the two modes of punishment prescribed are only alternative and it is not necessary that attachment should be effected before imprisonment is ordered.[12] Where an injunction was issued against a person restraining him from bringing about the marriage of a girl, but the marriage took place, the person injuncted not being responsible for it, and he was sought to be punished for contempt on the ground that he did not do all in his power to prevent the marriage, it was held, refusing the application, that the injunction order contained no direction that he should do all in his power to prevent the marriage.[13] In another case, where a company had been restrained from holding a meeting but the share-holders had not been restrained from voting and, at a meeting held in a private house, some of the share-holders attended and voted, it was held that they were not liable to punishment for disobedience.[14]

✓(4) *Jaharuddin v. Hari Charan Poddar*, (1914) 22 Ind Cas 499 (500): 18 Cal W N 470.

(5) *Mathuradas v. Venkata Rao*, (1910) 8 Ind Cas 7 (8): 8 Mad L Tim 374: 1910 Mad W N 631: 21 Mad L Jour 829.

(6) *Mouna Guruswamy v. Sheik Muhammadu*, 1923 Mad 92 (94): 1922 Mad W N 743: 16 Mad L W 748: 43 Mad L Jour 713: 46 Mad 83: 86 Ind Cas 650.

(6-a) *Ottapurakkal v. Alabi Mashur*, (1915) 27 Ind Cas 131 (132) Mad.

(7) *Kochappa v. Sachi Devi*, (1903) 26 Mad 494 (495).

(8) *Delhi & London Bank v. Ram Narain*, (1887) 9 All 497 (500): 1887 All W N 107.

(9) *Edom v. Pattar*, (1918) 47 Ind Cas 778 (779): 4 Mad L W 502: 1917 Mad W N 111: 35 Mad L Jour 96.

(10) *Jawitri v. Emile*, (1891) 13 All 98 (100): 1890 All W N 232.

(11) *The Advocate-General of Bombay v. Gangji Akhai*, (1895) 19 Bom 152 (158).

(12) *Ottapurakkal v. Alabi Masahur*, (1915) 27 Ind Cas 131 (133): *Ottapurukal Thazath Suppi v. Alabi Masahur Koya*, (1913) 22 Ind Cas 404 (406): 1913 Mad W N 1019: 14 Mad L Tim 545: 26 Mad L Jour 37: 1914 Mad W N 90: *Ottapurukal Thazath Suppi v. Alabi Masahur Koyanna Koya*, (1916) 34 Ind Cas 588 (591): 39 Mad 907: 3 Mad L W 430: 30 Mad L Jour 523: 19 Mad L Tim 314: (1916) 1 Mad W N 328: *Mawazzam v. Sebash Chandra Pakrashi*, 1927 Cal 598 (600): 31 Cal W N 814: 105 Ind Cas 848 [In fact an attachment is not a proper punishment except when a person is ordered to do something and he does not do it].

(13) *Muhammad Wazir Agha v. Muhammad Abdul Gafoor*, 1929 Nag 273 (274): 118 Ind Cas 675.

(14) *Kailash Chandra v. Sardar Munsif, Silchar*, 1925 Cal 817 (818): 52 Cal 513: 88 Ind Cas 826.

Although there might be a breach of an injunction in the literal sense, yet, if the party acted in *good faith* and without any intention to violate the order, he will not be liable for punishment.[15]

Where an injunction has been disobeyed the fact that the injunction has been subsequently dissolved will not exempt the party from punishment.[16] Although an injunction takes effect from the date of the service of the order, yet, if the order had been passed in the presence of the counsel for both sides, it is no excuse to say that the order was not communicated to the party *personally*.[17]

A person against whom no injunction has been ordered, cannot be punished under this sub-rule on the ground that he abetted the disobedience of the order.[18]

An undertaking not to alienate, duly recorded in the order of the Court, amounts to an injunction and a breach thereof is liable to be punished under this rule.[19]

7. **Power to grant temporary injunction in mandatory form.**—Courts in England have power to grant temporary mandatory injunction.[1] In a Bombay case, Beaman, J., held that the power to issue such an injunction was not within the scope of O. 39 and doubted whether a mofussil Court in India had power to issue such an injunction.[2] The power was, however, conceded in another decision of the same Court[3] and has been affirmed beyond all doubt in a number of other cases.[4]

8. **Appeal.**—An appeal lies from an order under this rule whether the order is one inflicting punishment or one refusing to take action.[1]

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(15) *Frass* v. *Bailement*, 10 Green 84 (Amer): *Basanta Kumar Das* v. *Nagendra Nath Pal*, 1932 Cal 719 (720): 137 Ind Cas 425 [Party alleging he had no notice of injunction—Court must give him an opportunity to prove it before committing him for contempt].

(16) *Eastern Trust Co* v. *Mackenzie, Mann & Co, Ltd*, (1916) 35 Ind Cas 378 (383): 20 Cal W N 457 P C.

(17) *Ram Pershad Singh* v. *Banares Bank, Ltd*, (1920) 58 Ind Cas 600 (602): 17 All L J 1127: 42 All 98.

(18) *Mawazzam Ali Khan* v. *Shebash Chandra Pakrashi*, 1927 Cal 598 (600): 31 Cal W N 814: 105 Ind Cas 348; *Marshall* v. *Grandhy Venkata*, (1915) 42 Cal 1169 (1178): 21 Cal L Jour 578: 30 Ind Cas 4.

(19) *Chatturbhujdas* v. *Natvarlal*, (1931) 33 Bom L R 1109 (1112): 134 Ind Cas 1165: 1931 Bom 509.

Note 7.

(1) *Robinson* v. *Lord Byron*, (1785) 1 Brown Ch Cas 588 Ref: 24 Ind Cas 625; *Bonner* v. *Great Western Ry Co, Ltd*, (1883) 24 Ch D 1 Ref, 41 Ind Cas 384.

(2) *Rasul Karim* v. *Pribhai Amirbhai*, (1914) 24 Ind Cas 625 (627, 629): 38 Bom 381: 16 Bom L R 288.

(3) *Chaussey Bhimjee & Co* v. *Jamna Flower Mills*, (1915) 28 Ind Cas 121 (122): 16 Bom L R 566.

(4) *Kandasamy Chetty* v. *Subramaniya Chetty*, (1917) 41 Ind Cas 384 (385): 41 Mad 208: 6 Mad L W 140: 1917 Mad W N 501: 33 Mad L Jour 448 [Beaman, J., in 24 Ind Cas 625: 38 Bom 381 not accepted]; *Gonpaiya* v. *Ankayya*, 1927 Mad 210 (211, 212): 24 Mad L W 854: 99 Ind Cas 566 [The power exists under S 151 and not under O 39]; *Lahore Electric Supply Co* v. *Bombay Motor & Cycle Co, Lahore*, (1922) 67 Ind Cas 742 (743): 107 Pun L R 1919 [But an interlocutory injunction of a mandatory nature which does not restore any previously existing state of things, but which directs defendant to establish a new state of things]; *Magan Lal* v. *Chhotalal*, (1902) 26 Bom 136 (139): 3 Bom L R 542.

Note 8.

(1) *Mohamed Wazir Agha* v. *Muhamad Abdul Gafoor*, 1929 Nag 273 (273): 118 Ind Cas 675; *Ottapurakkal Thazat Suppi* v. *Alabi Masahur Koyanna*, (1915) 27 Ind Cas 131 (133, 134) Mad *Ottapurakkal Thazat Suppi* v. *Alabi Musahur Koya*, (1914) 22 Ind Cas 404 (405): 1913 Mad W N 1019: 14 Mad L Tim 545: 26 Mad L Jour 37: 1914 Mad W N 90 [An order refusing to attach property for disobedience of injunction is an order passed under O 39, R 2 (3) and is appealable to the Dt Court under O 43, R 1]: *Suppi* v. *Syed Kunhi Koya*, (1916) 34 Ind Cas 588 (590, 591): 3 Mad L W 430: 30 Mad L Jour 523: 19 Mad L Tim 314: (1916) 1 Mad W N 328: 39 Mad 907 [On appeal from 27 Ind

O. 39, R. 2 Note 3.

No second appeal lies against an order passed on appeal from an order under this rule.[2]

O. 39, R. 3, Notes 1—2.

Before granting injunction Court to direct notice to opposite party.

R. 3. [S. 494.] The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

[1877—S. 494; 1859—S. 95.]

Synopsis.

1. **Scope of the rule.**
2. **Appeal.**

1. **Scope of the rule.**—Courts have *jurisdiction* to grant an injunction *ex parte*. But it should not be so granted without strong and grave reasons.[1] In other words, except where the delay involved in the issue of notice will defeat the object of the injunction notice should be ordered to the party before injunction is ordered against him.[2] An injunction granted in violation of this principle is irregular.[3]

In an appeal from an order granting an *ad interim* injunction, the appellate Court under this rule can pass an order *ex parte* staying the operation of the injunction order.[4]

2. **Appeal.**—No appeal lies from an order directing notice before granting injunction.[1]

O. 39, R. 4.

Order for injunction may be discharged, varied or set aside.

R. 4. [S. 496.] Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

[1877—Ss. 493, 496; 1859—S. 93.]

Synopsis.

1. **Scope of the rule.**
2. **Appeal.**

Compensation for obtaining injunction on insufficient grounds. See S. 95.

Cas 1211; *Diwan Chand* v. *Jharia Coal Co*, 1922 Lah 347 (348): 5 Lah L Jour 142: 66 Ind Cas 9 [Order refusing to attach property for disobedience of an injunction is one under O 39, R 2 and is appealable under O 43, R 1]; *Chaturbhujdas* v. *Natvarlal*, (1931) 33 Bom L R 1109 (1112): 1931 Bom 509: 134 Ind Cas 1165 [Undertaking and order thereon is equivalent to injunction and a breach of undertaking can be punished].

(2) *Venkatapathi Naidu* v. *Thirumalai Chetty*, (1901) 24 Mad 447 (449).

Order 39, Rule 3—Note 1.

(1) *Baddam* v. *Dhunpat Singh*, (1897) 1 Cal W N 429 (431).

(2) *Hari* v. *Secretary of State*, (1903) 27 Bom 424 (451): 5 Bom L R 431; *Gorid Dut Bogla* v. *Peroshaw Sorabshaw*, (1903-1904) 2 L B R 222 (223); *Burmah Oil Co, Ltd* v. *Sampson*, (1921) 64 Ind Cas 534 (535): 13 Bur L Tim 227.

(3) *Amelak Ram* v. *Sahib Singh*, (1885) 7 All 550 (552): 1885 All W N 128.

(4) *Syed Ahmad* v. *Barlow*, 1932 All 223 (224): 138 Ind Cas 822 [Stay of injunction restraining nominations in an election].

Note 2.

(1) *Luis* v. *Luis*, (1889) 12 Mad 186 (187); *Annamalai Desikar* v. *Govinda Rao*, 1924 Mad 857 (857, 858): 20 Mad L W 550.

O. 39, R. 4, Notes 1—2.

1. **Scope of the rule.**—This rule is intended to cover two classes of cases:—

(1) Where an urgent order *ex parte* has been made under R. 3, and

(2) Where an injunction order already in force, has owing to fresh circumstances, become unduly harsh or unnecessary or unworkable.[1] It is not intended to set at nought the ordinary rule that where an injunction has been ordered after granting each side an opportunity of being heard, it is final and cannot be interfered with except on the presentation of new matter not available when the original order was passed.[2]

Where an injunction is dissolved under this rule, the plaintiff may apply again for injunction if he can make out a sufficient case.[3]

2. **Appeal.**—An order under this rule is appealable under O. 43, R. 1 (*r*).[1]

O. 39, R. 5, Note 1.

Injunction to corporation binding on its officers.

R. **5.** [S. 495.] An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

Synopsis.

1. **Injunction against Corporations.**

1. **Injunction against Corporations.**—As to what is a corporation *see* the undermentioned case.[1]

As to the right of an individual to get an injunction against a Corporation, *see* the undermentioned case;[2] and *vide also* Notes under Note No. 3 to R. 1, *supra*.

INTERLOCUTORY ORDERS.

O. 39, R. 6.

Power to order interim sale.

R. **6.** [S. 498.] The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any moveable

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Order 39, Rule 4—Note 1.

[1] *Govinda Ramanuja Das Goswami* v. *Viziamaraju*, 1929 Mad 803 (804): 120 Ind Cas 862.

[2] *Govinda Ramanuja Das Goswami* v. *Viziamaraju*, 1929 Mad 803 (804): 120 Ind Cas 862.

[3] *Jagjivan* v. *Shridhar*, (1877) 2 Bom 252 (256).

Note 2.

[1] *Zobada Jan* v. *Muhammad Taiab*, (1893) 15 All 8 (9): 1892 All W N 140; *Luchmi Narain* v. *Ram Charan Das*, (1913) 20 Ind Cas 653 (654): 35 All 425: 11 All L J 613 [The appeal is not limited to an affirmative but includes a negative order also]; *Govinda Ramanuja Das Goswami* v. *Viziamaraju*, 1929 Mad 808 (804): 120 Ind Cas 862 [An order staying delivery of property in execution under O 39, R 1 was passed after notice. The non-applicant without filing an appeal applied for dissolution of the order under O 39, R 4 and the Court appointed a receiver. The non-applicant appealed from that order. *Held*, that the Lower Court had not really varied its original injunction staying delivery though he purported to do so by appointing a receiver. The original order staying delivery remained in full force and was reiterated in the revised order. Whatever be the scope of O 39, R 4 it cannot be that a party can appeal against a mere reiteration of the original order of injunction when he has failed to appeal against the original order].

Order 39, Rule 5—Note 1.

[1] *Magyi* v. *Pat Lon*, (1917) 38 Ind Cas 572 (573): 9 Bur L Tim 247.

[2] *Shepherd* v. *Trustees of the Port of Bombay*, (1876) 1 Bom 132 (142).

property, being the subject-*matter* of such suit, *or attached before judgment in such suit,* which is subject to speedy and natural decay, *or which for any other just and sufficient cause it may be desirable to have sold at once.*

[1877—S. 498; R. S. C., O. 50, R. 2.]

Synopsis.

1. Legislative changes.

2 Scope of the rule.

"Any other just and sufficient cause." See Note 1.

1. Legislative changes:—

1. The words "or attached before judgment in such suit" are new.
2. The words "or which for any other just and sufficient cause it may be desirable to have sold at once" are also new, and have been added in order to empower the Court to order sale of securities when the state of the market requires such a course.

2. Scope of the rule.—This rule will apply only if the property is either the subject-matter of the suit or has been attached before judgment in the suit.[1] An order under this rule can be passed only on an application made therefor and after notice to all the parties concerned.[2] The rule does not empower the Court to appoint a commissioner to sell any crop on the property attached.[3]

Detention, *preservation, Inspection etc., of subject-matter of suit.*

R. 7. [S. 499.] (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,—

(*a*) make an order for the detention, preservation or inspection of any property *which is* the subject-*matter* of such suit, *or as to which any question may arise therein*;

(*b*) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and

(*c*) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule.

[1877—S. 499; R. S. C., O. 50, R. 3.]

Order 39, Rule 6—Note 2.

(1) *Kalu Mal Ram Sewak* v. *Ganga Bishan Uggar Sain*, (1931) 134 Ind Cas 116 (119): 1932 Lah 51: 33 Pun L R 235.

(2) *Sengotha* v. *Ramasamy*, (1884) 7 Mad 241 (242).

(3) *Kristnayya* v. *Kothari*, 1930 Mad 224 (224): 126 Ind Cas 284.

O.39, R. 7;
Notes
1—4.

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Inspection of subject-matter of suit.
4. Inventory.
5. Application for such order to be after notice.
6. Power to allow party to draw money paid into Court pending decision.
7. Appeal.

Order against party. See Note 2, Pt. (1) and Note 6, Pt. (1).
Order to produce property. See Note 2, F.-N. (1).
Revision. See Note 2, F.-N. (1).

1. Legislative changes :—

> The words "or as to which any question may arise therein" in sub-R. (1) (*a*) are new.

2. Scope of the rule.—The first part of the rule applies to cases where the articles are in the possession or custody of the party against whom the order is made.[1] As to the power of Courts to pass an order under this rule in Probate Proceedings, *see* the undermentioned cases.[2]

3. Inspection of subject-matter of suit.—Where, in respect of the property of one person a right accrues in favour of another and that right cannot be measured without inspection of the property, such inspection can be ordered under this rule.[1] Thus in a suit for damages alleged to have been caused to the plaintiff by the defendant's construction in his premises and the extent of the alleged injury has to be ascertained, the Court has jurisdiction, under this rule, to order an inspection for the purpose.[2] In ordering such inspection, the Court should take care to impose as little inconvenience as possible on those against whom the order is made.[3]

4. Inventory.—The power to order inspection implies a power to order the preparation of an inventory if such inventory is essential for a proper decision of the case.[1] If such an inventory is not so essential, it should not be ordered.[2]

Order 39, Rule 7—Note 2.

(1) *Jitendra Nath Bhattacharya* v. *Asoke Nath Mitter,* (1919) 52 Ind Cas 4 (6): 30 Cal L Jour 64 [Where certain ornaments are pledged with the defendant, who has again pledged them along with other ornaments of his own with a third party and is in a position to redeem them from his pledge, a Court had jurisdiction to order their production by the defendant before it within a certain time—High Court confirmed the lower Court's order, in revision].

(2) *Kashinath Singh* v. *Sheoshankar Pande,* 1905 All W N 127 (128): *Nerodebarani Devi* v. *Chamatkarini Devya,* (1915) 27 Ind Cas 617 (619): 19 Cal W N 205: *Giribala Dasi* v. *Prokash Chandra Dutt,* (1929) 120 Ind Cas 459: 49 Cal L Jour 484: 1929 Cal 496.

Note 3.

(1) *Dhoroney Dhur Ghose* v. *Radha Gobind Kur,* (1896) 24 Cal 117 (121, 122): 1 Cal W N 99: *Amjad Ali* v. *Ali Hussain Johur,* (1910) 6 Ind Cas 574 (575): 12 Cal L Jour 519: 15 Cal W N 353.

(2) *Dhoroney Dhur Ghose* v. *Radha Gobind Kur,* (1897) 24 Cal 117 (121, 122): 1 Cal W N 99. See also *Amulya Kumar Samaddar* v. *Annada Charan Das,* (1933) 37 Cal W N 143 (145) [Structures on land—Whether recent or old—Commission for local inspection—Under this rule and not under O 26, Rr 4 or 9].

(3) *Amjad Ali* v. *Ali Hussain Johur,* (1910) 6 Ind Cas 574 (575): 12 Cal L Jour 519: 15 Cal W N 353; *Dero H H Mir Hussain Ali Khan* v. *H H Mir Abdul Hussain Khan,* (1908) 2 Sind L R 22 [An order by a Sub-Judge to open up a particular passage by the defendant, to allow a Receiver to enter upon the premises for the purpose of making an inventory, is without jurisdiction, if the defendant provides another means of access through his premises].

Note 4.

(1) *Amjad Ali* v. *Ali Hussain Johur,* (1910) 6 Ind Cas 574 (575): 12 Cal L Jour 519: 15 Cal W N 353.

(2) *Muhammad Rasek* v. *Tahidunnessa,* (1919) 52 Ind Cas 33 (34).

O. 39, R. 7, Notes 5—7.

5. **Application for such order to be after notice.**—An application for an order under this rule can only be made after reasonable notice to the parties concerned.[1]

6. **Power to allow party to draw money paid into Court pending decision.**—Where money paid into Court is claimed both by the plaintiff and by the defendant, the court cannot allow one of them alone to draw the amount pending the decision of the case even on his furnishing security for restitution.[1]

7. **Appeal.**—No appeal lies from an order under this rule.[1] But if an order applied for under this rule is wrongly refused, the proper course is to apply for review if any new matter is forthcoming.[2]

O. 39, R. 8. Note 1.

Application for such orders to be after notice.

R. 8. [S. 500.] (1) An application by the plaintiff for an order *under rule* 6 *or rule* 7 may be made after notice to the defendant at any time after *institution* of the *suit.*

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after *appearance.*

[1859—S. 91.]

Synopsis.

1. **Notice.**

1. **Notice.**—An application under this rule also can be made only after reasonable notice to the opposite party.[1]

O. 39, R.9.

When party may be put in immediate possession of land the subject-*matter* of suit.

R. 9. [S. 501.] *Where* land paying revenue to Government, or a tenure liable to sale, is the subject-*matter* of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure;

Note 5.

[1] *Sengotha* v. *Ramasamy*, (1883) 7 Mad 241 (242).

Note 6.

[1] *Dorasingam* v. *Vyravan*, (1913) 19 Ind Cas 219 (219): 13 Mad L Tim 326: 1913 Mad W N 363: 24 Mad L Jour 404.

Note 7.

[1] *Jogodishry Debia* v. *Kailash Chandra*, (1894) 24 Cal 725 (738): 1 Cal W N 374 F B.

[2] *Motivahu* v. *Premvahu*, (1892) 16 Bom 511 (513).

Order 39, Rule 8—Note 1.

[1] *Sengotha* v. *Ramasamy*, (1884) 7 Mad 241 (242).

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

[1877—S. 501; 1859—S. 91.]

Synopsis.

1. "Adjustment of accounts."

Payment by one co-sharer to save sale—Whether entitled to charge. See Note 1, Pt. (2).

1. **"Adjustment of accounts".**—An adjustment of account under this rule need not be sought in a separate suit, even if the decree in the first suit is silent about it. It can be worked out in execution of the decree, if it could be shown from the nature of the decree, that it could and ought to have contained such an order and is imperfect without it.[1]

The party paying the revenue under this rule, is entitled to a *charge* on the property for the amount.[2]

Deposits of money, etc., in Court.

R. **10.** [S. 502.] *Where* the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

[1877—S. 502; 1859—Ss. 95 and 243.]

Synopsis.

1. Scope of the rule.
2. Appeal.

"Holds." See Note 1, Pt. (2).

Refusal to deposit money—Liability to pay interest. See Note 1, Pt. (3).

1. **Scope of the rule.**—The rule does not apply unless—

(*i*) the admission of the party is an admission sufficient under O. 12, R. 6[1] and

(*ii*) the party making the admission "holds" the property or other thing capable of delivery.[2]

Order 39, Rule 9—Note 1.

[1] *Radhey Singh* v. *Mangat Ram,* (1902) 6 Cal W N 710 (712).

[2] *Rajah of Vizianagaram* v. *Rajah of Setrucherla,* (1903) 26 Mad 686 (692): 13 Mad L Jour 83 F B.

Order 39, Rule 10—Note 1.

[1] *Devsi Narayan Patel* v. *Hassanand,* 1927 Sind 25 (27): 97 Ind Cas 628.

[2] *Raja Parthasarathi Appa Rao* v. *Rajah Rangiah Appa Rao,* (1904) 27 Mad 168 (178) [The rule would not cover a case where the money was held by another Court to the credit

A refusal to pay as ordered, under this rule, will render the party refusing liable for interest from the date of the order.[3]

The rule applies to proceedings under the Guardians and Wards Act.[4]

2. **Appeal.**—An appeal lies from an order under this rule under O. 43, R. 1. (*r*).

ORDER XL.

APPOINTMENT OF RECEIVERS.

Appointment of receivers.

R. **1**. [S. 503.] (1) *Where* it appears to the Court to be *just and convenient*,[14] the Court may by order—

(*a*) appoint a receiver of *any* property, *whether before or after decree*;[20]

(*b*) remove *any* person *from the* possession or custody *of* the property;[49]

(*c*) commit the same to the *possession*, custody or management of *the* receiver; and

(*d*) *confer upon the* receiver all such powers, as to bringing and defending suits and for the realization,[24] management, protection, preservation and improvement of the property, the collection of the rents and profits[25] thereof, the application and disposal of such rents and profits, and the execution of *documents*[26] as the owner himself has,[23] or such of those powers as the Court thinks fit.

(2) Nothing in this *rule shall* authorize the Court to remove from the possession or custody of property any person whom *any* party to the suit has not a present right so to remove.

[1877—S. 503; 1859—S. 243. *See* Ss. 51 and 94.]

Synopsis.

1. Legislative changes.
2. Scope and object of the rule.
    3. Receiver, if can be appointed in proceedings other than suits.
    4. Receiver, if and when may be appointed in mortgage suits.
    5. Receiver of future earnings of judgment-debtor, if, can be appointed.
6. Testamentary suits.
7. Suits under S. 92 of the Code.
8. Partnership suits.
9. Maintenance suits.
10. Receiver, if can be appointed where one has been appointed by a Magistrate under S. 146 of the Criminal Procedure Code.

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of another suit. Subramania Ayyar, J dissenting].

[3] *Ram Dass* v. *Prosunnomoyee*, (1871) 16 Suth W R 297 (298).

[4] In re *Bai Jamna Bai*, (1911) 11 Ind Cas 554 (556): 36 Bom 20: 13 Bom L R 487.

O. 40, R. 1
Note 1.

11. Who may be appointed receiver.
12. What Court may appoint or remove a receiver.
13. When a receiver may be appointed.
    14. "Just and convenient."
    15. Partition suits.
    16. Executor in possession.
    17. Receiver, if, can be appointed for a company.
    18. Appointment, if can be made after reference to arbitration.
    19. Receiver in execution proceedings.
    20. Receiver after decree.
    21. Receiver of property in the hands of common manager.
22. Powers of the receiver.
    23. "All such powers as to bringing or defending suits . . . . as the owner himself has."
    24. Realisation of property.
    25. "Collection of the rents and profits thereof."
    26. "Power as to the execution of documents as the owner himself has."
    27. Delegation of duty by receiver.
28. The receiver is an officer of the Court.
    29. Possession of receiver enures for the benefit of the true owner.
    30. Attachment of properties in the hands of the receiver.
    31. Suits by or against receiver—Leave of Court.
    32. Debts incurred by receiver in the course of business.
    33. Loss caused by receiver's default.
    34. Agreement with receiver—Contempt of Court.
    35. Remuneration of receiver.
36. Liability of receiver.
    37. Liability to account.
    38. Liability of receiver and that of an executor or trustee.
    39. Liability to criminal prosecution.
40. When appointment takes effect.
41. Security to be given by receiver.
42. Receiver's lien.
43. Remedy of third party aggrieved by receiver's action.
44. Receiver if and when a necessary party to the suit.
45. Notice to opposite party if necessary before appointment.
46. Appointment of new receiver in place of old receiver.
47. Joint receivers.
48. Duration of office of receivership.
49. "Court may remove any person from the possession or custody of property."
50. Summary jurisdiction.
51. Appeal.
52. Letters Patent Appeal.
53. Revision.
54. Practice.

Attorney of a party—Whether can be appointed receiver. See Note 11, Pt. (6).
Declaratory suits. See Note 13, Pt. (22).
Effect of appointment—On execution by a decree-holder. See Note 19, Pt. (15).
Right of appeal to the Privy Council. See Note 51, Pt. (26).
Sale by receiver—Parties whether can impugn. See Note 22, Pt. (15).
Temporary injunctions and appointment of receivers—Distinction between. See Note 13, Pt. (4).
Two Courts appointing receivers in respect of the same properties—Whether expedient. See Note 12, Pt. (8).

1. Legislative changes:—

The portions of S. 503 dealing with receiver's remuneration and receiver's duties have been re-enacted as Rr. 2 and 3 of this order. Apart from this, the present rule contains the following changes:—

(1) S. 503 provided for the appointment of a receiver whenever it appeared "to be necessary for the realisation, preservation or better custody or management of any property". Under the present rule, the Court may appoint a receiver where it appears to be "just and convenient" to do so.

(2) S. 503 applied only to property which was the subject of the *suit or attachment*.[1] This restriction has been removed now.

Order 40, Rule 1—Note 1.

[1] *Sundaram v. Sankara*, (1886) 9 Mad 334

(3) The words "whether before or after the decree" in the present rule are new.

Thus the present rule is much wider in its scope than S. 503.

As to S. 243 of the Code of 1859, *see* the undermentioned cases.[2]

2. Scope and object of the rule.—This rule authorises a Court to appoint a receiver whenever it appears to it to be just and convenient to do so. The matter is thus left to the *discretion* of the Court.[1] Such discretion must, however, be exercised, not arbitrarily but judicially and according to legal principles. (*See* Note 14, *infra.*) The object and purpose of the appointment of a receiver may generally be stated to be the preservation of the subject-matter of the litigation pending a judicial determination of the rights of the parties thereto.[1-a] The Court does not, at the time of appointment of a receiver arrive at any final decision on the merits of the case, its aim being merely to preserve the *status quo ante* during the litigation.[2] Where a receiver is appointed under this rule in respect of any property, such property is in *costodia legis* for the benefit of the several parties according to their titles (*see* Notes 27 and 28, *infra*). When the Court appoints a person as the "manager" of the suit property, it really appoints a receiver, the term "Manager" being only another name for a receiver.[3] A *supurdar* to whom moveable property attached in execution is handed over for safe custody is not a receiver.[4]

3. Receiver, if can be appointed in proceedings other than suits.—The omission in R. 1 of the words "subject-matter of *suit*" which occurred in S. 503 of the old Code makes it clear that a receiver can be appointed in proceedings other than suits.[1] Thus, a receiver may now be appointed in proceedings for the appointment of a guardian under the Guardian and Wards Act,[2] or in a suit for rent and ejectment under Bengal Act, VIII of 1869[3] or under S. 32 of the Bengal Settled Estates Act, III of 1904 for the purpose of recovering the amount of any decree against a tenant for life of a settled Estate. But a Court has no jurisdiction to appoint a receiver in proceedings under the Succession Certificate Act[4] or in proceedings for the removal of a trustee under S. 74 of the Trusts Act[5] or to manage any occupancy hold-

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(2) *Fateh Singh* v. *Gunga Pershad,* 1874 Pun Re No 53; *Ajoodhya Dass* v. *Doorga,* (1872) 17 Suth W R 101 (101); *Bunwari Lall Sahu* v. *Mohibir Pershad,* (1873) 12 Beng L R 297: 1 Ind App 89 (102): 3 Sar 338 P C; *Bunwaree Lall Sahoo* v. *Baboo Girdharee Singh,* (1871) 16 Suth W R 273 (274): 8 Beng L R App 23; *Joynarain* v. *Shib Pershad,* (1866) 6 Suth W R Mis 1 (2).

Note 2.

(1) *Md Hussain Khan* v. *Amarchand,* (1913) 21 Ind Cas 283 (287): 16 Oudh Cas 238. See *Sheo Parkash* v. *Nand Kishore,* (1921) 61 Ind Cas 112 (112): 2 U P L R (A) 389 [Costs in the application also discretionary].

(1-a) *Md Hussain Khan* v. *Amarchand,* (1913) 21 Ind Cas 283 (286): 16 Oudh Cas 238; *Jagat Tarini Dasi* v. *Naba Gopal,* (1907) 34 Cal 305 (316): 5 Cal L Jour 270.

(2) *Kumar Satya Narain Singh* v. *Srimati Rani Keshabati Kumari,* (1914) 25 Ind Cas 406 (407): 18 Cal W N 537; *Bhupendra* v. *Manohar,* 1924 Cal 456 (458): 28 Cal W N 85: 77 Ind Cas 788; *Gopeenath* v. *Kally Dass,* (1884) 10 Cal 225 (230, 231): 8 Ind Jur 302; *Ram Sunser* v. *Kamal Jha,* (1905) 32 Cal 741 (745).

(3) *Ramasami Naidu* v. *Ayyalu Naidu,* 1924 Mad 614 (614): 46 Mad L Jour 196: 19 Mad L W 247: 34 Mad L Tim 6: 78 Ind Cas 625; *Jatindra Mohan* v. *Rabati Mohan Das,* 1932 Cal 275 (282): 55 Cal L Jour 8: 138 Ind Cas 4 [Position and duties of common manager of estate and of receiver of property are analogous].

(4) *Allah Dad* v. *Emperor,* 1924 Lah 667 (668): 25 Cr L Jour 43: 75 Ind Cas 731.

Note 3.

(1) *Asadali* v. *Mohomad,* (1916) 36 Ind Cas 177 (177): 20 Cal W N 1009: 43 Cal 986.

(2) *Mt Chandra Wati* v. *Jagannath,* 1925 Lah 489 (489, 491): 7 Lah L Jour 281: 90 Ind Cas 611: 26 Pun L R 576; *Gadoobai* v. *Janabai,* 1929 Nag 119 (119): 116 Ind Cas 642; In re *Bai Jamanabai,* (1911) 11 Ind Cas 554 (557): 36 Bom 20: 13 Bom L R 487.

(3) *Panye Chander* v. *Hurchunder,* (1883) 10 Cal 496 (498).

(4) *Kanhaya* alias *Moti Lal* v. *Kanya Lal,* 1924 All 376 (378): 46 All 372: 22 All L J 345: 79 Ind Cas 363.

(5) *Assardas* v. *Mst Thakurbai,* 1927 Sind 237 (238): 103 Ind Cas 816

O. 40, R. 1, Notes 3—4.

ing under the Central Provinces Tenancy Act.[6]

4. **Receiver, if and when may be appointed in mortgage suits.**—The High Court of Allahabad has held that O. 40 has no application to mortgage suits inasmuch as O. 34 provides in itself a complete machinery for such suits.[1] But the general trend of opinion of the other High Courts is that O. 40 is not inapplicable to mortgage suits and that a receiver can be appointed even if the mortgage is a simple one.[2] The test to be applied in this class of suits is, as in the case of other suits, to consider whether it will be *just and convenient* to appoint a receiver.[2-a] A receiver cannot be appointed merely because it is convenient to the *mortgagee* to do so,[3] or because a private sale by the receiver will fetch a higher price than the Court sale,[4] or because the mortgagor's reversioners support the appointment of a receiver.[5] Nor will a receiver be appointed where the mortgagee cannot recover his amount *personally* from the mortgagor.[6] On this principle it has been held that a receiver cannot be appointed of the *other* properties of the mortgagor where there is no likelihood of a *personal decree* being passed against the mortgagor in case the proceeds of the sale of the mortgaged property is found insufficient to satisfy the mortgage.[7] It has however been held in the undermentioned cases[8] that where a receiver *is* appointed at the instance of a mortgagee, the rents and profits of the property realised by the receiver must be treated as additional security for the amount found due to the mortgagee under the mortgage and that there-

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(6) *See* S 12 (2), C P Tenancy Act, I of 1920.

Note 4.

(1) *Gobind Ram* v. *Jwala Prasad*, (1918) 43 Ind Cas 533 (534) All; *Makhan Lal* v. *Mushtaq Ali*, 1927 All 419 (420): 100 Ind Cas 735.

(2) *Jaikissondas* v. *Zenabai*, (1890) 14 Bom 431 (435); *Ghanashyam* v. *Gobinda Moni*, (1903) 7 Cal W N 452 (453); *Rameswar Singh* v. *Chuni Lal Shatia*, (1920) 56 Ind Cas 839 (841): 47 Cal 418: 31 Cal L Jour 385; *Arunachalam* v. *Manicka*, (1909) 3 Ind Cas 437 (437): 6 Mad L Tim 238; *Venkata Rajagopal Surya Row* v. *Basavi Reddy*, (1915) 26 Ind Cas 986 (989, 991): 1 Mad L W 785: 1914 Mad W N 771: 16 Mad L Tim 407: 29 Mad L Jour 457; *Ethirajulu Chetti* v. *Rajagopalachari*, 1929 Mad 138 (141): 29 Mad L W 553: 115 Ind Cas 244: 56 Mad L Jour 115; *Surya Rao* v. *Gokul Doss*, 1931 Mad 626 (629): 54 Mad 565: 61 Mad L Jour 111: 34 Mad L W 165: 133 Ind Cas 504; *Dhian Singh* v. *Har Narain*, 1929 Lah 780 (781); *Jaswant Singh* v. *Punjab National Bank*, 1932 Lah 82 (83): 133 Ind Cas 433 [Equitable mortgagee is entitled to appointment of Receiver]; *Parasram* v. *Puran Mal Ditta Mal*, 1925 Lah 590 (591, 592): 85 Ind Cas 737; *Khoo Joo Tin* v. *Ma Sein*, 1928 Rang 176 (176): 110 Ind Cas 620: 6 Rang 261; *Punjab National Bank, Ltd* v. *Firm of Moosaji Jaffirji*, 1927 Sind 230 (230, 231): 102 Ind Cas 353. But see *Womda Khanum* v. *Rajroop Koer*, (1877-78) 3 Cal 335 (336): 1 Cal L Rep 295 [S 243, Act VIII of 1859 not applicable to mortgage decree for sale—Receiver cannot be appointed]; *Nrisinga Charan Nandy* v. *Rajniti Prasad Singh*, 13 Pat L Tim 525 (580).

(2-a) *Kshitish Chandra* v. *Janakinath Roy*, 1932 Cal 194 (195): 35 Cal W N 1141: 137 Ind Cas 127. See *Nrisinga Charan* v. *Rajniti Prasad*, 13 Pat L Tim 525 (530) [*See* observations of Fazl Ali, J].

(3) *Nawab Mirza Muhammad Hussain Khan* v. *Amar Chand Paul*, (1913) 21 Ind Cas 283 (284, 285): 16 Oudh Cas 238.

(4) *Latafut Hossein* v. *Anunt Chowdhury*, (1896) 23 Cal 517 (521).

(5) *Govind Rani Dasi* v. *Brinda Rani Dasi*, (1916) 34 Ind Cas 405 (405): 23 Cal L Jour 440.

(6) *Khubsarat Koer* v. *Sarada*, (1911) 12 Ind Cas 165 (165, 166): 16 Cal W N 126: 14 Cal L Jour 526 [*See* however 1933 Mad W N (Weeks Cases) p. 12, where it was held that a Receiver could be appointed for the *mortgaged* properties even if there is no personal remedy].

(7) *Rajah Satrucharla Gangaraju* v. *Raja of Jeypore*, 1926 Mad 797 (797, 798): 23 Mad L W 650: 1926 Mad W N 937: 96 Ind Cas 194.

(8) *Surya Rao* v. *Gokul Doss*, (1931) 61 Mad L Jour 111 (115, 116): 1931 Mad 626: 54 Mad 565: 31 Mad L W 165: 133 Ind Cas 504; *Moolji Moorarji, In re*, 1929 Sind 114 (114, 115): 23 Sind L R 200: 115 Ind Cas 306; *Rameswar Singh* v. *Chuni Lal*, (1920) 56 Ind Cas 839 (840, 841): 47 Cal 418: 31 Cal L Jour 385; *Eastern Mortgage and Agency Co, Ltd* v. *Fukuruddin Mahomed Chowdhury*, (1912) 17 Ind Cas 849 (851): 17 Cal W N 16 [Court cannot order Receiver to pay out of the moneys in his hands, any sums to the mortgagor to prosecute his appeal against the decree in the mortgage suit]. See also *Ponnu Chettiar* v. *Sambasiva Iyer*, (1933) 141 Ind Cas 372 (373, 375, 377) Mad [Receiver in mortgage suit—Subsequent Court-auction purchaser in execution of money decree—Such purchaser is not entitled to rents and profits though Receiver was impleaded therein and though both suits were in the same Court].

fore the mortgagee is entitled to be paid out the rents and profits so received in priority to other *personal* creditors of the mortgagor.

Where the mortgage is void *ab initio* and the mortgagee obtains a simple money decree in respect of the mortgage amount it has been held by the High Court of Rangoon that he cannot apply for the appointment of a receiver of the properties of the mortgagor.[9] It has been held by the High Court of Madras that the Court has no power to appoint a receiver pending a suit for the specific performance of a *contract to execute a mortgage*.[10]

In the circumstances of the following cases, it has been held that a receiver may properly be appointed:—

(1) Where the interest due on the mortgage is in arrears or the sale proceeds of the property are likely to be insufficient to satisfy the mortgage.[11]

(2) Where the mortgage is by the *karta* of a joint Hindu family and it is found that such a mortgage is binding on the family.[12]

(3) Where the suit is to enforce a floating charge on the good-will and the stock-in-trade of a business under a mortgage containing a proviso that the mortgagor should not permit the stock-in-trade to fall below a certain value.[13]

(4) Where the mortgagor who is in possession on behalf of the mortgagee becomes insolvent.[14]

(5) Where the mortgagee is entitled to enter into possession on default of payment of the mortgage moneys.[15]

(6) Where the mortgagor, transfers his properties, with the mortgagee's consent, to trustees who undertake to liquidate his debts by periodical payments but the arrangement fails.[16]

A receiver can be appointed in a mortgage suit for sale even though a receiver has already been appointed in a prior partition suit comprising such property.[17] Such appointment can be made even *after the final decree* in the mortgage suit is passed and at any time before the mortgage is fully satisfied.[18]

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(9) *Meyappa Chetty* v. *Ma Bu*, 1930 Rang 271 (272): 127 Ind Cas 176. But see *Ram Rucha* v. *Doorga Dutt*, (1870) 13 Suth W R 453 (454) [Receiver may be appointed though the mortgagee has taken only a money decree].

(10) *Chokkalingam Pillai* v. *Pichappa Chettiar*, 1926 Mad 155 (156): 22 Mad L W 579: 1925 Mad W N 802: 92 Ind Cas 599.

(11) *Maharaja Sir Rameswar Singh Bahadur* v. *Chuni Lal Shah*, (1920) 56 Ind Cas 839 (841): 31 Cal L Jour 385: 47 Cal 418: *Punjab National Bank* v. *Moosaji Jaffirji*, 1927 Sind 230 (231): 102 Ind Cas 353; *Eastern Mortgage and Agency Co, Ltd* v. *Rakea Khatun*, (1912) 17 Ind Cas 202 (203, 204): 16 Cal W N 997; *Eastern Mortgage and Agency Co, Ltd* v. *Fakuruddin Mohammad*, (1912) 17 Ind Cas 849 (852): 17 Cal W N 16; *Weatherall* v. *Eastern Mortgage and Agency Co, Ltd*. (1911) 9 Ind Cas 985 (987): 13 Cal L Jour 495; *Manindra Chandar* v. *Suniti Bala Debi*, 1926 Cal 1006 (1008): 95 Ind Cas 632; *Ahmed Kasim Baroocha* v. *Solappa Chetti*, (1909) 4 Ind Cas 1031 (1032): 5 L B R 135: 3 Bur L Tim 20.

(12) *Ram Kumar Lal* v. *Chartered Bank of India, Australia and China*, 1925 Cal 664 (666): 41 Cal L Jour 203: 87 Ind Cas 375.

(13) *Hardwari Mull Dibi Chand* v. *Lachmandas Kuruk Chand*, (1918) 46 Ind Cas 389 (390) Cal.

(14) *Kaki Venkataraju* v. *Official Receiver*, (1916) 32 Ind Cas 691 (692): 1915 Mad W N 864.

(15) *Jaikissandas* v. *Zenabai*, (1890) 14 Bom 431 (435).

(16) *Weatherall* v. *Eastern Mortgage and Agency Co, Ltd*. (1911) 9 Ind Cas 985 (987): 13 Cal L Jour 495.

(17) *Khubsurat Koer* v. *Sarada Charan*, (1911) 12 Ind Cas 165 (165, 166): 14 Cal L Jour 526: 16 Cal W N 126

(18) *Abdul Khairat* v. *Hirshikesh Das*, 1926 Cal 978 (979): 95 Ind Cas 6; *Manindra Chandar* v. *Suniti Bala Debi*, 1926 Cal 1006 (1008): 95 Ind Cas 632.

O. 40, R.1, Notes 4—7.

A receiver may thus be appointed after the sale under the mortgage decree and pending an application to set aside such sale.[19]

Where a receiver is appointed in a mortgage suit, the mortgagee, if in possession, must give up such possession to the receiver, even though, he has been in possession under an arrangement that he should apply the income of the property to the discharge of the debt.[20]

S. 69-A of the Transfer of Property Act which was introduced newly by Act. XX of 1929, now makes provision for the appointment of a receiver of the mortgaged property by the *mortgagee himself* in cases where he is entitled to sell the property without recourse to a suit for sale. Hence the undermentioned decision[21] passed prior to Act. XX of 1929, wherein this right was not recognised is no longer good law.

5. **Receiver of future earnings of judgment-debtor, if can be appointed.**—Apart from any *charge* given by the debtor, the Court has no power to appoint a receiver in aid of a judgment, of the future earnings of the judgment-debtor, inasmuch as such earnings are not *property* in respect of which the judgment-creditor could proceed in equity or at law.[1] A receiver cannot therefore be appointed to receive the maintenance allowance[1-a] or the pension payable to the judgment-debtor.[2] But where the latter has been given certain lands for his maintenance, a receiver can be appointed to collect the rents and profits of the lands and pay out of the same, a sufficient sum for the maintenance of the judgment-debtor and his family applying the balance, if any, to the liquidation of the judgment-creditor's debt.[3] *See also* the undermentioned cases.[4]

6. **Testamentary suit.**—A receiver can be appointed in a testamentary suit.[1] *See* Note 3, *supra.*

7. **Suits under S. 92 of the Code.**—The Court can appoint a receiver in a suit under S. 92 of the Code.[1] But it cannot do so in a suit under

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(19) *Madheshwar Singh* v. *Mohamaya Prasad Singh,* (1911) 9 Ind Cas 1027 (1028): 15 Cal W N 672: 13 Cal L Jour 487.

(20) *Hitendra Singh* v. *Rameshwar Singh,* 1921 Pat 43 (44): 6 Pat L Jour 37: 2 Pat L Tim 593: 61 Ind Cas 67.

(21) *Syam Peary Dassya* v. *Eastern Mortgage and Agency Co, Ltd,* (1917) 40 Ind Cas 865 (879) Cal.

Note 5.

(1) *Holmes* v. *Millage,* (1893) 1 Q B 551 C A; *Cadagon* v. *Lyric Theatre,* (1894) 3 Ch 338 C A: Re *Jhonson,* (1898) 2 I R 551.

(1-a) *Padmanand Singh* v. *Rama Prasad Mahi,* (1912) 17 Ind Cas 284 (288): 16 Cal L Jour 354: 17 Cal W N 662; *Palikandy Mammad* v. *Chingoran Keloth Valippa,* (1916) 34 Ind Cas 381 (383): 20 Mad L Jour 361: 40 Mad 302.

(2) *Debi Prasad* v. *Amir Ali,* (1909) 4 Ind Cas 145 (148): 12 Oudh Cas 323 [Pension also cannot be attached].

(3) *Rajindra Narain Singh* v. *Mt Sunder Bibi,* 1925 P C 176 (176): 41 Cal L Jour 383: 23 All L J 634: 27 Bom L R 849: 87 Ind Cas 295: 3 Pat L R 142: 47 All 385: 52 Ind App 262: 49 Mad L Jour 244: 1925 Mad W N 630: 22 Mad L W 284: 6 L R P C 138: 30 Cal W N 818 P C: *Lahunu Bai* v. *Harak Chand,* (1915) 31 Ind Cas 285 (287): 11 Nag L R 113.

(4) *Rani Annapurni* v. *Swaminathan,* (1911) 6 Ind Cas 439 (439): 8 Mad L Tim 108: 34 Mad 7: 1910 Mad W N 505: 20 Mad L Jour 785 [Decree or agreement for maintenance may be assigned]; *Asad Ali* v. *Haider Ali,* (1911) 6 Ind Cas 826 (829): 14 Cal W N 918: 12 Cal L Jour 130: 38 Cal 13 [Decree for maintenance may be assigned].

Note 6.

(1) *Yeshwant Bhagwant* v. *Shankar Ramchandra,* (1893) 17 Bom 388 (391).

Note 7.

(1) *Ajapa Natesa Pandhara Sannadhi* v. *Ramalingam Pillai,* (1913) 20 Ind Cas 767 (767): 24 Mad L Jour 658; *Veeraragava Thathachariar* v. *Krishnasami Thathachariar,* (1910) 7 Ind Cas 900: 20 Mad L Jour 638: 4 Mad L Tim 88; *Kuppusami* v. *Subramaniam,* 1923 Mad 224 (224): 16 Mad L W 927: 1923 Mad W N 75: 68 Ind Cas 565: 41 Mad L Jour 545 [Court can supersede existing trustee by Receiver]; *Shah Mahammad* v. *Muhammad Masudul,* (1920) 55 Ind Cas 442 (443): 2 U P L R (Pat) 34 [Settler's idea that different bodies created by him should

the Religious Endowments Act except under S. 5 of that Act.[2] *See also* the undermentioned cases.[3]

8. **Partnership suits.**—Where a dissolution of the partnership is inevitable, and the partners are on bad terms, the usual way of guarding their interests is by appointing a receiver and by ordering the good will of the business and the stock in trade to be sold, the partners being at liberty to bid at the sale.[1] But no receiver can be appointed to manage a partnership business where all the partners are not parties to the suit.[2] It is not necessary that on the death of a co-partner the Court, must in every case, appoint a receiver. The Court should look at the whole of the circumstances of each case.[3]

9. **Maintenance suits.**—Where by a decree for maintenance a charge is created on the defendant's property for the payment of maintenance, it is desirable, in order to facilitate execution and to avoid further litigation, that the decree itself should appoint a receiver with directions to take possession of the property, in case of default of payment and to sell the same, and to pay out of the proceeds of the sale the amount due to the plaintiff.[1]

10. **Receiver, if can be appointed where one has been appointed by a magistrate under S. 146 of the Cr. P. C.**—A civil Court cannot appoint a receiver in respect of properties for which a criminal Court has already appointed a receiver under S. 146 of the Criminal Procedure Code.[1] But the mere fact that there exists with reference to any property an order under S. 145 of the Criminal Procedure Code is no bar to a civil Court appointing a receiver in respect of such property.[2] Nor can a Magistrate acting under S. 145 of the Cr. P. Code interfere with the possession of a receiver appointed by a civil Court without the permission of that Court.[3]

11. **Who may be appointed receiver.**—A *party* to the litigation should not be appointed a receiver except under very special circumstances or with the consent of the other parties,[1] because, as a general rule, absolute disinterested-

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concur in the administration of the trust—Concurrence becoming impossible—Receiver can be appointed]; *Balakrishna* v. *Jagannada*, 1925 Mad 820 (822): 48 Mad L Jour 534: 87 Ind Cas 194 [Internecine quarrels between the trustees].

(2) *Gyannananda Asaram* v. *Kristo Chandra*, (1903) 8 Cal W N 404 (407).

(3) *Narayanan Chetty* v. *Ramasami Chetti*, (1909) 4 Ind Cas 1069 (1070): 19 Mad L Jour 669 [Suit by some members of a community against other members—Joint property of community—Prayer for appointment of Receiver refused]; *Subramania Desika Pandarasannadhi* v. *Arumuga Tambiran*, (1926) 91 Ind Cas 106 (108) Mad [Suit for scheme and removal of Pandarasannadhi for misconduct—Death of Pandarasannadhi—Abatement—In an appeal from order of abatement, application for appointment of receiver refused].

Note 8.

(1) *E F Dover* v. *E S Dover*, (1915) 29 Ind Cas 684 (686): 8 Bur L Tim 57: 8 L B R 332; *Kin Foo* v. *Whee Sheik Cheng*, 1925 Rang 287 (287): 3 Rang 196: 89 Ind Cas 593.

(2) *Mikanbai* v. *Dassimal*, (1918) 45 Ind Cas 224 (226): 11 Sind L R 115.

(3) *Haji Kadir Baksh* v. *Gulam Muhammad*, (1920) 55 Ind Cas 50 (52): 2 U P L R (Lah) 56: 30 Pun W R 1920.

Note 9.

(1) *Hemanginee* v. *Kumode Chander*, (1899) 26 Cal 441 (448, 449): 3 Cal W N 139.

Note 10.

(1) *Bidya Prosad Narain Singh* v. *Asraf Singh*, (1913) 20 Ind Cas 269 (271): 17 Cal W N 1070: 40 Cal 862; *Md Ali Khan* v. *Nisar Ali Khan*, 1926 Oudh 504 (505): 95 Ind Cas 561 [Property already in Receiver's hands by Criminal Court's order may be so retained till disposal of consequent civil suit].

(2) *Barkat-un-nissa* v. *Abdul Aziz*, (1900) 22 All 214 (215): 1900 All W N 22.

(3) *A M Dunne* v. *Kumar*, (1902) 30 Cal 593 (598): 7 Cal W N 390.

Note 11.

(1) *Jan Mohammad* v. *Gulam Rasul*, 1926 Sind 37 (38): 89 Ind Cas 104; *Supprasanna Roy* v. *Upendra Narain Roy*, (1914) 22 Ind Cas 601 (603): 18 Cal L Jour 638: 18 Cal W N 533; *Bhagwan Das* v. *Sheonandan Prasad*, 1925 Pat 293 (294): 3 Pat 964: 85 Ind Cas 93: 6

O. 40, R. 1, Notes 11—12.

ness is an indispensable qualification for a receiver.[2] Subject to the above general rule however in the case of partnership and partition suits, a party is more readily appointed a receiver than in other cases.[3] There is nothing to prevent a Hindu from being appointed receiver of the properties of a Muhammadan *wakf* where his duties do not include the performance of *religious ceremonies.*[4] Similarly the appointment of the guardian of a minor as receiver of his properties is not illegal.[5] But the attorney of a party to the litigation cannot be appointed receiver, as such appointment will interfere with the arrangement made by such party for the conduct of his case.[6]

The fact that the receiver lives far away from the properties is a disqualification, which, though not absolute, should be taken into consideration in making the appointment.[7]

12. What Court may appoint or remove a receiver.—Under S. 505 of the Code of 1882 a receiver could be appointed only by the High Courts and the District Courts and not by Courts subordinate to the District Court.[1] Under the present Code, a receiver can be appointed by all Courts. The appointment can be made only by the Court before which the suit wherein the receiver is sought to be appointed is pending, or where the decree has been appealed against, by the appellate Court.[2] Hence a District Court cannot appoint a receiver in a suit pending in a Court subordinate to it.[3] Now that the words "property, the subject of a suit or attachment" which occurred in S. 503 of the old Code have been omitted in the present rule, a Court can appoint a receiver even of property situated beyond its local jurisdiction,[4] and even before deciding the question of jurisdiction, where such question is raised.[5] A Court of Small Causes cannot appoint a receiver of immoveable

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Pat L Tim 778; In re *Thyannayaki Achi,* (1914) 25 Ind Cas 602 (602, 603) Mad; *Syed Asad Reza* v. *Wahidunnessa Begum,* (1912) 57 Ind Cas 70 (71): 80 Cal L Jour 231; *Kali Kumari* v. *Bachhan Singh,* (1913) 19 Ind Cas 878 (874): 17 Cal W N 974; *Dhian Singh* v. *Har Narain,* 1929 Lah 780 (781) [No absolute prohibition against party being Receiver].

(2) *Sripatti Datta* v. *Bibhuti Bhusan,* 1926 Cal 593 (595): 53 Cal 319: 92 Ind Cas 940 *Bupendra Nath* v. *Monohar Mokherjee,* 1924 Cal 456 (460): 28 Cal W N 86: 77 Ind Cas 783.

(3) *Bhagawan Das* v. *Sheo Nandan Prasad Sahu,* 1925 Pat 293 (294): 3 Pat 964: 85 Ind Cas 93: 6 Pat L Tim 778.

(4) *Syed Asad Reza* v. *Wahidunnessa Begum.* (1920) 57 Ind Cas 70 (71): 30 Cal L Jour 231.

(5) *Nadar* v. *Tenammal.* (1916) 35 Ind Cas 939 (1): 4 Mad L W 285: (1916) 2 Mad W N 256: *Rukmani Ammal* v. *Advocate-General of Madras,* (1915) 31 Ind Cas 908 (908): 1916 Mad W N 10.

(6) *Johurmull* v. *Kedarnath.* 1927 Cal 714 (717): 31 Cal W N 953: 55 Cal 113: 104 Ind Cas 387.

(7) *Kali Kumar* v. *Bachhan Singh,* (1913) 19 Ind Cas 873 (874): 17 Cal W N 974.

Note 12.

(1) *Birajan Kooer* v. *Ram Churn Lal,* (1883) 7 Cal 719 (721): 9 Cal L Rep 203; *Bai Mani* v. *Khimchand,* (1908) 33 Bom 104: 10 Bom L R 1037: 1 Ind Cas 657 (657); *Amar Nath* v. *Raj Nath,* (1896) 18 All 453 (454): 1896 All W N 141; *Budh Parkash* v. *Santrein,* 1885 Pun Re No 102. See *Khagendra Narain* v. *Shashadar,* (1904) 31 Cal 495 (497): 8 Cal W N 608.

(2) *Shaik Moheeoodeen* v., *Shaikh Ahmed Hossein,* (1870) 14 Suth W R 384.

(3) *Latafut Hossein* v. *Anunt Chowdhry,* (1896) 23 Cal 517 (519, 520); *Dhundiram* v. *Chandana,* (1865) 2 Bom H C R 98.

(4) *M K R V Alagappa Chetty* v. *S Krishnaswami Ayyar,* 1921 Mad 119 (120); *Pramatha Nath Malia* v. *N V Low & Co,* 1930 Cal 502 (505): 34 Cal W N 238: 51 Cal L Jour 209: 57 Cal 964: 128 Ind Cas 97. But see *Dharendra Krishna* v. *Surendra Krishna,* 1930 Cal 610 (612): 34 Cal W N 440: 129 Ind Cas 609 [Simple contract creditor without a lien on the property not entitled to ask for Receiver]; *Narulasidda Raja* v. *Siddalinga Raja,* (1912) 17 Ind Cas 16 (16) [Property not subject-matter of suit —Receiver cannot be appointed]. See also *Ismail Hadjee* v. *Mahomed Hadjee,* (1874) 21 Suth W R 303 (305): 13 Beng L R 91 [Case under Code of 1859—Question was left open].

(5) *Kin Foo* alias *Whee Fong* v. *Whee Sheik Chaeng,* 1925 Rang 287 (288): 3 Rang 196: 89 Ind Cas 593.

O. 40, R. 1. Notes 12—13.

property) (*See* Ss. 7 and 94 of the Code.[6]) A civil Court in the Punjab can appoint a receiver to collect the rent of agricultural land.[7]

Where a receiver of a certain property has already been appointed by a Court, it is inexpedient that another Court should appoint another receiver for the same property.[8] It is only the Court that appointed the receiver, that can remove him[9] or give him any directions in the matter.[10]

13. When a receiver may be appointed.—*See also* Note 6 to S. 51. As has been seen in Note 2, *ante*, the appointment of a receiver is in the judicial discretion of the Court. Where the property is *in medio, i.e.,* in the possession of no one, a receiver can readily be appointed. But where any one is in possession under a legal claim, strong reasons are necessary for interfering with his possession. [*See* Notes 14 and 48, *infra*, where the general principles are discussed. *See also* sub-R. (2).]

A plaintiff applying for the appointment of a receiver must show *prima facie* that he has a strong case and good title to the property[1] or a special equity in his favour[2] that the property in the hands of the defendant is in danger of being wasted.[3] The distinction between the appointment of a receiver and temporary injunction is this. While in either case, it must be shown that the property should be preserved from waste or alienation, it is enough to show in an application for injunction that the plaintiff has a *fair question* to raise as to the existence of the right alleged, but this is not enough for the appointment of a receiver, a good *prima facie* title has to be made out.[4] The mere fact that the plaintiff in his plaint makes violent and wholesale charges of malversation against the defendant in possession is no ground for the appointment of a receiver.[5] Nor is a mere future apprehension of

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(6) *Nursingdas* v. *Tulsiram*, (1878) 2 Bom 558 (560) [Case under Code of 1877—*Held*, moffusal Court of Small Causes had no power to appoint Receiver].

(7) *Dhumi* v. *Nawab Muhmmad Sajjad Ali Khan*, 1923 Lah 623 (625): 78 Ind Cas 600: 5 Lah L Jour 533.

(8) *Sridhar Chowdhery* v. *Mugniram*, 1924 Pat 491 (495): 3 Pat 357: 5 Pat L Tim 248: 1924 Pat H C C 54: 78 Ind Cas 620.

(9) *Bihari Lal* v. *Shankar Das*, 1925 Lah 309 (310): 7 Lah L Jour 6: 86 Ind Cas 246; *John* v. *Agra United Mills, Ltd*, 1931 All 72 (78): 1931 All L J 18: 134 Ind Cas 454; *Seva Das* v. *Puran Das*, 1889 Pun Re No 74.

(10) *Janiki Ammal* v. *Narayanasami*, (1908) 18 Mad L Jour 589 (589): 4 Mad L Tim 268.

Note 13.

(1) *Mahomed Qasim Ravuthar* v. *Nagaraja Moopanar*, 1928 Mad 813 (814): 106 Ind Cas 167; *Banwari Lal Chowdhury* v. *Moti Lal Chowdhury*, 1922 Pat 493 (494): 8 Pat L Tim 466: 68 Ind Cas 656; *The Firm Raghbir Singh Jaswant* v. *Narinjan Singh*, 1923 Lah 48 (51, 53): 72 Ind Cas 569; *Nga Kiji Maung* v. *Mi Sin*, 1908 U B R 2nd quarter, Civil Procedure, 17: *Sham Chand Giri* v. *Bhaya Ram Pandey*, (1894) 5 Cal W N 365 (367); *Alkama Bibi* v. *Syed Istak Hossain*, 1925 Cal 970 (971, 972): 29 Cal W N 886: 89 Ind Cas 183 [Receiver will not ordinarily be appointed at instance of a plaintiff who has merely a shadowy claim]. See *Sia Ram Das* v. *Mohbir Das*, (1900) 27 Cal 279 (282): 5 Cal W N 362 [Enough if fair *prima facie* case is made out].

(2) *Chowdhury* v. *K Sing and H C Dutt*, 1922 Pat 318 (319, 320): 3 Pat L Tim 24: 6 Pat L Jour 366: 61 Ind Cas 849.

(3) *John Mahomed* v. *Gulam Rasul Khan*, 1926 Sind 37 (38): 89 Ind Cas 104: *Jethalal Mohanji* v. *Dayalal Ranjit*, 1926 Sind 83 (84): 89 Ind Cas 413; *Govind Narain Rao* v. *Desai Vallabhrao*, (1920) 55 Ind Cas 827 (827, 828): 22 Bom L R 217; *Mi Shwe Ma* v. *Mi Mi*, (1911) 12 Ind Cas 198 (198, 199): 4 Bur L Tim 241; *Tirath Singh* v. *Shromani Gurdwara*, 1931 Lah 688 (688): 32 Pun L R 665: 134 Ind Cas 799 [Some peril to the property must be shown]; *Tribhovan* v. *Jamuna*, 1889 Bom P J 184 (184) [Redemption suit].

(4) *Sivagnanathammal* v. *Arunachalam Pillai*, (1911) 11 Ind Cas 870 (871): 21 Mad L Jour 821: 10 Mad L Tim 490: (1911) 2 Mad W N 75; *Nga Kiji Maung* v. *Mi Sin*, 1908 U B R 2nd quarter, Civil Procedure Code 17; *Gurusami Pandian* v. *Sendhathi*, (1919) 53 Ind Cas 760 (761): 10 Mad L W 551; *Chandidat Jha* v. *Padmunand Singh Bahadoor*, (1895) 22 Cal 459 (465).

(5) *Srimati Presennomoyi* v. *Beni Madab*, (1883) 5 All 556 (561): 1883 All W N 136; *Jivani* v. *Labhu Ram*, (1909) 4 Ind Cas 694 (695): 1908 Pun Re No 107: 1909 Pun L R 12 [Proof of such charges is necessary].

O. 40, R. 1, Note 13.

misappropriation or mismanagement sufficient ground for the appointment.[6] Vague charges against the person in possession are not enough; the charges must be specific.[7] Persons in possession under a legal claim must not be removed on the strength of mere suspicion.[8] In a suit for possession and mesne profits against a defendant who claims to hold the property as trustee, the mere fact that the defendant is a poor man from whom it would be impossible to realise any mesne profits which might be decreed, is no ground for appointing a receiver where there is no allegation of misappropriation or waste.[9] But in the undermentioned cases, the *insolvency* of the person in possession of the disputed property was held to be good ground for the appointment of a receiver.[10]

A receiver cannot be appointed for the purpose of ascertaining the real income of a property so that the Court may have correct *data* for fixing the rate of maintenance payable to a widow.[11] The allegation against a defendant, a trustee, that since his acceptance of office, he has not paid allowances to the beneficiaries, without any allegation of waste or mismanagement, *etc.*, is no ground for appointing a receiver in his place.[12] Nor should a receiver be appointed merely because the relations between the parties are strained[13] or because the manager of the estate of the defendant produces his accounts and documents late.[14] But where the defendant removes under suspicious circumstances, a large extent of property during the pendency of a suit, in which the title to the property is to be determined,[15] or where a Hindu widow in possession of her husband's estate is found to be wasting the property[16] or where a life tenant intends to transfer the estate to a stranger thus constituting a danger to the reversionary interests,[17] a receiver may be properly appointed. In a suit for possession, where it is clearly proved that the estate is grossly mismanaged and wasted, a receiver should be appointed.[18] It is not

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(6) *Sant Ram* v. *Ram Chand*, (1910) 6 Ind Cas 659 (660): 1910 Pun Re No 36: 1910 Pun L R 72: 1910 Pun W R 58; *Satis Chandra Giri* v. *Benoy Krishna Mukhopadya*, 1926 Cal 1092 (1096): 96 Ind Cas 30.

(7) *Satis Chandra Giri* v. *Benoy Krishna Mukhopadhya*, 1926 Cal 1092 (1093): 96 Ind Cas 30; *Sant Ram* v. *Ramchand*, (1910) 6 Ind Cas 659 (660): 1910 Pun W R 58: 1910 Pun Re No 36: 1910 Pun L R 72.

(8) *Tejmall Bikaram Singh* v. *Ramraj Kuar*, (1911) 11 Ind Cas 703 (705) All.

(9) *Mahomed Askari* v. *Nisar Husain*. 1921 All 91 (92): 43 All 311: 19 All L J 50: 60 Ind Cas 901; *Sivaji Raja Sahib* v. *Aiswariyanandaji Sahib*, (1915) 29 Ind Cas 485 (488): 29 Mad L Jour 209: 18 Mad L Tim 155; *Tirath Singh* v. *Shromani Gurdwara*, 1931 Lah 688 (689): 32 Pun L R 665: 134 Ind Cas 799.

(10) *Official Assignee* v. *Haji Mohammad Hady*, (1918) 48 Ind Cas 152 (158): 11 Bur L Tim 127 [Insolvency of arbitrator is sufficient ground for appointing Receiver though the administrator has been managing the estate carefully and has kept proper accounts]; *Kaki Venkataraju* v. *The Official Receiver, Godavari, at Rajamandri*, (1916) 32 Ind Cas 691 (692): 43 Cal 136: 19 Cal W N 998: 23 Cal L Jour 118 [Mortgagor in possession on mortgagee's behalf—Mortgagor becoming insolvent—Receiver can be appointed].

(11) *Rajammal* v. *Thyagaraja Ayyar*, 1925 Mad 1245 (1246): 22 Mad L W 816: 89 Ind Cas 943.

(12) *Hobibullah* v. *Abtaikallah*, (1916) 34 Ind Cas 693 (694): 23 Cal L Jour 567.

(13) *The firm Ragbir Singh* v. *Narinjan Singh*, 1923 Lah 48 (51, 53): 72 Ind Cas 569.

(14) *Narayanaswami Ayyer* v. *Janaki Ammal*, (1912) 17 Ind Cas 261 (263): 1912 Mad W N 904.

(15) *Sia Ram* v. *Mohabir*, (1900) 27 Cal 279 (282): 5 Cal W N 362; *Sham Chand* v. *Bhaya Ram*, (1901) 5 Cal W N 365 (367).

(16) *Guruva Chetty* v. *Ragammal*, (1910) 7 Ind Cas 534: 1910 Mad W N 347: 8 Mad L Tim 189; *Mt Maharani* v. *Nuddu Lal Misser*, (1868) 1 Beng L R A C J 27: 10 Suth W R 73.

(17) *Ahmad Asmal Muse* v. *Bai Bibi*, (1920) 57 Ind Cas 553 (555): 44 Bom 727: 22 Bom L R 826. See *Shankarbhai* v. *Bai Shiv*, (1930) 32 Bom L R 1013 (1022, 1030): 1930 Notes 545: 54 Bom 837: 127 Ind Cas 897: 1930 Bom 545.

(18) *Satya Narain Singh* v. *Keshabati Kumari*, (1914) 25 Ind Cas 406 (407): 18 Cal W N 587.

necessarily improper that a receiver should be appointed to deal with the rents and profits of land assigned to a Hindu widow for her maintenance, even if she has no other source of income.[19] The mere fact that the party in possession is a Muhammadan widow claiming a lien for her dower debt, is no bar to the appointment of a receiver if there are good grounds for such appointment.[20] *See also* the undermentioned cases.[21]

A receiver may be appointed in a suit for a declaration[22] or in a mere suit for money.[23] But in such cases the creditor must establish a special equity in his favour.[24] The High Court of Calcutta has however held that a simple creditor without charge on the property is not entitled to ask for the appointment of a receiver.[24-a] A receiver can be appointed to collect the rents and profits of an estate which is itself not liable to attachment.[25] The mere fact that the acts alleged against the defendant constitute a crime for which he may be prosecuted is no bar to the appointment.[26] An application for the appointment of a receiver should always be made promptly. Delay in making it is a circumstance unfavourable to such appointment.[27] An application for the appointment of a receiver should not be dismissed summarily. The matter should be considered judicially in all its aspects before being disposed of. The dismissal of an application, at a prior stage when the suit itself was dismissed does not prevent a subsequent application when the suit has been restored and the proceedings re-opened.[28]

14. "Just and convenient".—The provisions of English Law corresponding to this rule (S. 25 of the Judicature Act, 1873, now S. 45 of the Judicature Act, 1925) use the words "just *or* convenient". But they have

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(19) *Lahunu Bai v. Harakchand,* (1915) 31 Ind Cas 285 (287): 11 Nag L R 113.

(20) *Zahros Syed Ali v. Ahmad Syed,* 1923 Nag 21 (21, 22): 68 Ind Cas 502.

(21) See *Kumara Tirumalai v. Bangaru Thirumalai,* (1898) 21 Mad 310 (328) [Co-owner—One co-owner entitled to manage but minor—His mother a Gosha lady and acting through stranger denying plaintiff's rights as co-owners, to share in rents and profits—Receiver appointed]; *Raja Ram v. Sheorani Kuer,* (1910) 7 Ind Cas 344 (345) All [Suit to set aside trust—Profits from the property large—Expenses of the trust small—Trustees not paying due regard to any method of any account—Receiver may be appointed]; *Mahomed Ali Khan v. Nisar Ali Khan,* 1926 Oudh 504 (505): 95 Ind Cas 561 [Receiver appointed under Criminal Procedure Code, S 146—Title of one of the parties declared by Board of Revenue—*Held*, that Receiver's custody should be continued till disposal of civil suit].

(22) *Dhumi v. Nawab Muhammad,* 1923 Lah 623 (624, 625): 73 Ind Cas 600: 5 Lah L Jour 533; *Amarnath v. Mt Tehal Kaur,* 1922 Lah 444 (446): 67 Ind Cas 383; *Makhan Shah v. Musammat Halima,* 1927 Lah 65 (65): 27 Pun L R 138: 94 Ind Cas 39. But see *Pounchbai v. Lekhraj,* (1909) 4 Ind Cas 605 (605): 3 Sind L R 118.

(23) *Nedungadi Bank v. Official Assignee,* 1929 Mad 184 (186): 56 Mad L Jour 95: 29 Mad L W 664: 118 Ind Cas 70: 52 Mad 988; *Lahunu Bai v. Harak Chand,* (1915) 31 Ind Cas 285 (287): 11 Nag L R 113; *Ramasamy Naik v. Ramasami Chetty,* (1907) 30 Mad 255 (264): 2 Mad L Tim 167: 17 Mad L Jour 201. But see *Marula Sidda v. Siddlinga,* (1912) 17 Ind Cas 16 (16) Mad [Receiver cannot be appointed for property which cannot be dealt with in any way by the Court in the suit].

(24) *Pirthi Chand Lal v. Kalikannand Singh,* 1922 Pat 318 (319, 320): 3 Pat L Tim 24: 6 Pat L Jour 366: 61 Ind Cas 849.

(24-a) *Dharendra Krishna Deb v. Surendra Krishna Nandi,* 1930 Cal 610 (611): 34 Cal W N 440: 129 Ind Cas 609; *Hemendra Nath v. Prokash Chandra,* 1932 Cal 189 (192): 35 Cal W N 1066: 59 Cal 205: 137 Ind Cas 98.

(25) *Udoy v. Hari Ram,* (1901) 28 Cal 483 (485) [Rents and profits of Ghatwali land]; *Tikait Damodar Narain Singh v. Ganga Ram Marwari,* 1924 Pat 269 (270): 1923 Pat H C C 372: 5 Pat L Tim 34: 76 Ind Cas 8: 3 Pat 339 [Rents and profits of Ghatwali lands]; *Lahanubai v. Harak Chand,* (1915) 31 Ind Cas 285 (286): 11 Nag L R 113; *Kesobati v. Mohan Chand,* (1912) 14 Ind Cas 227 (229): 39 Cal 1010: 16 Cal W N 802.

(26) *Hanumayya v. Venkatasubbayya,* (1895) 18 Mad 23 (24).

(27) *Satis Chandra Giri v. Binoy Krishna Mukhopadhya,* 1926 Cal 1092 (1092): 96 Ind Cas 30.

(28) *Zahros Syed Ali v. Ahmed Syed,* 1933 Nag 21 (21, 22): 68 Ind Cas 502.

O. 40, R. 1, Note 14.

been interpreted to mean "just *and* convenient" even in England.[1] S. 503 of the old Code restricted the power of the Court in making the appointment of a receiver, to certain specific purposes[2] but the present rule has brought it into a line with the powers exercised by the English Courts under the English Law.[3] Courts in India have therefore the fullest jurisdiction to appoint or remove a receiver in the exercise of their judicial discretion.[4] The principles by which the Court of Chancery in England was guided in appointing a receiver before the judicature Acts (and which were, only given effect to by the judicature Acts) are thus stated by Lord Cranworth, L.C., as follows:—

"The receiver, if appointed in this case, must be appointed on the principle on which the Court of Chancery acts, of preserving property pending litigation which is to decide the right of the litigant parties. In such cases the Court must, of necessity, exercise a discretion as to whether it will or will not take possession of the property by its officer . . . . where, indeed, the property is, as it were, *in medio,* in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble . . . . But when the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court, by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the Court may, by its interim interference, have caused mischief to the defendant, for which the subsequent restoration of the property may afford no adequate compensation."[5]

The principles followed by the English Courts of equity should be adopted as safe guides by the Courts in India in these matters.[6] The discretion conferred by this rule should therefore not be exercised in an arbitrary or unregulated manner but cautiously, judicially and according to legal principles[7] after a consideration of the whole of the circumstances of the

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Note 14.

(1) *Dharendra Krishna* v. *Surendra Krishna,* 1930 Cal 610 (611): 34 Cal W N 440: 129 Ind Cas 609.

(2) *Raja Muneshar Bakhsh* v. *Babu Jagan Nath Prasad,* (1907) 10 Oudh Cas 265 (272).

(3) *Ramji Ram* v. *Salig Ram,* (1910) 5 Ind Cas 96 (97): 11 Cal W N 248: 14 Cal L Jour 215

(4) *Srimathi Mathuria Debya* v. *Shibdyal Singh Hajari,* (1909) 5 Ind Cas 27 (27): 14 Cal W N 252; *Vythilinga* v. *Board of Control,* 1932 Mad 193 (195): 61 Mad L Jour 904: 35 Mad L W 22.

(5) *Owen* v. *Homan,* (1853) 4 H L Cas 997 (1032): 17 Jur 861. See also *Leny* v. *Callingham,* (1908) 1 K B 79 (84): 77 L J K B 64: 97 L T 697: 24 T L R 55. See also the following cases:—*Bhupendra* v. *Manohar,* 1924 Cal 456 (459): 28 Cal W N 86: 77 Ind Cas 783 [Property *in medio*—Court should appoint Receiver to prevent scramble]; *Mt Ishri* v. *Shib Ram,* 1923 Lah 239 (241): 71 Ind Cas 743, (Do); *Nilambar Das* v. *Mabal Behari Das,* 1927 Pat 220 (221): 101 Ind Cas 640: 8 Pat L Tim 455, (Do.); *Alkama Bibi* v. *Syed Istak,* 1925 Cal 970 (972): 29 Cal W N 836: 89 Ind Cas 183, (Do.); *Jibannissa Khatan* v. *Majidunnissa Khatun,* (1913) 18 Ind Cas 398 (399, 400): 17 Cal W N 581, (Do.); *Manohar Das* v. *Kalyan Das,* 1924 Lah 421 (422): 69 Ind Cas 861, (Do.); *Audh Behari Pande* v. *Jadubans Misir,* (1915) 29 Ind Cas 485 (489): 29 Mad L Jour 209: 8 Mad L Tim 155, (Do.).

(6) *Nasrrwanji Merwanji Panday* v. *Gordon,* (1882) 6 Bom 266; *Jaikissandas* v. *Zanabai,* (1890) 14 Bom 431 (434); *Sideshwari Debi* v. *Abhoyeswari Debi,* (1888) 15 Cal 818 (822): 18 Ind Jur 258; *Chandidat Jha* v. *Padmanand Singh,* (1885) 22 Cal 459 (464, 465); *Mikan Bai* v. *Dassimal Gangaram,* (1918) 45 Ind Cas 224 (226): 11 Sind L R 115; *Pana Scenee* v. *Ana Mahalingam,* (1910) 8 Ind Cas 1191 (1194): 8 Bur L Tim 95.

(7) *Mt Ishri* v. *Shib Ram,* 1923 Lah 239 (241): 71 Ind Cas 743; *Satis Chandra* v. *Benoy Krishna,* 1926 Cal 1092 (1092, 1093, 1096): 96 Ind Cas 30; *Habibulla* v. *Abtiakallah,* (1916) 34 Ind Cas 693 (694): 23 Cal L Jour 567; *Benoy Krishna Mukerjee* v. *Satish Chundra Giri,* 1928 P C 49

O. 40, R. 1, Notes 14—15.

case.[8] A receiver cannot be appointed merely because it is expedient or convenient to the mortgagee to do so,[9] or because it will do no harm to do so.[10] The *bona fide* possessor of the property in dispute should not be disturbed by the appointment of a receiver unless there is some substantial ground for such interference,[11] such as a well founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the Court gives its protection.[12] As has been said already in Note 13, *ante* the Court will refuse to interfere unless the applicant establishes some special equity in his favour.[13]

15. **Partition suits**.—O. 40, R. 1. sub-R. (2) applies only to the dispossession of *third* parties (*See* Note 49, *infra.*) Hence, it is no bar to the appointment of a receiver in a suit for partition.[1] But a receiver will not be appointed in such a suit in the absence of special circumstances necessitat-

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(50): 27 Mad L W 333: 5 Oudh W N 272: 53 Ind App 131: 54 Mad L Jour 423: 26 All L J 481: 47 Cal L Jour 424: 108 Ind Cas 348: 30 Bom L R 815: 32 Cal W N 681: 55 Cal 720 P C; *Harbuns Sahai* v. *Bhairo Prasad Singh*, (1879) 5 Cal 259 (265): 4 Cal L Rep 23: 5 Ind Jur 78; *Tirath Singh* v. *Shromani Gurdwara Prabandhak Committee*, 1931 Lah 688 (688): 32 Pun L R 665: 134 Ind Cas 799.

[8] *Gurdwara Parbandhak Committee, Amritsar* v. *Mahant Dharam Das*, 1925 Lah 349 (351, 352): 6 Lah 74: 88 Ind Cas 562: 26 Pun L R 228; *Haji Kadir Bakhsh* v. *Ghulam Mohammad*, (1920) 55 Ind Cas 50 (52): 30 Pun W R 1920 2 U P L R (Lah) 56; *Sant Ram* v. *Ramchand*, (1910) 6 Ind Cas 659 (660): 1910 Pun Re No 36: 1910 Pun W R 53: 1910 Pun L R 72; *Ramji Ram* v. *Salig Ram*, (1910) 5 Ind Cas 96 (97): 14 Cal W N 248: 14 Cal L Jour 215; *The Eastern Mortgage and Agency Company, Limited* v. *Rakea Khautan*, (1912) 17 Ind Cas 202 (203, 204): 16 Cal W N. 997; *Kali Kumari* v. *Bochhan Singh*, (1913) 19 Ind Cas 873 (874): 17 Cal W N 974; *Sivagnanathammal* v. *Arunachalam Pillai*, (1911) 11 Ind Cas 870 (871): 21 Mad L Jour 821: 10 Mad L Tim 490: (1911) 2 Mad W N 75; *Weatherall* v. *Eastern Mortgage and Agency Co. Ltd*, (1911) 9 Ind Cas 985 (987): 13 Cal L Jour 495; *Bhupendra* v. *Manohar*, 1924 Cal 456 (459): 28 Cal W N 86: 77 Ind Cas 783; *Jethalal Mohanji* v. *Dayabhai Ramji*, 1926 Sind 83 (84): 89 Ind Cas 413; *Prosonomoyi Devi* v. *Beni Madhab Rai*, (1883) 5 All 556 (561): 1883 All W N 136: *Mun Mohinee Dassee* v. *Ichamoyee Dasseo*, (1870) 13 Suth W R 60 (60); *Chandidat Jha* v. *Padmanand Singh Bahadur*, (1895) 22 Cal 459 (464, 465); *Sidheswari Dabi* v. *Abhoyeswari Dabi*, (1888) 15 Cal 818 (822): 13 Ind Jur 258; *Budh Parkash* v. *Sant Reim*, 1885 Pun Re No 102; *In re Rani Mathusri Jijai Amma*, (1890) 13 Mad 390 (394): 5 Sar 584; *Jiwani* v. *Labhu Ram*, (1909) 4 Ind Cas 694 (695): 107 Pun Re 1908: 12 Pun L R 1909; *Jaswant Singh* v. *Punjab National Bank*, 1932 Lah 82 (83): 133 Ind Cas 433.

[9] *Habibulla* v. *Abitakallah*, (1916) 34 Ind Cas 693 (694): 25 Cal L Jour 567; *Bhupendra* v. *Monohar*, 1924 Cal 456 (459): 28 Cal W N 86: 77 Ind Cas 783; *Gurdwara Parbandhak Committee* v. *Dharam Das*, 1925 Lah 349 (351): 6 Lah 74; 88 Ind Cas 562: 26 Pun L R 228; *Dharendra Krishna* v. *Surendra Krishna*, 1930 Cal 610 (611): 34 Cal W N 440: 129 Ind Cas 609; *Bhai Bhagat Singh* v. *Harnam Singh*, 1890 Pun Re No 136; *Mirza Muhammad* v. *Amar Chand*, (1913) 21 Ind Cas 283 (285): 16 Oudh Cas 238.

[10] *Prosonomoyi Debi* v. *Beni Madhab Rai*, (1883) 5 All 556 (561): 1883 All W N 136: *Habibullah* v. *Abatikallah*, (1916) 34 Ind Cas 693 (694): 25 Cal L Jour 567; *Kunhun Menon* v. *Kannan Menon*, 1924 Mad 482 (483): 46 Mad L Jour 133: 1924 Mad W N 202: 79 Ind Cas 561.

[11] *Mai Bu* v. *Mai Oh*, 1927 Rang 179 (179): 5 Rang 70: 101 Ind Cas 717; *Bhupendra Nath* v. *Monohar*, 1924 Cal 456 (459): 28 Cal W N 86: 77 Ind Cas 783; *Prosonomoyi* v. *Madho*, (1883) 5 All 556 (561): 1883 All W N 136; *Sidheswari Dabi* v. *Abhoyeswari Dabi*, (1888) 15 Cal 818 (822): 13 Ind Jur 258; *Sivagnanathammal* v. *Arunachalam Pillai*, (1911) 11 Ind Cas 870 (871): (1911) 2 Mad W N 75: 21 Mad L Jour 821: 10 Mad L Tim 490; *Bakhat Behari* v. *Isa Shah*, (1911) 11 Ind Cas 403 (404): 62 Pun W R 1911: *Shivaji Raja Saheb* v. *Aiswariyanandaji Sahib*, (1915) 29 Ind Cas 485 (488, 489): 29 Mad L Jour 209: 18 Mad L Tim 155; *Meyappa Chetty* v. *Narayan Chetty*, (1918) 43 Ind Cas 550 (550) Rang; *Mikan Bai* v. *Dassimal Gangram*, (1918) 45 Ind Cas 224 (226, 227): 11 Sind L R 115; *Satis Chandra* v. *Benoy Krishna*, 1926 Cal 1092 (1093): 96 Ind Cas 30; *Mele Vittal Kunhan Menon* v. *Kannan Menon*, 1924 Mad 482 (483): 1924 Mad W N 202: 79 Ind Cas 561: 46 Mad L Jour 133; *Pana Seenee* v. *Ana Mahalingam*, (1910) 8 Ind Cas 1191 (1194): 3 Bur L Tim 95; *Mathuria Debya* v. *Shibdoyal Singh Hazari*, (1910) 5 Ind Cas 27 (28): 14 Cal W N 252; *Mussammat Budhwanti* v. *Musst Bishen Kaur*, 1902 Pun Re No 73: 59 Pun L R 1902: *Bhai Bhagat Singh* v. *Haram Singh*, 1890 Pun Re No 136.

[12] *Benoy Krishna* v. *Satish Chandra*, 1928 P C 49 (50): 27 Mad L W 333: 5 Oudh W N 272: 53 Ind App 131: 54 Mad L Jour 423: 26 All L J 481: 47 Cal L Jour 424: 108 Ind Cas 348: 30 Bom L R 815: 32 Cal W N 681: 55 Cal 720 P C.

[13] *Prithi Chand Lal Chaudhuri* v. *Kalikanand Singh*, 1922 Pat 318 (319, 320): 2 Pat L Tim 24: 6 Pat L Jour 366: 61 Ind Cas 849.

Note 15.

[1] *Babbarao* v. *Narayana Rao*, 1929 Nag 283 (284): 119 Ind Cas 687: *Jan Mohammad* v. *Gulam Rasul Khan*, 1926 Sind 37 (38): 89 Ind Cas 104· *Poreshnath* v. *Omerto Nauth*, (1890) 17 Cal 614 (618, 619); *Kumaraswami Pillai* v. *Sri Sundareswaraswami Temple, Muthupet*, 1932 Mad 542 (544): 139 Ind Cas 670.

O. 40, R. 1, Notes 15—16.

ing interference by the Court.[2] The mere fact that there is a dispute as to the share to which the plaintiff is entitled[3] or that the relations between the parties are strained[4] is no ground for appointing a receiver. Nor is a mere apprehension of future waste sufficient for that purpose.[4-a] There should be some specific act of misappropriation, malversation, or mismanagement shown; and this principle is practically to be applied in the case of partition of Hindu Joint family property in the hands of the eldest brother who is the manager of the property.[5] But this rule does not apply when one co-owner occupies the whole property and *excludes* the other co-owners from their shares of the rents and profits of the property. In such a case, a receiver may be appointed although no waste or malversation by the co-owner in possession is proved.[6] The Court may also allow the party in sole occupation to elect to pay to the other co-owners an occupation rent or may require him to furnish security for the shares of the rents and profits of the other parties.[7]

A receiver may be appointed in a partition suit at the instance of the creditors of the co-parceners.[8] A receiver in a partition suit is entitled to require payment of rent from the party who is in possession of an important item of the family property in suit.[9]

16. **Executor in possession.**—In England the rule is that the Court will not interfere with the possession of an executor of a will by appointing a receiver except where a case of gross misconduct is established against the executor.[1] In India also, very strong reasons are necessary to appoint a receiver in such a case.[2] (*See* the undermentioned cases[3] for instances in which a receiver was appointed.) But in the case of a Muhammadan will the executor is not entitled to the same degree of protection from interference as is given by the English Law, and a receiver can more readily be appointed in displacement of such an executor than in the case of the executor of a will made by other persons.[4] This is because a Muhammaden can dispose of by his will only a *third* of his property and the reason for the

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(2) *Govind Narayan Rao Desai* v. *Vallabhrao Narayan Rao Desai*, (1920) 55 Ind Cas 827 (827, 828): 22 Bom L R 217.

(3) *Mai Bu* v. *Mai Oh Gyi*, 1927 Rang 179 (179): 5 Rung 70: 101 Ind Cas 717.

(4) *Raghubir Singh* v. *Narinjan Singh*, 1923 Lah 48 (51): 72 Ind Cas 569.

(4-a) *Sant Ram* v. *Ram Chand*, (1910) 6 Ind Cas 659 (660): 53 Pun W R 1910: 36 Pun Re 1910: 72 Pun L R 1910.

(5) *Sant Ram* v. *Ram Chand*, (1910) 6 Ind Cas 659 (660): 72 Pun L R 1910: 36 Pun Re 1910: 53 Pun W R 1910; *Hanumayya* v. *Venkatasubbayya*, (1913) 18 Mad 23 (24).

(6) *Ramji Ram* v. *Saliq Ram*, (1910) 5 Ind Cas 96 (96, 97): 14 Cal W N 248: 14 Cal L Jour 215; *Basant Ram* v. *Dasondhi Mal*, 1929 Lah 497 (497): 117 Ind Cas 375; *Suprasanna* v. *Upendra Narain*, (1914) 22 Ind Cas 601 (603): 18 Cal L Jour 688: 18 Cal W N 533.

(7) *Superseenna Roy* v. *Upendra Narain Roy*, (1914) 22 Ind Cas 601 (603): 18 Cal L Jour 638: 18 Cal W N 533.

(8) *Babarao* v. *Narayan Rao*, 1929 Nag 283 (284): 119 Ind Cas 687.

(9) *Pulin Behary De* v. *Satya Charan De*, (1920) 58 Ind Cas 301 (302) Cal.

Note 16.

(1) *Hafizabai* v. *Kazi Abdul Karim*, (1895) 19 Bom 83 (85); *Surendra Kumar* v. *Sushil Kumar*, 1928 Cal 256 (259): 55 Cal 249: 109 Ind Cas 759.

(2) *Surendra Kumar* v. *Sushil Kumar*, 1928 Cal 256 (259): 55 Cal 249: 109 Ind Cas 759.

(3) *Surendra Kumar* v. *Sushil Kumar*, 1928 Cal 256 (259): 55 Cal 249: 109 Ind Cas 759 [Executor directed to act in consultation with other heirs—This condition becoming impossible is a circumstance sufficient to justify appointment of Receiver]: *S A K Emanjan* v. *M A Emanjan*, 1927 Rang 135 (135): 6 Bur L Jour 13: 100 Ind Cas 1020 [Executor failing to file inventory required by law—Four years' income not accounted for—Receiver should be appointed].

(4) *S A K Emanjan* v. *M A Emanjan*, 1927 Rang 135 (135): 6 Bur L Jour 13: 100 Ind Cas 1020; *Hafizabai* v. *Abdul Karim*, (1895) 19 Bom 83 (85).

English rule, *viz.*, that the executor is a person enjoying in a marked degree the testator's confidence and as such should not be lightly interfered with, does not apply with the same force to the executor of a Muhammadan will.

17. **Receiver, if can be appointed for a company.**—A Court cannot appoint a receiver of a company except in a debenture holder's action when the business and assets of the company are charged with payment of the claims of the debenture-holders. If it is necessary to protect the assets of a company, the appropriate action must be taken under the provisions of the Companies Act.[1]

18. **Appointment if can be made after reference to arbitration.**—A receiver can be appointed after a suit has been referred to arbitration unless the Court finds that the reference included also the question of interim management.[1] He can be appointed even in the interval between the submission of an award and the final acceptance or rejection of it.[2]

19. **Receiver in Execution proceedings.**—The appointment of a receiver is prescribed by S. 51 of the Code as one of the modes of executing a decree. This rule prescribes the *conditions and limitations* under which such appointment is to be made. Reading S. 51 with this rule, as it ought to be, it is clear that the Court can appoint a receiver in execution proceedings only when it considers *just and convenient* to do so.[1] The decree-holder's consent is, however not necessary for such appointment.[2] Nor can he, *as of right* and as a *matter of course* apply for execution by the appointment of a receiver.[2-a]

Although in India where there is no distinction between law and equity it is not always necessary that legal execution should be exhausted before equitable execution by the appointment of a receiver is made, such appointment is not to be resorted to when there is no impediment to execution being levied in the ordinary way as provided by the Code; the person seeking equitable execution must show that he was met by difficulties arising from the nature of the property which prevented his obtaining relief by the usual modes of execution and that it is necessary and advantageous to appoint a receiver.[3] The mere fact that the defendants belong to an old family and that, unless the Court steps in and saves them from the consequences of their debts they may be ruined, is not, in itself, a sufficient ground for such appointment.[4]

Note 17.

[1] *Kailash Chandra* v. *Sadar Munsif*, 1925 Cal 817 (819): 52 Cal 513: 88 Ind Cas 826.

Note 18.

[1] *Surendra Kumar* v. *Sushil Kumar*, 1928 Cal 256 (258, 259): 86 Ind Cas 753: *Chetan Singh* v. *Gulibai*, 1925 Sind 102 (102): 78 Ind Cas 84: 18 Sind L R 303.

[2] *Chetan Singh* v. *Gulibai*, 1925 Sind 102 (103): 78 Ind Cas 84: 18 Sind L R 303.

Note 19.

[1] *Sambhu Nath* v. *Balmukand*, 1931 Oudh 307 (308): 8 Oudh W N 677: 132 Ind Cas 349; *Munshi Lal* v. *Mahomad Amir Mirza Beg*, (1919) 52 Ind Cas 305 (308): 22 Oudh Cas 194; *Kshitish Chandra* v. *Raja Janakinath*, 1932 Cal 194 (195): 35 Cal W N 1141: 137 Ind Cas 127. See also *Sri Pratab Chandra Deo Dhabal Deb* v. *Sri Raja Jagadish Chandra Deo*, (1923) 75 Ind Cas 417 (419): 37 Cal L Jour 417 [Impartible Zemindar with valuable forests and mines —Receiver should be appointed].

[2] *Thakoor Chunder* v. *Choudhury Chotee Singh*, 1863 Marsh 261: 2 Hay 112.

[2-a] *Hemandra Nath* v. *Prakash Chandra*, 1932 Cal 189 (192): 35 Cal W N 1066: 59 Cal 205: *Chetra Kunhi Shridevi Amma* v. *Valia Narayan*, 1929 Mad 20 (21): 114 Ind Cas 839.

[3] *Promotha Nath* v. *H V Low & Co*, 1930 Cal 502 (504, 506): 34 Cal W N 238: 51 Cal L Jour 209: 57 Cal 964: 128 Ind Cas 97.

[4] *Latafat Hossein* v. *Anunt Chowdhury*, (1895) 23 Cal 517 (520): *Rameshwar* v. *Bheekdhari*, (1915) 28 Ind Cas 505 (506) Cal [Fact that judgment-debtor will be reduced to poverty if his properties were allowed to be sold is not

O. 40, R. 1, Note 19.

A receiver should not be appointed where it would unduly delay the realisation of the decree debt.[5] In execution of a decree against a legal representative of a judgment-debtor a receiver cannot be appointed of properties which do not form part of the assets of the deceased;[6] nor can he be appointed where such appointment has the effect of depriving one of the legal representatives of the *entire* profits from the portion of the estate in his hands without anything being left even for the maintenance of himself and his family while the other legal representatives who are in enjoyment of substantial portion of the deceased's estate were left scot-free.[7]

Where the decretal debt will be equally and as surely satisfied by the appointment of a receiver as in any other way and at the same time the judgment-debtor will be saved from great prospective loss, the Court can appoint a receiver.[8] Such an appointment can also be made where the interests of both the decree-holder and the judgment-debtor can be safeguarded and where such appointment appears to be the only way in which the decree-holder can hope to realise any appreciable part of his dues.[9] Thus where a decree has been obtained against trust property and such property cannot be sold in execution of the decree,[10] or where the debts and rents due to the judgment-debtor are sought to be attached in execution of the decree and the person owing the same denies his liability to the judgment-debtor[11] or where a decree in favour of the judgment-debtor is attached in execution of the decree in favour of his decree-holder[12] a receiver can properly be appointed. *See also* the undermentioned case,[13] where a receiver was appointed to sell a colliery directed to be sold by the decree so as to safeguard the interests of all parties.

A receiver can be appointed for the preservation of a property after its sale in execution and before its confirmation.[14]

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sufficient]: *Shambhu Nath Baksh Singh* v. *Balmukand Dakshit*, 1931 Oudh 307 (308): 8 Oudh W N 677: 132 Ind Cas 349 [The fact that the appointment of a receiver is the only way of saving the judgment-debtor's ownership of the hypothecated villages is not sufficient]. See also *Moran* v. *Mittu Bibee*, (1878) 2 Cal 58 (73): 1 Ind Jur 337 [Simply to carry on judgment-debtor's business pending execution proceedings receiver cannot be appointed]. But see *Deb Kumari* v. *Ram Lall*, (1869) 3 Beng L R App 107: 12 Suth W R 66 (67) [Receiver should be appointed when judgment-debtor offers to place all his properties under Court's management].

(5) *Reduum* v. *Mahomed*, (1869-70) 5 Mad H C R 272 (273); *Mohinee Mohun* v. *Ram Kant*, (1871) 15 Suth W R 322 (323); *Doorga Dutt* v. *Bunwaree Lall*, (1876) 25 Suth W R 33 (34); *Huree Sunkur* v. *Jogendra Coomar*, (1874) 22 Suth W R 220 (220). See also *Dinobundhoo* v. *Macnaghten*, (1878) 2 Cal L Rep 185 (186); *Ootum Singh* v. *Ram Surun*, (1875) 23 Suth W R 287 (288) [Application for appointment of receiver—Simply to put off payment—Application should be refused].

(6) *Rani Kanno Dai* v. *B J Lacy*, (1897) 19 All 235 (237): 1897 All W N 38.

(7) *Sharaf Jahan Begum* v. *Mahomed Sadiq Ali Khan*, 1928 Oudh 40 (41): 2 Luck 408: 4 Oudh W N 98: 99 Ind Cas 897.

(8) *Zohooran* v. *Najeeboodeen*, (1869) 11 Suth W R 505 (506).

(9) *Lakunu Bai* v. *Harak Chand*, (1915) 31 Ind Cas 285 (287): 11 Nag L R 113; *Din Dyal Lall* v. *Ram Ruttan Neogee*, (1871) 16 Suth W R 46 (47); *Umbica Churn* v. *Meik*, (1900-01) 5 Cal W N xxii (xxii); *Hemandra Nath* v. *Prakash Chandra*, 1932 Cal 189 (193): 35 Cal W N 1066: 59 Cal 205 [Principle is whether in view of the assets the decree amount is likely to be realised within a reasonable time from the profits of attached property].

(10) *Vibhudapria* v. *Lakshmindra*, 1927 P C 131 (135): 101 Ind Cas 545: 29 Bom L R 955: 50 Mad 497: 54 Ind App 228: 45 Cal L Jour 613: 1927 Mad W N 507: 25 All L J 697: 31 Cal W N 1021: 53 Mad L Jour 156: 39 Mad L Tim 45; *Syed Asad Raza* v. *Wahidunnessa Begam*, (1920) 57 Ind Cas 70 (71): 30 Cal L Jour 231. See also *Damodar* v. *Panalal*, (1907) 9 Bom L R 540 (541) [Judgment-debtor, a partner in a firm—Partnership property not attachable—Appointment of receiver is proper remedy].

(11) *Toolsa Goolal* v. *John Antone*, (1887) 11 Bom 448 (455): Chittys S C C R 147; *Mg Thein Zan* v. *S A S Firm*, 1925 Rang 318 (319): 3 Rang 235: 89 Ind Cas 794.

(12) *Pratap Singh* v. *The Delhi and London Bank, Ltd*, (1908) 30 All 393 (394): 1908 All W N 164: 5 All L J 583.

(13) *Pramathanath Malia* v. *H V Low & Co*, 1930 Cal 502 (504, 505, 506, 507): 34 Cal W N 238: 51 Cal L Jour 209: 57 Cal 964: 128 Ind Cas 97.

(14) *Sambasiva Mudali* v. *Krishnan*, (1910) 5 Ind Cas 758: 7 Mad L Tim 86.

The appointment of a receiver in execution does not operate as a stay of execution so as to disentitle the decree-holder from executing his decree in respect of the same debt in any manner provided by the Code. The mere fact that the decree-holder consented to the appointment does not estop him from subsequently seeking to enforce his decree by execution.[15]

20. **Receiver after decree.**—The words "whether before or after decree" are new and make it clear that a receiver can be appointed even after a decree has been passed in the suit.[1] These words have given effect to the undermentioned case[2] under the former Code. A receiver can be appointed even after execution sale and before its confirmation[3] or after the grant of leave to appeal to the Privy Council.[4] But the Court has no jurisdiction to appoint a receiver when there is no litigation pending before it, in which such appointment can be made. Thus no receiver can be appointed after a suit has been dismissed[5] or compromised[6] or after the decree has been satisfied.[7]

21. **Receiver of property in the hands of a common manager.**—Under this rule a receiver, can be appointed for property in the hands of a common manager under S. 95 of The Bengal Tenancy Act.[1] A receiver can also be appointed pending proceedings for the appointment of a common manager.[2] A Civil Court can appoint a receiver of property in respect of which proceedings for the appointment of a common manager are pending before the District Judge.[3]

22. **Powers of a receiver.**—A receiver has no powers except what have been conferred on him expressly or impliedly, by the Court.[1] His powers are therefore conditioned by the terms of his appointment subject to any subsequent modification by the Court.[2] In the absence, therefore, of any provision, express or implied, as to the powers conferred on him there is no presumption that all the powers mentioned in Cl. (*d*) of the rule are conferred on him[3] and he cannot deal with the property of which he is the receiver, in

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[15] ***Rameswar Singh* v. *Hitendra Singh*,** 1921 Pat 131 (132): 6 Pat L Jour 208: 2 Pat L Tim 628: 62 Ind Cas 469.

Note 20.

[1] ***Manindra Chandra Roy Chaudhury* v. *Suniti Bala Debi*,** 1926 Cal 1006 (1008): 95 Ind Cas 632: ***Abdul Khairat* v. *Hirishikesh*,** 1926 Cal 978 (979): 95 Ind Cas 6

[2] ***Shunmugam* v. *Moidin*,** (1885) 8 Mad 229 (233).

[3] ***Sambasiva Mudali* v. *Krishnan*,** (1910) 5 Ind Cas 758: 7 Mad L Tim 86.

[4] ***Mi Shwe Ma* v. *Mi Mi*,** (1911) 12 Ind Cas 198 (198, 199): 4 Bur L Tim 241.

[5] ***Shaik Moheeooddeen* v. *Shaik Ahmed Hossein*,** (1870) 14 Suth W R 384 (384).

[6] ***Chandreshwar Prasad* v. *Bisheshwar*,** (1920) 58 Ind Cas 405 (406): 1920 Pat H C C 231: 5 Pat L Jour 513: 1 Pat L Tim 643.

[7] ***Abdul Khairat* v. *Hrishikesh*,** 1926 Cal 978 (979): 95 Ind Cas 6.

Note 21.

[1] ***Madheshwar Singh* v. *Mohamaya Prasad Singh*,** (1911) 9 Ind Cas 1027 (1029, 1030): 13 Cal L Jour 487: 15 Cal W N 672.

[2] ***Asadali Choudhury* v. *Syed Mahommad Hossain Chowdhury*,** (1916) 36 Ind Cas 177 (177): 20 Cal W N 1009: 43 Cal 986; ***Asad Ali* v. *Mohammed Husain*,** (1916) 34 Ind Cas 83 (83) Cal [Evidence of necessity for such appointment should be produced].

[3] ***Jibunnessa Khatun* v. *Majidunnessa Khatun*,** (1913) 18 Ind Cas 398 (399): 17 Cal W N 581.

Note 22.

[1] ***Ratnaswami Pillai* v. *Sabapathy Pillai*,** 1925 Mad 318 (319): 82 Ind Cas 793.

[2] ***The Secretary of State* v. *Komaragiri Janardhana Rao*,** (1916) 32 Ind Cas 207 (208): 30 Mad L Jour 436.

[3] ***Hoe Hin* v. *Bathazar*,** (1915) 30 Ind Cas 678 (678): 8 Bur L Tim 164; ***Ramachandra Ayyar* v. *Sankara Ayyar*,** 1926 Mad 357 (358): 50 Mad L Jour 239: 23 Mad L W 145: 1926 Mad W N 159: 93 Ind Cas 271. See also S 20 of the Provincial Insolvency Act, V of 1920, for the powers of an interim receiver and S 16 of the Punjab Sikh Gurdwaras and Shrines Act, VI of 1922, for the powers of the Board of manage-

O. 40, R. 1, Note 22.

any way without the consent of the Court.[4] Thus he has no power to lease out *debutter* property without the sanction of the Court.[5] Even if full powers are conferred on the receiver, he should take the directions of the Court in all important matters if he wishes to have complete protection for himself.[6]

A receiver who has been given *all the powers mentioned in Cl. (d)* will have impliedly a discretionary power of sale.[7] The authority will also include a power to give notice to quit or to sue for compensation for use and occupation without the special leave of the Court.[8] A general power of management will include a power to exercise the powers of a proprietor under Madras Act, II of 1894.[9] A *bona fide* acknowledgment of a debt by the receiver is an acknowledgment by an authorised person which will extend the period of limitation under S. 19 of the Limitation Act.[10] But a receiver, can have, at the most, only such powers and rights over the property *as the parties to the suit are found to possess* when their rights are finally determined.[11] Any misrepresentation or concealment of material facts from the Court in connection with a proposed transaction by the receiver would vitiate the authority conferred on the receiver.[12] Nor can a clause be added to a lease granted by the receiver subsequent to the grant of the sanction, if it was not mentioned in the terms proposed in the application for sanction.[13] When property is sold by a receiver in auction under the directions of the Court, the sale is as much a Court sale as an execution in the usual course, and is therefore not complete till it is confirmed by the Court.[14] Nor can it be attacked by the parties *collaterally*.[15] In the case of a *private* sale by the receiver, a right of pre-emption can be exercised to the same extent as if the sale was by the owner himself.[16]

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ment under the said Act. But see *Deo Baksh v. Kaluram*, 1924 Nag 186 (137): 7 Nag L Jour 16: 78 Ind Cas 811 [Unless expressly reserved, every receiver has all the powers mentioned in rule 1].

(4) *K C Baunerjee, Official Receiver*, in re, 1928 Cal 402 (405): 107 Ind Cas 738.

(5) *Srish Chandra Banerjee v. Debendra Nath Banerjee*, 1929 Cal 828 (828, 829): 50 Cal L Jour 333.

(6) *Mohini Mohan Patra v. Baroda Kanta Sarkar*, (1911) 12 Ind Cas 780 (786): 14 Cal L Jour 445; *Balaji Narayan v. Ramachandra Govind*, (1894) 19 Bom 660 (662).

(7) *Sir Rameshwar v. Hitendra*, 1924 P C 202 (204): 47 Mad L Jour 286: 5 Pat L Tim 491: 20 Mad L W 456: 81 Ind Cas 576: 35 Mad L Tim 182: 22 All L J 968: 5 L R P C 175: 26 Bom L R 1153: 40 Cal L Jour 431: 29 Cal W N 413: 3 Pat L R 180 (Civ) P C.

(8) *Meer Mahomed v. J Homasji*, (1917) 38 Ind Cas 92 (92): 10 Bur L Tim 244. See also *Hari Das Kandu v. J C MacGregor, Receiver, High Court and Receiver to the estate of Raj Chunder Das*, (1891) 18 Cal 477 (480) [Where the receiver was held entitled to sue for the ejectment of the tenant]. But see *Drobomoyi Gupta v. C T Davis*, (1887) 14 Cal 323 (340, 341) [*Held*, on construction of the *order* of appointment that receiver could not give notice to quit].

(9) *Secretary of State v. Komaragiri Janardhana Rao*, (1916) 32 Ind Cas 207 (208): 30 Mad L Jour 456.

(10) *Lakshumanan Chetty v. Sadayappa*, (1918) 48 Ind Cas 179 (181): 8 Mad L W 594: 35 Mad L Jour 571: 1918 Mad W N 877: 25 Mad L Tim 371. See also *Periasami v. Seetharama*, (1904) 27 Mad 243 (255): 14 Mad L Jour 84. But see *Baij Nath v. Hem Chunder Bhose*, (1906) 10 Cal W N 959 (961) [Receiver is not agent of party so as to bind him by an acknowledgment].

(11) *Messrs Jhon Tiel & Co v. Abdool Hye*, (1873) 19 Suth W R 87 (89).

(12) *Srish Chandra Banerjee v. Debendra Nath Banerjee*, 1929 Cal 828 (828, 829): 50 Cal L Jour 333.

(13) *Srish Chandra Banerjee v. Debendra Nath Banerjee*, 1929 Cal 828 (828, 829): 50 Cal L Jour 333.

(14) *Ratnaswami v. Sabapathy*, 1925 Mad 318 (319): 82 Ind Cas 798. See however *Golam Hossain v. Fatima Begum*, (1910) 6 Ind Cas 300 (301): 16 Cal W N 394 [Where a distinction was drawn between sale *by* the Court and a sale *under the orders* of a Court].

(15) *Gora Chand Lurki v. Makhan Lal Chakravarti*, (1907) 6 Cal L Jour 404 (408): 11 Cal W N 489.

(16) *Kanhai Lal v. Kalka Prasad*, (1905) 27 All 670 (677): 1905 All W N 149: 2 All L J 390.

O. 40, R. 1, Notes 22—23.

A Court has no power to confer on the receiver any fresh power such as a liberty to sell *after the suit has been dismissed.*[17] It is also irregular for the Court to order payment of the debts of any party from the estate before the ascertainment of the estate. In exceptional cases, as where a plaintiff applies for payment to the creditors from out of the estate in the hands of the receiver, payments might be ordered out of the share of the plaintiff, where such share is admitted and it is more than enough to satisfy the debts of the creditors, subject to the plaintiff later on proving that there are liabilities of the estate and as such must come out of the whole estate.[18] No Court, other than that by which the receiver was appointed can make or give any directions to the receiver as supplementary to those given by the appointing Court.[19] A mortgage by the receiver under the Court's order, directing that it should be entitled to priority over the pre-existing charges, takes precedence over such mortgages as a salvage lien.[20] *See also* Note 42 below.

23. "**All such powers as to bringing or defending of suits as the owner himself has**".—A right to sue is not necessarily incidental to the general powers of a receiver[1] and does not exist unless it has been conferred on him expressly or by necessary implication.[2] It depends solely on the order of the Court and not on the wishes of the parties.[3] A Court can expressly authorise the receiver to sue in his own name.[4] But such an authority may also be given *impliedly*. Thus a receiver who is given the same powers of suing and defending suits as the owner himself has, is entitled to sue in his own name though not *expressly* authorised to do so.[5] Similarly, a receiver appointed to collect outstandings can sue in his name.[6] On the appointment of a receiver with the requisite powers he is the only person competent to bring suits and obtain decrees. Hence, after such a receiver has been appointed for an estate the landlord cannot sue for rent.[7]

Though ordinarily a suit for possession can only be instituted by a person having a *present title* to such possession, and though by his appointment no property *vests* in a receiver, he is entitled to sue for possession if he

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(17) *Rabeholme* v. *Smith*, (1907) 34 Cal 336 (339).

(18) *Motivahu* v. *Premvahu*, (1892) 16 Bom 511 (512, 518); *Thakoor Chunder* v. *Chowdhry Chotee Singh*, Marsh 261: 2 Hay 112 [Manager under S 243 of Code of 1839—Court has no power to order him to pay claims of persons other than decree-holders].

(19) *Janaki Ammal* v. *Narayanaswami Ayyar*, (1908) 4 Mad L Tim 268.

(20) *Giridhari Lal* v. *Dhirendra Kristo*, (1907) 34 Cal 427 (442): 11 Cal W N 1: 4 Cal L Jour 495.

Note 23.

(1) *Badri Pershad* v. *The Civil Nazir of Ambala*, (1912) 17 Ind Cas 751 (751): 56 Pun Re 1913: 247 Pun L R 1913.

(2) *Badri Pershad* v. *Civil Nazir Ambala*, (1912) 17 Ind Cas 751 (751): 56 Pun Re 1913: 247 Pun L R 1913.

(3) *Benode Behary Mookerjee* v. *Rajnarain Mitter*, (1903) 30 Cal 699 (705): 7 Cal W N 651.

(4) *W R Fink* v. *Maharaj Bahadur Singh*, (1898) 25 Cal 642 (646): 2 Cal W N 469. See also *Mcleod* v. *Kissen*, (1904) 6 Bom L R 995 (999): 30 Bom 250 [A decree in such suit will be for the benefit of the true owner].

(5) *The Oriental Bank Corporation* v. *Gobin Lal*, (1884) 10 Cal 713 (733); *Jabbar Ali Sardar* v. *Monmohan Pandey*, 1929 Cal 110 (111): 55 Cal 1216: 49 Cal L Jour 70: 114 Ind Cas 485; *Jagat Tarini Dasi* v. *Naba Gopal Chaki*, (1907) 34 Cal 305 (313): 5 Cal L Jour 270; *Fink* v. *Buldeo Das*, (1903) 26 Cal 715 (720): 3 Cal W N 524. But see *Juggannath Pershad Dutt* v. *Hogg*, (1869) 12 Suth W R 117 (118) [Receiver obtaining permission *to sue on behalf of* parties interested in estate but suing in his own name—Frame of suit erroneous]. See also *Wilkinson* v. *Gangadhar*, (1871) 6 Beng L R 486 (486).

(6) *S Manikkam Pillai* v. *Kuppa Goundan*, (1916) 33 Ind Cas 69 (70) Mad

(7) *Jatindra Nath* v. *Sarfaraz Meah*, (1910) 6 Ind Cas 214 (215): 14 Cal W N 653; *Bhubaneswari Koer* v. *Ajodhya Singh*, (1911) 11 Ind Cas 102 (103): 15 Cal L Jour 339.

O. 40, R. 1, Notes 23—24.

is given by the Court all the requisite powers.[8] In a suit brought by the receiver within his authority, the defendant cannot question the validity of his appointment as receiver.[9] Where, however, after the appointment of the receiver, the property is sold in Court auction to a third person, and a sale certificate issued to him, the authority to sue for possession of that property must be taken to be withdrawn from the receiver and he cannot therefore sue for possession of that property. The only person who could sue therefor is the auction-purchaser.[9-a] A receiver's discretion to spend money in litigation ought not to be interfered with by the appellate Court; the Court of first instance, will, if necessary take security from him for restitution of such expenses in certain events.[10]

It was held in the undermentioned case[11] a receiver of a Zamindari was entitled to sue for sums spent by the Zamindar at the defendant's request before the appointment of the receiver as it was found that the claim arising out of such expenditure was one annexed to the estate.

24. Realisation of property.—A receiver appointed to get in and realise the estate of a deceased person and to pay debts has a power of sale also.[1] Similarly, a receiver of mortgaged properties in respect of which mortgage decrees have been passed, who has been given powers of realisation, management, protection and preservation of the property has a discretionary power of sale.[2] But a receiver empowered to *collect outstandings* and do all things necessary for the realisation and preservation of the assets of a firm, has no power to mortgage the property of the firm.[3] A receiver of debts due to a judgment-debtor can take legal proceedings by way of suit or execution proceedings to collect the outstandings.[4] A receiver, however, cannot recover property sold away by the judgment-debtor, on the ground of the sale being voidable under S. 53 of the Transfer of Property Act.[5] Rent accrued due to the estate prior to the appointment of the receiver is not part of the estate in his hands, and therefore a payment to the proprietor on account of such liability is a sufficient discharge of the debt.[6] For further information, *see* Notes 22 and 23, *supra*.

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(8) *Kassim Mamooji v. Dutt*, (1915) 27 Ind Cas 459 (461, 462): 19 Cal W N 45.

(9) *Bhairab Chandra Dutta v. Benoy Chandra Dutta*, (1918) 43 Ind Cas 804 (806): 46 Cal 70: 22 Cal W N 520: 27 Cal L Jour 395.

(9-a) *Abdulla Abdul Gani v. B K Chatterjee*, 1932 Rang 11 (12): 9 Rang 565: 135 Ind Cas 863.

(10) *Jambagathammal v. Kanakathammal*, (1914) 25 Ind Cas 645 (646) Mad.

(11) *Sundaram v. Sankara*, (1886) 9 Mad 334 (337, 338, 340).

Note 24.

(1) *Fatmabai v. Abdul*, (1904) 6 Bom L R 1140 (1143).

(2) *Rameshwar Singh v. Hitendra Singh*, 1924 P C 202 (204, 206): 47 Mad L Jour 286: 5 Pat L Tim 491: 20 Mad L W 456: 81 Ind Cas 576: 35 Mad L Tim 182: 22 All L J 968: 5 L R P C 175: 26 Bom L R 1153: 40 Cal L Jour 431: 29 Cal W N 413: 8 Pat L R A (Civ) 180 P C.

(3) *Subramanian v. Lakshman*, 1923 P C 50 (52): 71 Ind Cas 650: 50 Ind App 77: 44 Mad L Jour 602: 32 Mad L Tim 184: 2 Bur L Jour 25: 25 Bom L R 582: 1 Rang 66: 50 Cal 338: 38 Cal L Jour 41: 18 Mad L W 446: 28 Cal W N 1: 1923 Mad W N 762 P C. See also *Tiel & Co v. Abdul Hye*, (1873) 19 Suth W R 37 (39) [Case under Code of 1859—Receiver's power confined to realisation of debts due to judgment-debtor].

(4) *Rambutty Koer v. Ramessur Pershad*, (1874) 22 Suth W R 96 (37); *Reazat Hossein v. Jugganath Singh*, (1874) 21 Suth W R 419 (419).

(5) *Mahomed Kasin Sahib v. Panchapakesa Chetty*, (1912) 17 Ind Cas 233 (234, 235): 35 Mad 578.

(6) *Ganpati Singh v. Sachi Ojhain*, (1917) 42 Ind Cas 785 (1): 1917 Pat H C C 311.

25. Collection of the rents and profits thereof.—A receiver appointed to *collect* the rents of land cannot *raise* the rent.[1] A receiver appointed in respect of property under attachment, has the powers of the owner as they existed *at the time the property was brought under the orders of the Court by attachment,* provided they have not ceased by operation of law. Hence, where, subsequent to the attachment but before the appointment of the receiver, the landlord had reduced the rate of rent payable by the tenant, the receiver was held entitled to recover rent at the original rate.[2]

26. Power as to the execution of documents as the owner himself has.—When a receiver sells a property under the orders of the Court, he should be a party to the deed of conveyance.[1] A receiver in an administration suit cannot sell in satisfaction of a mortgage executed by one of the claimants of the estate before the administration is complete.[2] A conveyance of the property by a receiver acting within his authority binds all the persons entitled to share in the estate including minors.[3]

27. Delegation of duty by receiver.—A receiver being an officer of the Court, is responsible to the Court for the due discharge of his duties. He is not entitled to delegate to another any of the duties entrusted to him by the Court,[1] or assign to another for valuable consideration any of his rights as receiver.[1-a] Not having any proprietary interest in the estate under his control, he cannot assign his rights to another so as to enable the latter to enforce them as such assignee.[2] As to whether and under what circumstances, a receiver is entitled to have clerks and agents to assist him *See* Notes 35 and 42 below.

28. The receiver is an officer of the Court.—A receiver is an officer of the Court. He is also "a public officer" within the meaning of S. 2, Cl. 17.[1] He is nothing more than the hand of the Court for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of the Court, in order to preserve the subject-matter of the suit *pendente lite.*[1-a] He is a representative of the Court and not of any of the parties to the suit, though he holds the property for the benefit of those ultimately found to be rightful owners.[2] Thus, a receiver in execution proceedings is not the

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Note 25.

(1) *Ketter Mohun* v. *Wells,* (1882) 8 Cal 719 (720): 11 Cal L Rep 13.

(2) *Gopalaswami* v. *Sankara,* (1885) 8 Mad 418 (420): 9 Ind Jur 308.

Note 26.

(1) *Chundranath* v. *Biswanath,* (1871) 6 Beng L R 492 Note.

(2) *Netai Chand Chuckerbutty* v. *Ashtosh Chuckerbutty,* (1901) 5 Cal W N 408 (409).

(3) *Basir Ali* v. *Hafiz Nazir Ali,* (1915) 30 Ind Cas 406 (407): 43 Cal 124: 19 Cal W N 817; *Minatunnissa* v. *Khatonnissa,* (1894) 21 Cal 479 (481).

Note 27.

(1) *Balaji* v. *Ramchandra,* (1895) 19 Bom 660 (662).

(1-a) *Po Shan* v. *Maung Gyi,* (1910) 8 Ind Cas 976 (978): 5 L B R 213: 3 Bur L Tim 89.

(2) *Poshan* v. *Maung Gyi,* (1910) 8 Ind Cas 976 (978): 3 Bur L Tim 89: 5 L B R 213.

Note 28.

(1) *Jagadish Chandra Deo* v. *Debendra Prasad,* 1931 Cal 503 (503): 35 Cal W N 161: 58 Cal 850: 132 Ind Cas 634.

(1-a) *Wilkinson* v. *Gangadhar Sirkar,* (1871) 6 Beng L R 486; *A M Dunne* v. *Kumar Chandra Kishore,* (1903) 30 Cal 593 (598): 7 Cal W N 390; *Adiministrator-General* v. *Prem Lal,* (1895) 22 Cal 1011 (1015): 22 Ind App 203: 6 Sar 660: 5 Mad L Jour 157 P C.

(2) *Bonnerjee, Official Receiver,* In re, 1928 Cal 402 (403, 405): 107 Ind Cas 738; *Harihar Mukerji* v. *Jaharuddin Mandal,* 1921 Cal 516 (516): 26 Cal W N 992: 62 Ind Cas 768; *Fink*

agent of the judgment-creditor and moneys realised by the receiver do not become *ipso facto* moneys belonging to the judgment-creditor.[3] (*See* Note 33, *infra.*) A receiver's possession being that of the Court, no one is entitled to interfere with it.[4] A sale of property by the receiver has the same effect as a sale by the Court and the purchaser is entitled to the assistance of the Court in obtaining possession of the property so purchased.[5] A receiver, though an officer of the Court, is not a *judicial* officer. Hence, a Court has no power to delegate to a receiver the duty of enquiring into the claims of rival claimants to the property.[6]

A receiver should not be allowed to purchase the property of which he is the receiver[7] and such a sale if made would be voidable by an application made under S. 47 of the Code.[8]

29. Possession of the receiver enures for the benefit of the true owner.—The possession of the receiver is the possession of the Court, and the possession of the Court by the receiver is the possession of all the parties to the action according to their titles. The property passes into legal custody (*custodia legis*) and such custody is for the benefit of the true owner. The receiver thus holds the property for the benefit of those ultimately found to be the true owners.[1] By the appointment of a receiver the Court takes upon itself the *management* of the property during the continuance of the litigation. But the proprietary right or interest in the property is not transferred from the rightful owner either to the Court or to the receiver appointed by it[2]. The receiver's possession being possession on behalf of all the parties to the action according to their titles none of them can claim to be in adverse possession during the continuance of the receiver's possession against the party

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v. *Corporation of Calcutta*, (1903) 30 Cal 721 (724): 7 Cal W N 706 [He cannot be fined as representing the owner]; *Harihar Mukherjee* v. *Harendra Nath Mukerjee*, (1910) 6 Ind Cas 416 (418): 12 Cal L Jour 252: 37 Cal 754; *Binjraj Marwari* v. *Das Mookerjee & Co*, 1929 Cal 659 (660) [Receiver cannot pledge credit of any party to the proceeding].

(3) *Natesa Pillai* v. *Govindasami Pathan*, 1930 Mad 4 (8).

(4) *Nedungadi Bank, Ltd, Madras* v. *Official Assignee of Madras*, 1929 Mad 184 (186): 56 Mad L Jour 95: 29 Mad L W 664: 118 Ind Cas 70: 52 Mad 938.

(5) *Minatoonnessa* v. *Khatoonnessa*, (1894) 21 Cal 479 (483). *See Herumba Nath Banerjee* v. *Satish Chandra Mukerjee*, (1905) 33 Cal 1175 (1177) [When Court orders transfer of property it is entitled to priority over subsequent attachment though the transfer may be actually executed subsequent to attachment].

(6) *Kershaji* v. *Kaikhushru Kolhabai*, 1929 Bom 478 (479): 31 Bom L R 1081: 121 Ind Cas 433 [Order directing Receiver to hold inquiry as to heirs in contested succession proceedings—Order held illegal]; *Hamida Rahaman* v. *Jamila Khatun*, 1921 Cal 298 (299): 34 Cal L Jour 123: 65 Ind Cas 837 [Claims of third parties—Court cannot delegate duty of enquiry to Receiver].

(7) *Ramkomal* v. *Bank of Bengal*, (1901) 5 Cal W N 91 (104). See also *Jiteswari* v. *Sudha Krishna*, 1932 Cal 673 (673): 36 Cal W N 125: 55 Cal L Jour 85: 59 Cal 956: 139 Ind Cas 186 [Decree-holder—Receiver, purchasing in Court auction without leave of Court void].

(8) *Jiteswari Dassi* v. *Sudha Krishna Mukherjee*, (1932) 36 Cal W N 125 (126, 127): 59 Cal 956: 139 Ind Cas 186: 55 Cal L Jour 85: 1932 Cal 672.

Note 29.

(1) *Dwijendra Narayan Roy* v. *Jogesh Chandra De*, 1924 Cal 600 (610): 39 Cal L Jour 40: 79 Ind Cas 520; *Eastern Mortgage and Agency Co, Ltd* v. *Moulvi Muhammad Fazlul Karim*, 1926 Cal 385 (392): 52 Cal 914: 41 Cal L Jour 571: 90 Ind Cas 851; *Bonnerjee, Official Receiver, In Re*, 1928 Cal 402 (403, 405): 107 Ind Cas 738; *Jagat Tarini* v. *Naba Gopal*, (1907) 34 Cal 305 (316, 317): 5 Cal L Jour 270; *Doulat Koer* v. *Rameswari Koeri*, (1899) 26 Cal 625 (629, 630): 3 Cal W N 461; *Appaswami Naicken* v. *Jotha Naicken*, (1899) 22 Mad 448 (452).

(2) *Jabbar Ali Sirdar* v. *Manmohan Pandey*, 1929 Cal 110 (112): 55 Cal 1216: 49 Cal L Jour 70: 114 Ind Cas 485; *Eastern Mortgage and Agency Co, Ltd* v. *Md Fazlul Karim*, 1926 Cal 385 (392): 52 Cal 914: 41 Cal L Jour 571: 90 Ind Cas 851; *Imperial Oil Soap and General Mills Co, Ltd* v. *Ramchand*, (1916) 36 Ind Cas 980 (981): 91 Pun Re 1917; *John Tiel* v. *Abdool Hye*, (1873) 19 Suth W R 37 (38); *Kirtarath Gir* v. *Muthara Prasad Ram*, 1925 All 72 (72): 81 Ind Cas 741: 46 All 924.

O. 40, R. 1, Notes 29—30.

ultimately found entitled to the property.[3] Nor is it open to the receiver during the continuance of the receivership to set up a title in himself adverse to that of the parties. Even if the receiver is discharged he would still hold the property on behalf of the rightful owner.[4] Thus the title of the real owner is in no way affected either in theory or principle, by the appointment of a receiver. A payment made by a receiver out of the funds of an estate is equivalent to a payment made by the owner of the estate and where he would be entitled to get reimbursement from a third person if he had made the payment himself, he would be equally entitled to such reimbursement if the payment is made by the receiver.[5] If despite the appointment of the receiver, the defendant continues in possession, he can be sued by the true owner for the profits misappropriated by him.[6]

The appointment of a receiver does not supersede a prior attachment of the property.[7]

When the owner of a property is himself appointed receiver he does not lose his rights as a proprietor of dealing with the property during the receivership except that he cannot impair the value of the property in his hands or cause interference with his possession of the property as receiver.[8]

30. **Attachment of properties in the hands of receiver.**—Property in the hands of a receiver, being really property in the possession of the Court, it is, as a general rule, exempt from judicial process except to the extent permitted by the Court appointing such receiver. In other words the possession of the Court is not to be interfered with by taking any judicial proceedings against the property in the receiver's hands without the permission of the Court.[1] Hence leave of Court is necessary for execution of a decree by attachment and sale of property in the hands of the receiver.[2]

Such leave is necessary even where the property is sought to be proceeded against in execution of a *mortgage decree,* although no *attachment* is necessary for sale in such a case.[3] The High Court of Calcutta is, however,

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(3) *Brojendra* v. *Bharatchandra Roy,* (1915) 31 Ind Cas 242 (244): 22 Cal L Jour 283: 20 Cal W N 481 [When Receiver is appointed, there is no dispossession of true owner within Art. 142 of Limitation Act]; *Sarala Sundari Dasi* v. *Sarada Prasad Sur,* (1905) 2 Cal L Jour 602 (611). See *Seerangathani* v. *Bava Vaithilinga Mudaliar,* 1921 Mad 528 (529): 40 Mad L Jour 532: 13 Mad L W 392: 1921 Mad W N 248: 63 Ind Cas 104. See *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar,* (1917) 40 Ind Cas 50 (54): 21 Mad L Tim 62: 5 Mad L W 690: 32 Mad L Jour 85.

(4) *Kuppuswami Chetty* v. *Kusala Ramiah,* (1919) 49 Ind Cas 89 (91): 1918 Mad W N 683: 24 Mad L Tim 424: 8 Mad L W 551; *Kartick Nath Pandey* v. *Pudmanand Singh,* (1885) 11 Cal 496 (498).

(5) *Eastern Mortgage and Agency Co, Ltd* v. *Fazlul Karim,* 1926 Cal 385 (392): 52 Cal 914: 41 Cal L Jour 571: 90 Ind Cas 851.

(6) *Mt Phula* v. *Kusam Singh,* 1928 Nag 70 (72, 73): 71 Ind Cas 418.

(7) *Mahabeer Pershad Singh* v. *Collector of Tirhoot,* (1870) 13 Suth W R 423 (425).

(8) *Jabbar Ali Sirdar* v. *Manmohan Pandey,* 1929 Cal 110 (112): 55 Cal 1216: 49 Cal L Jour 70: 114 Ind Cas 485.

Note 30.

(1) *Thayuman* v. *Ramaswami,* 1925 Mad 51 (51): 79 Ind Cas 632: 19 Mad L W 681; *Levenia Ashton* v. *Madhabmoni,* (1910) 5 Ind Cas 390 (392): 14 Cal W N 560: 11 Cal L Jour 489.

(2) *Fraser* v. *Krishnaswami,* 1923 Mad 144 (146): 1922 Mad W N 745: 43 Mad L Jour 211: 31 Mad L Tim 290: 71 Ind Cas 293: 16 Mad L W 322: 47 Mad 47; *Jogendra Nath Gossain* v. *Debendro Nath Gossain,* (1898) 26 Cal 127 (129): 3 Cal W N 90; *J Khan* v. *Alli Mahomed,* (1892) 16 Bom 577 (579, 580); *Mahomed Zohuruddeen* v. *Mahomed Noorooddeen,* (1894) 21 Cal 85 (91) [Such attachment will not be recognised]; *Hemchander* v. *Pran Kristo,* (1876) 1 Cal 403 (406); *Saratchandra* v. *Apurba Krishna Roy,* (1911) 11 Ind Cas 187 (188, 189): 14 Cal L Jour 55: 15 Cal W N 925. See *Raghunath* v. *Gopinath,* (1905) 25 All W N 110 (111) [On discharge of Receiver no bar to execution of decree against property of which he was appointed Receiver].

(3) *Fraser* v. *Krishnaswami Ayyar,* 1923 Mad 144 (2) (146): 1922 Mad W N 745: 43 Mad

O. 40, R. 1, Notes 30—31.

of opinion that as no attachment is necessary in the case of a sale under a mortgage decree, the permission of the Court is not necessary for such a sale.[4] Even where an attachment was levied on property *before* the appointment of the receiver, it is within the discretion of the appointing Court, to refuse to permit a sale of property under such attachment, and a purchaser in Court auction at a sale held without the previous permission of the Court, buys at his peril, as the sale may be cancelled.[5] Permission is necessary even for an application for rateable distribution against the receiver.[5-a]

A sale of property in the hands of a receiver without the leave of the Court, is however, not *void* but is only *voidable, i.e.*, it is valid until set aside by appropriate proceedings. If the persons interested do not impeach the sale, it is not open to others to do so.[6] It has even been held that the sale cannot be set aside if the person seeking to have it set aside has in no way been prejudiced by the sale.[7]

But where a decree obtained by a receiver is attached without the Court's permission and is then transferred by the receiver to a third person who takes the assignment in good faith and without knowledge of the attachment, the attachment being irregular does not affect the title of the assignee.[7-a]

Though a receiver of a property may have been *appointed*, yet, until he actually takes possession of the property a stranger decree-holder is not precluded from executing his decree against the property without obtaining the leave of the Court.[8]

The proper Court to permit the attachment of property in the hands of a receiver is the Court by which the receiver has been appointed.[9]

As to the effect of subsequent grant of leave, *see* Note 31, *infra*.

31. **Suits by or against receiver—Leave of Court.**—*See also* Note 43, *infra*.

A receiver can neither sue nor be sued without the leave of the Court.[1] He is merely an officer of the Court and not the representative of the owner

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L Jour 211: 16 Mad L W 322: 31 Mad L Tim 290: 71 Ind Cas 293: 47 Mad 47.

(4) *Jogendra Nath Gossain* v. *Debendro Nath Gossain*, (1899) 26 Cal 127 (128, 129): 3 Cal W N 90.

(5) *Thayumana Pillai* v. *Ramaswami Chettiar*, 1925 Mad 51 (51): 19 Mad L W 681: 79 Ind Cas 632; *Fraser* v. *Krishnaswami Ayyar*, 1923 Mad 144 (2) (146): 1922 Mad W N 745: 43 Mad L Jour 211: 16 Mad L W 322: 31 Mad L Tim 290: 71 Ind Cas 293: 47 Mad 47: *Levenia Ashton* v. *Madhabmoni*, (1910) 5 Ind Cas 390 (392): 11 Cal L Jour 489: 14 Cal W N 560.

(5-a) *Saratchandra* v. *Apurba Krishna Roy*, (1911) 11 Ind Cas 187 (188, 189): 14 Cal L Jour 55: 15 Cal W N 925.

(6) *Jagadish Chandra Deo Dhabal Deb* v. *Bhubaneswar Mitra*, 1923 Cal 121 (130): 76 Ind Cas 241: 37 Cal L Jour 265: 27 Cal W N 38; *Kanai Lal Jalan* v. *Manoo Bibi*, (1919) 51 Ind Cas 394 (396): 23 Cal W N 952: 29 Cal L Jour 424.

(7) *Karimunnessa Khatun* v. *Fazlal Karim*, 1924 Cal 1055 (1055): 40 Cal L Jour 78: 84 Ind Cas 471.

(7-a) *Kalyana Sundaram Ayyar* v. *Narasimha Ayyangar*, 1923 Mad 567 (568): 44 Mad L Jour 427: 18 Mad L W 280: 73 Ind Cas 456.

(8) *Jagadish Chandra Deo Dhabal Deb* v. *Bhubaneswar Mitra*, 1923 Cal 121 (129, 130): 76 Ind Cas 241; *Kanai Lal Jalan* v. *Manoo Bibi*, (1919) 51 Ind Cas 394 (396): 23 Cal W N 952: 29 Cal L Jour 424.

(9) *Behari Lal* v. *Punjab National Bank, Ltd.*, 1929 Lah 147 (148): 111 Ind Cas 789.

Note 31.

(1) *Kassim Mamoojee* v. *Isuf Mahomed Sulliman*, (1902) 6 Cal W N 829 (829): 29 Cal 509: *Miller, Official Receiver of the High Court (in respect of the estate of Khettermoni Dassee)* v. *Ram Ranjan Chakravarthi*, (1884) 10 Cal 1014 (1017); *Bhagwan Das Marwari* v. *Manindra Chandra Nandi*, 1927 Pat 397 (398): 8 Pat L Tim 717: 104 Ind Cas 295; *Dunne* v. *Kumar*

of the estate. Hence, no cause of action vests in him and he has no *locus standi* to sue except with the leave of the Court.[2] "There is no statutory provision which requires a party to take the leave of the Court to sue a receiver. The rule has come down to us as a part of the rules of equity, binding upon all English Courts of Justice in this country. It is a rule based upon public policy which requires that when the Court has assumed possession of a property in the interests of the litigants before it, the authority of that Court is not to be obstructed by suits designed to disturb the possession of the Court. The institution of such suits is in the eye of the law a contempt of the authority of the Court and therefore the party contemplating such a suit is required to take the leave of the Court so as to absolve himself from that charge. The grant of such leave is made not in the exercise of any power conferred by statute, but in the exercise of the inherent power, which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority.[3]

A Court will however, readily grant leave to sue the receiver if it is satisfied that there is a case to be tried so that the claim of the third party may be tried in the presence of the receiver.[4]

The omission to obtain the sanction of the Court prior to the institution of the suit can be rectified by leave granted subsequent to the institution of the suit.[5] In the undermentioned cases[6] however, it was held that the Court's sanction was a *condition precedent* to institution of the suit and the defect due to the want of such sanction could not be rectified by leave obtained subsequently. A suit against a receiver without the leave of the Court is liable

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Chandra, (1903) 30 Cal 593 (598): 7 Cal W N 390; *Fink v. Corporation of Calcutta,* (1903) 30 Cal 721 (724): 7 Cal W N 706; *U On Maung v. Ebrahim,* 1928 Rang 175 (175): 6 Rang 268: 110 Ind Cas 622; *Secunder v. J A M Kasiyar & Co,* 1923 Rang 208 (208): 1 Rang 138: 76 Ind Cas 441; *Sreedhar Chaudhury v. Nilmoni Chaudhury,* 1925 Cal 681 (683): 41 Cal L Jour 197: 86 Ind Cas 677; *Mahrana Kunwar v. David,* 1924 All 40 (43): 46 All 16: 21 All L J 737: 77 Ind Cas 57 [Estate does not vest in Receiver as it does in the case of Official Receiver in insolvency proceedings]; *Kamatchi v. Sundaram,* (1903) 26 Mad 492 (498); *Jatindranath Chowdhury v. Sarfaraz Meah,* (1910) 6 Ind Cas 214 (216): 14 Cal W N 653 [Suit against Receiver]. See also *Jamnadas Purbhudas v. Bai Soonabhai,* 1932 Bom 622 (624, 625): 34 Bom L R 1405 (1409, 1410) [No leave of Court is necessary for making an application for rateable distribution].

[2] *Badri Pershad v. Civil Nazir Ambala,* (1912) 17 Ind Cas 751 (751): 56 Pun Re 1913: 247 Pun L R 1913; *A B Miller, Official Receiver of the High Court v. Ram Ranjan Chakravarthi,* (1884) 10 Cal 1014 (1017): *Wilkinson v. Gangadhar,* (1871) 6 Beng L R 486 (486).

[3] *Braja Bhusan v. Sris Chandra,* (1918) 47 Ind Cas 719 (723): 4 Pat L Jour 20: 1918 Pat H C C 337; *Kuppuswami v. Waz,* 1921 Bom 427 (428): 45 Bom 99: 59 Ind Cas 421: 22 Bom L R 1126 [Receiver is an officer of the Court and any action taken against him without leave of the Court is contempt]; *Satya Kripal v. Satya Bhupal,* (1914) 22 Ind Cas 623 (624): 19 Cal L Jour 191: 18 Cal W N 546 [Suit against Receiver without leave of Court is contempt of Court].

[4] *Sirdhar Chowdhry v. Mugniram Bangar,* 1924 Pat 491 (495): 3 Pat 357: 5 Pat L Tim 243: 1924 Pat H C C 54: 78 Ind Cas 620; *Bhagwan Das Marwari v. Manindra Chandra Nandi,* 1927 Pat 397 (398): 8 Pat L Tim 717: 104 Ind Cas 295; *Braja Bhusan v. Sris Chandra Tewari,* (1918) 47 Ind Cas 719 (721, 722): 4 Pat L Jour 20: 1918 Pat H C C 337.

[5] *Jagna Sanaysiah v. Atchanna Naidu,* 1921 Mad 624 (626): 42 Mad L Jour 339: 15 Mad L W 289: 70 Ind Cas 759; *Kalyanasundaram Iyer v. Narasimha Iyengar,* 1923 Mad 567 (567): 73 Ind Cas 456: 18 Mad L W 280: 44 Mad L Jour 427; *Jamsedji v. Hussainbhai,* (1920) 56 Ind Cas 424 (425): 22 Bom L R 319; *Lakshmi Amma v Kutti Kunhunni,* (1921) 59 Ind Cas 568 (569): 43 Mad 793: 12 Mad L W 331: *Maharajah of Burdwan v. Apurba Krishna,* (1911) 10 Ind Cas 527 (529): 15 Cal W N 872: 14 Cal L Jour 50; *Banku v. Harendra,* (1910) 8 Ind Cas 1 (2): 15 Cal W N 54; *Sarat Chandra Banerjee v. Apurba Krishna Roy,* (1911) 11 Ind Cas 187 (188, 189): 14 Cal L Jour 55: 15 Cal W N 925; *Srihari Jana v. Satyacharan Dulia,* 1926 Cal 1040 (1041): 95 Ind Cas 961: *Jagat Tarini v. Naba Gopal,* (1907) 34 Cal 305 (312): 5 Cal L Jour 270; *Rustomjee v. Frederic,* (1919) 51 Ind Cas 486 (488): 46 Cal 352: 23 Cal W N 496 [Suit by Receiver]; *Jabbar Ali Sirdar v. Manmohan Pandey,* 1929 Cal 110 (112): 56 Cal 1216: 49 Cal L Jour 70: 114 Ind Cas 485, (Do.); *Nripendra Kumar v. Nikunja Behari,* (1921) 63 Ind Cas 843 (844) Cal; *Lalman* alias *Lalloo v. Gopi Nath,* (1921) 61 Ind Cas 888 (889) All [But if there is laches in obtaining leave, suit liable to be dismissed].

[6] *Pramatha Nath Gangooly v. Khetra Nath Bannerjee,* (1905) 32 Cal 270 (271, 272): 9 Cal W N 247; *Venkatasubbaramiah v. Nambura Ramiah Setti,* (1914) 24 Ind Cas 622 (622) Mad.

O. 40, R. 1, Note 31.

to be dismissed.[7] If a decree is passed in such a suit it can be set aside.[8] The absence of an objection by the receiver, that no leave was obtained, will not entitle the Court to pass a decree against a receiver.[9] But where the receiver has been discharged[9-a] or has ceased to exist and has been replaced by the heirs of one of the parties who were on the record[10] the objection that the suit against the receiver was instituted without the leave of the Court will not stand. The leave of the Court is not necessary for a suit against a receiver, under S. 85 of the Madras Act, VIII of 1865.[11]

It is the Court *appointing the receiver* that can grant leave for the institution of a suit by or against the receiver. The Court trying the suit cannot grant it.[12] A Court does not by granting leave to sue the receiver relinquish its possession of the property to the Court in which the suit against the receiver is instituted.[13] The Court trying such suit cannot issue an injunction against the receiver restraining him from dealing with the property as it would lead to a conflict of jurisdictions.[14] Nor can a Court other than the appointing Court issue a *rubkar* to the latter Court requesting it to restrain the receiver from taking possession of a part of the property in respect of which the receiver has been appointed.[15] The proper course for a person who has obtained a decree against the receiver is to apply to the Court by which he has been appointed, to direct the receiver to act according to the decree.[16]

A receiver is not a necessary party to a suit for declaration of title and possession in respect of the property in the receiver's hands. The decree passed in such a suit can always be carried out against the property in the hands of the receiver with the leave of the Court appointing him, although he has not been made a party to the suit.[17] (*See also* Note 44, *infra.*)

A receiver appointed by a Civil Court is not a necessary party to proceedings in respect of the property under S. 145 of the Criminal Procedure

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(7) *Venkata Subbaramayiah* v. *Nambura Ramiah Setti*, (1914) 24 Ind Cas 622 (622) Mad: *Sattya Satyakripal Bannerjee* v. *Sattya Bhupal Bannerjee*, (1914) 22 Ind Cas 623 (624): 19 Cal L Jour 191: 18 Cal W N 546 [Several Receivers appointed in respect of different portions of same property—One of the Receivers suing another without leave of Court—*Held*, that it is contempt of Court but not so grave as to make it obligatory on the Court to dismiss suit].

(8) *Balthazar and Sons* v. *Burma Engineering and Trading Company*, (1912) 17 Ind Cas 916 (916): 5 Bur L Tim 163.

(9) *Srihari Jana* v. *Satya Charan*, 1926 Cal 1040 (1041): 95 Ind Cas 961. But see *Jagna Sanyasiah* v. *Mycherla Peda Atchanna*, 1921 Mad 624 (626): 15 Mad L W 289: 70 Ind Cas 759: 42 Mad L Jour 339 [Per Sadasiva Aiyar, J *Obiter*].

(9-a) *F E Dinshaw* v. *Amrit Lal & Co*, 1931 Pat 298 (300): 10 Pat 379: 13 Pat L Tim 142: 133 Ind Cas 459.

(10) *Jagana Sanyasiah* v. *M P Atchanna Naidu*, 1921 Mad 624 (626): 42 Mad L Jour 339: 70 Ind Cas 759: 15 Mad L W 289.

(11) *Receiver of Ammayyanaikanur* v. *Suppan Chetty*, (1907) 30 Mad 505 (506): 17 Mad L Jour 483: 3 Mad L Tim 7.

(12) *Bapuji Sorabji Patel* v. *Lakhmidas Ravji Tersi*, 1924 Bom 89 (90): 81 Ind Cas 844: 25 Bom L R 1180: 48 Bom 200; *Maharajah Guru Mahadeva Asram Prasad Sahai* v. *Ram Sekhar Prasad Singh*, (1919) 51 Ind Cas 706 (707) Pat.

(13) *Shridhar* v. *Mugniram*, 1924 Pat 491 (495): 3 Pat 357: 5 Pat L Tim 243: 1924 Pat H C C 54: 78 Ind Cas 620.

(14) *Jugal Kishore Debi* v. *Deva Prasanna Mukerji*, 1928 Pat 321 (323): 7 Pat 684: 9 Pat L Tim 279: 110 Ind Cas 722; *Nuruddin Ahmad* v. *Subodh Chandra Mitra*, 1925 Cal 1174 (1175): 87 Ind Cas 808. See also *Official Assignee* v. *Chimni Ram*, 1933 Bom 51 (52, 53 and 57): 34 Bom L R 1615 [Order against Receiver in another suit to make payments to plaintiffs in the trial suit—Especially out of income of assets not mortgaged, parties in the two suits not being the same].

(15) *Kedarnath Thakur* v. *Mohammad Ali Khan*, 1921 Pat 92 (93): 68 Ind Cas 465: 2 Pat L Tim 716: 6 Pat L Jour 268.

(16) *Jugal Kishori* v. *Deva Prasanna*, 1928 Pat 321 (323): 7 Pat 684: 9 Pat L Tim 279: 110 Ind Cas 722; *Nuruddin Ahmed* v. *Sabodh Chandri Mitra*, 1925 Cal 1174 (1175): 87 Ind Cas 808.

(17) *Sultya* v. *Golap*, (1900) 5 Cal W N 27 (28); *Administrator-General of Madras* v. *Dasai Gounder*, (1911) 10 Ind Cas 673 (674).

O. 40, R. 1, Notes 31—34.

Code.[18] A Criminal Court has no jurisdiction in such proceedings to interfere with the possession of a receiver appointed by a Civil Court, without the permission of such Court.[19]

An owner of an estate cannot sue for accounts a Jaherdar appointed by the receiver. There is no fiduciary relation between the receiver and the owner, which is essential for such an action.[20] Similarly, a present receiver cannot sue a former receiver of the estate for recovery of money alleged to be due by the latter to the estate for breach of duty committed by him as receiver.[21]

32. **Debts incurred by receiver in the course of business.**—A receiver is personally liable in respect of debts incurred or contracts entered into by him in the course of his management of the estate, but he is entitled to indemnity from the estate for such debts.[1] The creditors can also proceed against the estate for the recovery of such debts in priority to other creditors of the estate, the principle being that as the acts of the receiver acting within his authority are the acts of the Court, the estate cannot be permitted to enjoy the benefits of those acts without being held liable for the obligation arising therefrom.[2] The ordinary rule that the creditors who have advanced money to a receiver for the management of the estate can proceed against him personally does not apply where the advance has been expressly made on the condition that the estate alone should be liable.[3]

33. **Loss caused by receiver's default.**—The receiver is not the agent or representative of any party to the suit. If therefore loss arises from the default of the receiver, such loss, subject to the receiver's liability for his default, must be borne by the estate and not by the party at whose instance he was appointed receiver.[1] But in the undermentioned case,[2] a Full Bench of the Oudh Chief Court has held that where a receiver in execution, misappropriates the moneys paid by the judgment-debtor, the loss should be borne by the decree-holder and not the judgment-debtor, the reason given being that the payment to the receiver absolves the judgment-debtor from all further responsibility.

34. **Agreement with receiver—Contempt of Court.**—It is only the Court that can control the powers of the receiver. As an officer of the Court, he has only such powers as the Court chooses to give him. It is a contempt of Court for any one else to enter into an agreement with the receiver

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(18) *A M Dunne* v. *Kumar Chandra Kishore*, (1903) 30 Cal 593 (598): 7 Cal W N 390.

(19) *Dunne* v. *Kumar Chandra*, (1903) 30 Cal 593 (598): 7 Cal W N 390.

(20) *Harihar Mukerji* v. *Jaharuddin Mandal*, 1921 Cal 516 (516): 62 Ind Cas 768: 26 Cal W N 992.

(21) *Dutt* v. *Shamal*, (1913) 24 Ind Cas 768 (770): 41 Cal 92.

Note 32.

(1) *Debi Prasad Dhandhania* v. *Mahesh Lal*, 1925 Pat 602 (604, 605): 7 Pat L Tim 129: 89 Ind Cas 32: 1925 Pat H C C 201; *Ramnarayan Satyapal* v. *Carey & Daniel*, 1931 Cal 491 (492): 134 Ind Cas 1266: 58 Cal 174; *Mohari Bibi* v. *Shyama Bibi*, (1903) 30 Cal 937 (944): 7 Cal W N 799.

(2) *Mohari Bibi* v. *Shyama Bibi*, (1903) 30 Cal 937 (944): 7 Cal W N 799.

(3) *Debi Prasad Dhandhania* v. *Mahesh Lal*, 1925 Pat 602 (604, 605): 7 Pat L Tim 129: 1925 Pat H C C 201: 89 Ind Cas 32.

Note 33.

(1) *Orr* v. *Muthia Chetty*, (1894) 17 Mad 501 (504); *Muthiah* v. *Orr*, (1897) 20 Mad 224 (226, 229) F B [Defalcation by Receiver in execution proceedings. Is judgment debt satisfied *pro tanto?* No, as per Shepherd, J and yes as per Davis, J]; *Natesa Pillai* v. *Govindaswami Pathar*, 1930 Mad 4 (8) [Receiver in execution proceedings—Moneys realised by him do not become *ipso facto* the moneys of the decree-holder].

(2) *Jai Indar* v. *Brij Indar Kuar*, 1929 Oudh 231 (233): 6 Oudh W N 334: 117 Ind Cas 748 F B.

O. 40, R. 1,
Notes
34—36.

restricting and controlling his powers.[1] Similarly, a promise by a party to pay remuneration to a receiver is against Law and not enforceable.[2]

A receiver also can apply for process for contempt of Court against any one interfering with his possession.[3]

35. **Remuneration of receiver.**—Under R. 2, *infra*, the Court has the power of fixing the receiver's remuneration. Such remuneration is generally by way of *percentage* or *commission* but there is no absolute rule that he should be so remunerated. The Court has a discretion if it thinks fit, to allow him remuneration at a *fixed rate*.[1] The receiver is also entitled to all reasonable expenses of management[1-a] including the fees of counsel whom he may have to engage.[2] (*See* Note 42, *infra* for further information.) An agreement by a party to pay remuneration to the receiver is as has been observed in Note 34, *ante* against law and cannot be enforced.[3] The receiver's remuneration must come out of the estate and the parties are not personally liable for it.[4] The managing partner of a firm by consenting to act without remuneration as receiver during the dissolution of the partnership, does not forego his rights to such remuneration as he would be entitled to as managing partner.[5]

The receiver of mortgaged property is entitled to priority over the mortgagee in respect of his remuneration and the expenses properly incurred by him in the course of his management.[6] But the priority does not extend to the wages that became due to a servant of the estate before the appointment of the receiver.[7]

36. **Liability of receiver.**—*See* R. 3, *infra*. The receiver is liable to duly account for the income and the properties that come into his hands. He is responsible for any loss occasioned to the property by his wilful default and gross negligence. *See* Note 32, *supra* for the receiver's liability for debts incurred by him in the course of the management of the estate. A receiver disregarding the Court's orders is liable to be removed[1] or committed for contempt in case he is appointed by a High Court.[2] (For further information, *see* next Note.)

Note 34.

[1] *Manick Lall Seal* v. *Surrunt Coomary Dassee*, (1895) 22 Cal 648 (656).

[2] *Prokash Chandra* v. *Adlam*, (1903) 30 Cal 696 (698).

[3] *O E Grey* v. *Woogra Mohan Thakur*, (1901) 28 Cal 790 (793).

Note 35.

[1] *Srepat Singh* v. *Ram Sarup Surya Prasad*, 1923 Cal 516 (517): 76 Ind Cas 583; *Kabalamurthi Pillai* v. *Subramania Pillai*, 1931 Mad 500 (501): 131 Ind Cas 655: 60 Mad L Jour 332 [Order of Court providing for percentage on gross sales of business—Receiver not entitled to commission on trade discount which is invariably deducted before arriving at sale price. But Receiver entitled to include freight and packing in the sale proceeds for purposes of commission].

[1-a] *Balaji Narayana Patvardhan* v. *Ramachander Govind Kanade*, (1895) 19 Bom 660 (662).

[2] *Mohini Mohan Patra* v. *Baroda Khanta Sarkar*, (1911) 12 Ind Cas 780 (787): 14 Cal L Jour 445.

[3] *Prokash Chandra* v. *Adlam*, (1903) 30 Cal 696 (698).

[4] *Srepat Singh* v. *Ram Sarup Surya Prasad*, 1923 Cal 516 (517): 76 Ind Cas 583.

[5] *Mahomed Kamil* v. *Hedayetulla*, 1926 Cal 380 (380): 90 Ind Cas 492.

[6] *Rajagopalachariar* v. *Jamal Ayisha Bibi*, 1925 Mad 571 (572, 573): 21 Mad L W 312: 90 Ind Cas 337; *Short* v. *Pickering*, (1883) 6 Mad 138 (139): 7 Ind Jur 136.

[7] *Short* v. *Pickering*, (1882) 6 Mad 138 (139): 7 Ind Jur 136.

Note 36.

[1] *Bihari Lal* v. *Shankar Das*, 1925 Lah 309 (310, 311): 7 Lah L Jour 6: 86 Ind Cas 246.

[2] *Jayantilal Hiralal & Co* v. *Waman*, 1932 Bom 638 (642): 34 Bom L R 1416 [Failure to comply with order to pay money].

O. 40, R. 1, Note 37.

37. Liability to account.—In *Mohini Mohan Patra* v. *Baroda Kanta Sarkar*.[1] Their Lordships of the Calcutta High Court expressed themselves as follows:—

"The receiver is but an officer of the Court appointing him, and is, therefore, bound to account to that Court for all property which he has received. It is his duty to keep his accounts and vouchers in such condition that they will be ready for examination at any time; and, as a general proposition, whenever property or funds come into the hands of a receiver pending litigation, the Court may require him to report his acts and doings and to render an account, in order to ascertain the condition of the property and to enable the Court to settle the rights of, and do justice to, all the litigant parties. When the accounts of the receiver come up for adjustment, he is a party in interest, entitled to be heard, and it is the duty of the Court to see that his rights are protected. But so, also, all other interested parties are entitled to notice and an opportunity to attend and be heard. All persons having an interest in the estate which the receiver represents, have the right to be present, and be examined on any subject pertinent to the inquiry which springs out of the proceedings itself, and to take exception to the receiver's accounts. Courts are disposed to hold receivers to great strictness in rendering their accounts, and a thorough investigation of the accounts and vouchers is proper where, as here, the rights of infants are involved. A receiver is bound to exercise the same degree of diligence in keeping down expenses and in caring for the estate in his possession as a prudent man would observe in connection with his own property under similar circumstances. A receiver, therefore, will not ordinarily be permitted, without the sanction and authority of the Court, to incur any expenditure which will seriously diminish the funds entrusted to his charge, and it is his duty if he wishes to protect himself, to apply to the Court for instructions as to the expenditure, and to keep regular accounts of all items of receipts and expenditures. . . . . It does not, however, follow that in every case in which the receiver neglects to obtain an order of the Court authorising a particular payment out of the fund in his possession, he will be denied reimbursement. . . . . . Where a receiver has laid out money without a previous order of Court, and the transaction is proved by him to have been *beneficial* to the parties in interest, he is entitled to be allowed credit in his accounts for the amount thus expended."

A receiver must produce vouchers for all payments other than petty sums,[2] but when produced they will be evidence of the payment of the sums therein specified and credit will be given for such sums to the accounting party in the account unless it is shown that there are reasonable grounds for impeaching the vouchers.[3] A receiver can be required to submit his accounts for scrutiny even after the suit has been dismissed[4] and even after his dis-

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Note 37.

(1) (1911) 12 Ind Cas 780 (785): 14 Cal L Jour 445.

(2) *Balaji Narayan* v. *Ramchandra Govind*, (1894) 19 Bom 660 (662); *Haji Teller Rahman* v. *Golam Gone*, 1924 Cal 1063 (1064): 40 Cal L Jour 28: 82 Ind Cas 419.

(3) *Haji Teller Rahman* v. *Golam Gone*, 1924 Cal 1063 (1064): 40 Cal L Jour 28: 82 Ind Cas 419.

(4) *Chandreshwar Prasad* v. *Bisheswar*, (1920) 58 Ind Cas 405 (406): 1920 Pat H C C 231: 5 Pat L Jour 513: 1 Pat L Tim 643; *Administrator-General* v. *Prem Lal*, (1895) 22 Cal 1011 (1015): 22 Ind App 203: 6 Sar 660: 5 Mad L Jour 157 P C.

O. 40, R.1. Notes 37—40.

charge.[5] He is responsible not only for sums *actually* received by him but also for all such sums which he might have received but for his default or negligence.[6] A *party* appointed receiver is liable to account in the same way as a stranger so appointed.[7]

It is not right, when considering the accounts submitted by the receiver, to go into the question of the liability to account for periods other than the period covered by the account itself.[8] Nor does the question of bad management by the receiver arise when he submits his accounts for being passed.[9]

The accounts of the receiver can be examined only by *the Court appointing him.*[10] And where it has over-ruled the objections of a party impugning the accounts and passed them, a suit will not lie against the receiver for damages for negligence, etc., based on allegations which have already been considered and overruled by the Court.[11]

See also Note 3 to R. 3, *infra.*

38. **Liability of receiver and that of an executor or trustee.**—A trustee or executor is not personally liable for debts incurred by him in the course of the management of the estate, but a receiver is personally liable for such debts.[1]

39. **Liability to criminal prosecution.**—A receiver of property cannot be prosecuted for criminal breach of trust in respect of the property without the sanction of the Court appointing him.[1] The same rule applies to any other offence committed by the receiver in his capacity of receiver.[2] But where the offence committed by the receiver has nothing to do with the office held by him the Court's sanction is not necessary for his prosecution.[3]

40. **When appointment takes effect.**—Where the order appointing a person as receiver requires him to give security so that the order is conditional on the security being given, the appointment is not complete till such security is given.[1] But the Nagpur Judicial Commissioner's Court has held in the undermentioned case[2] that the appointment of the receiver is complete on the

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(5) *Harihar Mukerjee v. Jaharaddin,* 1921 Cal 516 (516): 26 Cal W N 992: 62 Ind Cas 768; *Mohini Mohan v. Baroda Kanta,* (1911) 12 Ind Cas 780 (790): 14 Cal L Jour 445.

(6) *Ooomar Sattya Sankar Ghosal v. Ranee Gopalmonee Dabee,* (1901) 5 Cal W N 223 (228).

(7) *Mt Nag Kuer v. Sham Lal,* 1925 P C 257 (259): 23 All L J 1045: 92 Ind Cas 274: 1926 Mad W N 101: 23 Mad L W 628: 7 Pat L Tim 275 P C.

(8) *Samhautta Singh v. Bhagwanti Singh,* (1920) 55 Ind Cas 15 (16): 5 Pat L Jour 97: 1920 Pat H C C 121.

(9) *Haji Teller Rahman v. Golam Gone,* 1924 Cal 1063 (1064): 40 Cal L Jour 28: 82 Ind Cas 419.

(10) *Ganesh Lal v. Kumar Satya Narayan Singh,* (1920) 54 Ind Cas 207 (209): 4 Pat L Jour 636: 1920 Pat H C C 35.

(11) *Shrinivas Kuppuswami Mudaliar v. Waz,* (1921) 59 Ind Cas 421 (428): 22 Bom L R 1126: 45 Bom 99.

Note 38.

(1) *Mohari Bibi v. Shyama Bibi,* (1903) 30 Cal 937 (943, 944): 7 Cal W N 799.

Note 39.

(1) *Santok Chand v. Sugan Chand,* (1918) 46 Ind Cas 836 (840): 46 Cal 432: 22 Cal W N 910: 28 Cal L Jour 115.

(2) *Ananth Nath Dey v. Mohendra Nath,* (1913) 15 Ind Cas 489 (490, 491): 13 Cr L Jour 489 [Defamation].

(3) *Nagendra Nath v. Jogendra Nath,* (1912) 15 Ind Cas 491 (492).

Note 40.

(1) *Srinivas v. Kesho,* (1911) 12 Ind Cas 745 (750): 14 Cal L Jour 489.

(2) *Deobax v. Kalu Ram,* 1924 Nag 136 (137): 7 Nag L Jour 16: 78 Ind Cas 811.

O. 40, R. 1. Notes 40—43.

passing of the *order* of appointment although he may not be able to take actual possession of the property until security is approved.

Where there is *no direction* as to security and the order appointing the receiver is *unconditional*, it takes effect immediately it is made.[3] But the *transfer of the property* to the receiver's possession, actual or constructive, and the confirment of *special powers* on him require specific orders under Cls. (*b*), (*c*) and (*d*) of the rule.[4]

41. Security to be given by receiver.—R. 3, *infra* requires a receiver *inter alia*, to furnish such security as the Court thinks fit. As to whether the appointment of a receiver is complete before the payment of security, *see* Note 40.

42. Receiver's lien.—A receiver has a lien on the estate for all his just claims and allowances.[1] "On this principle it follows that a Court will not compel a receiver who has been discharged, to make over the property in his possession until his lien has been satisfied or provided for by a sufficient indemnity".[2]

43. Remedy of third party aggrieved by receiver's action.—A third person feeling aggrieved by the receiver's conduct has, ordinarily two remedies:—

(1) He may apply to the Court in the very suit in which the receiver has been appointed for a summary order against the receiver;

(2) He may, with the leave of such Court, sue the receiver.

The more proper and usual mode is by applying to the Court for summary relief. This is done by the aggrieved person applying to the Court for permission to come in and be examined *pro interesse suo* (for his own *interest*). If no question of title is involved and if the applicant has shown diligence, the Court will decide the matter on such an application. But otherwise, it will refer the third person to a separate suit against the receiver.[1] Where debatable questions, not easy to be dealt with at the passing of the receiver's accounts, are involved, the Court will decline to go into them in summary proceedings in the suit itself.[2]

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[3] *Srinivas* v. *Kesho*, (1911) 12 Ind Cas 745 (750): 14 Cal L Jour 489; *Bhairab* v. *Benoy Chandra*, (1919) 43 Ind Cas 804 (806): 22 Cal W N 520: 27 Cal L Jour 395: 46 Cal 70. *Pala Mal* v. *Tek Chand*, 1902 Pun L R 61.

[4] *Ramkrishna* v. *Ganpati*, 1923 Nag 6 (6): 68 Ind Cas 432.

Note 42.

[1] *Moran* v. *Muttu Bebee*, (1876) 2 Cal 58 (70): 1 Ind Jur 337; *Premlall Mullick* v. *Sumbhoonath Roy*, (1895) 22 Cal 960 (973).

[2] *Premlall Mullick* v. *Sumbhoonath Roy*, (1895) 22 Cal 960 (973).

Note 43

[1] *K K Secunder* v. *J A M Kasaiyar & Co.* 1923 Rang 208 (208): 1 Rang 138: 76 Ind Cas 441; *Thavasimuthu* v. *Balguru Swami*, 1923 Mad 304 (305, 306): 17 Mad L W 64: 70 Ind Cas 673; *Kamatchi* v. *Sundaram*, (1903) 26 Mad 492 (493); *Sreedhar Chaudhury* v. *Nilmoni Chowdhury*, 1925 Cal 681 (683): 41 Cal L Jour 197: 86 Ind Cas 677; *E M & Agency Co* v. *Fazlul Karim*, 1926 Cal 385 (394): 52 Cal 914: 41 Cal L Jour 571: 90 Ind Cas 851; *Ramaswamy Pillai* v. *Janaki Ammal*, 1923 Mad 129 (130): 1922 Mad W N 725: 16 Mad L W 833: 32 Mad L Tim 96: 69 Ind Cas 393; *Amulya Chandra Bhaduri* v. *Kashi Nath Missir*, 1927 Pat 297 (298, 299): 8 Pat L Tim 629: 102 Ind Cas 797; *Mohamed Medhi* v. *Zoharra*, (1890) 17 Cal 285 (287) [On the original side of Calcutta High Court, persons not parties to the suit may establish their rights by motion]. See also *Hazarimull Hiralal* v. *Sadasukh Parruck & Co*, 1925 Cal 750 (752): 41 Cal L Jour 371: 88 Ind Cas 808 [*Held*, in the circumstances of the case that the declaration asked for could not be granted in summary proceedings]. But see *Bissessuree Debi* v. *Sookram Das Mohunt*, (1871) 15 Suth W R 347 (348) [Acts of Collector done by him in his capacity of Receiver, in seizing and retaining certain property under his care cannot be disputed by way of motion to discharge or to get rid of the attachment].

[2] *Eastern Mortgage and Agency Co, Ltd* v. *Fazlul Karim*, 1926 Cal 385 (394): 52 Cal 914: 41 Cal L Jour 571: 90 Ind Cas 851.

O. 40, R.1,
Notes
44—46.

44. **Receiver, if and when a necessary party to a suit.**—In a suit for *money* against the representatives of a deceased person, the receiver holding possession of the deceased's estate is not a necessary party.[1] Nor is he a necessary party in *every suit* concerning the property of which he is the receiver.[2] Thus he is not a necessary party to a suit between third parties for declaration of title to, and possession of, the property in his charge.[3] In such cases, if the plaintiff obtains a decree he can go to the executing Court, obtain the leave of that Court to execute the decree against the property in his hands and then enforce the decree.[4] Where, however, the property in the hands of the receiver is intended to be affected by the result of the suit and the possession of the receiver or the jurisdiction of the Court is intended to be interfered with, leave of the Court must be obtained and the receiver made a party.[5] Thus the receiver is a proper party to proceedings for the sale of property in the receiver's hands in execution of a decree for sale on a mortgage.[6]

A receiver cannot be added as a party to proceedings under the Criminal Procedure Code.[7]

45. **Notice to opposite party if necessary before appointment.**—Notice to the other side is not indispensable in *every* case before a receiver is appointed. The very object of appointing a receiver may be defeated in many cases if notice were insisted on.[1] Hence, in emergent cases a receiver may be appointed without notice to the opposite side.[2] But except for very special reasons notice should not be excused before an order is made for such appointment.[3]

46. **Appointment of new receiver in place of old receiver.**—Where a receiver ceases to hold the office of receiver pending a suit filed by him, the suit does not abate but may be continued by his successor in office.[1] *See* Note 31, *supra* as to a present receiver's power to sue a former receiver for acts done by the latter during his tenure of office as receiver.

Note 44.

[1] *N H Moos* v. *Abdul Husain*, 1925 Bom 523 (523, 524): 27 Bom L R 1147: 90 Ind Cas 600.

[2] *Administrator-General of Madras* v. *Dasai Goundan*, (1911) 10 Ind Cas 673 (674): 9 Mad L Tim 300; *A Veeraputhra Daven* v. *Vaidalingum Daven*, 1893-1900 L B R 432 [Attachment—Mortgage decree—Attachment before judgment in suits for money decrees in Subordinate Court—Lien upon crop by labourers—Joinder of Receiver as defendant].

[3] *Rodger* v. *Ashutosh*, (1902) 6 Cal W N 829 (829); *Suttya* v. *Golap*, (1901) 5 Cal W N 27 (28); *Madheva Surendra Sahi* v. *Awadh Missir*, 1923 Pat 86 (87): 3 Pat L Tim 316: 65 Ind Cas 349.

[4] *Administrator-General of Madras* v. *Dasai Goundan*, (1911) 10 Ind Cas 673 (674): 9 Mad L Tim 300; *N H Moos* v. *Abdul Husain*, 1925 Bom 523 (523, 524): 27 Bom L R 1147: 90 Ind Cas 600; *Rodger* v. *Ashutosh*, (1902) 6 Cal W N 829 (829); *Suttya* v. *Golap*, (1901) 5 Cal W N 27 (28).

[5] *Jatindra Nath* v. *Sarfaraz Meah*, (1910) 6 Ind Cas 214 (215): 14 Cal W N 653; *Banku Behary Dey* v. *Harendra Nath Mukherjee*, (1910) 8 Ind Cas 1 (2): 15 Cal W N 64; *Tohra Bibi* v. *Zabeda*, (1910) 7 Ind Cas 75 (76): 12 Cal L Jour 368.

[6] *Fraser and Ross* v. *Krishnaswami Iyer*, 1923 Mad 144 (146): 47 Mad 47: 1922 Mad W N 745: 43 Mad L Jour 211: 16 Mad L W 322: 31 Mad L Tim 290: 71 Ind Cas 298; *Madhewa Surendra Sahi* v. *Awadh Missir*, 1923 Pat 86 (87): 3 Pat L Tim 316: 65 Ind Cas 349.

[7] *Dunne* v. *Kumar Chandra Kisore*, (1903) 30 Cal 593 (598): 7 Cal W N 390.

Note 45.

[1] *Mt Ishri* v. *Shib Ram*, 1923 Lah 239 (241): 71 Ind Cas 748.

[2] *Asadali* v. *Mahammad Hassain*, (1916) 36 Ind Cas 177 (177, 178): 43 Cal 986: 20 Cal W N 1009.

[3] *Gorid Dut Bogla* v. *Perushaw Sorabshaw*, (1903-1904) 2 L B R 222; *Vasudev* v. *Rambhat*, 1883 Bom P J 160 (160).

Note 46.

[1] *Akula Paradesi*. v. *Delhi Jagannadha*, (1905) 28 Mad 157 (160). See *Lalman* v. *Gopinath*, (1921) 61 Ind Cas 888 (889) All [Receiver defendant—Dying pending suit—Can be continued against successor].

O. 40, R.1,
Notes
47—48.

47. **Joint receivers.**—It is competent to a Court under this rule to appoint two or more persons as joint receivers of the same property. In such a case, the retirement or resignation of one of the receivers does not put an end to the order appointing a receiver.[1] In a partition suit where the Court ordered the plaintiff to be in charge of one portion of the suit properties and the defendant to be in charge of the remaining portion, it was held that the order was not *ultra vires.*[2] Ordinarily, it is not open to a Court to appoint a receiver when a receiver has already been appointed in respect of the same property by another Court.[3] But a receiver can be appointed in a mortgage suit where the decree is for sale although a receiver has already been appointed in respect of the same property in a prior partition suit.[4]

48. **Duration of office of receivership.**—A Court appointing a receiver may order that the office should continue permanently or for such period as is deemed necessary.[1] It can also cancel the order of appointment at any time if it considers it necessary.[2] Even if such appointment has been made with the consent of parties,[2-a] it has an inherent power to discharge or remove the receiver appointed by it.[3] But until otherwise ordered by the Court the receiver will continue in office[4] though the suit in which he has been appointed has come to an end but the purpose of his appointment has not been achieved.[5] *A fortiori*, a receiver in a partition suit is not discharged merely by the passing of a preliminary decree in the suit.[6] A receiver in an administration suit cannot ordinarily be discharged before the completion of the administration.[6-a]

A consent order of appointment of a receiver does not prevent a party from impugning the *administration thereunder* which is of such a character as to amount to a malfeasance or to be, in substance, so protracted and imperfect as to be futile.[7]

Note 47.

(1) *Eastern Mortgage Agency Co, Ltd* v. *Premanand Saha*, (1916) 34 Ind Cas 789 (790): 23 Cal L Jour 217: 20 Cal W N 789.

(2) *Dan Prasad* v. *Gopi Kishen*, (1914) 22 Ind Cas 59 (60): 36 All 19: 11 All L J 973.

(3) *Sridhar Chowdhury* v. *Mugniram Bangar*, 1924 Pat 491 (495): 1924 Pat H C C 54: 3 Pat 357: 5 Pat L Tim 243: 78 Ind Cas 620.

(4) *Khubsarat Koer* v. *Sarada Charan Guha*, (1911) 12 Ind Cas 165 (165, 166): 14 Cal L Jour 526: 16 Cal W N 126.

Note 48.

(1) *Mathusri* v. *Mathusri Dipamba*, (1896) 19 Mad 120 (127): 23 Ind App 28: 6 Sar 684 P C.

(2) *Ranganayagammal* v. *Mahali Pillai*, (1907-1908) 4 L B R 356.

(2-a) *Venkatalingama Nayanim Varu* v. *Venkatarama Rao*, 1921 Mad 234 (234): 13 Mad L W 367: 29 Mad L Tim 175: 1921 Mad W N 178: 61 Ind Cas 562 [May be discharged before termination of proceedings if no injury to the estate would result by this course].

(3) *Subramanya Iyer* v. *Muthulakshmiammal*, (1912) 17 Ind Cas 583 (584): 1912 Mad W N 1208.

(4) *Shankar Das* v. *Beharilal*, 1925 Lah 445 (446): 7 Lah L Jour 239: 6 Lah 442: 89 Ind Cas 932: 26 Pun L R 564 [Although circumstances have rendered the appointment nugatory]; *Duraivelu Mudaliar* v. *Audikesavalu*, 1924 Mad 557 (558): 19 Mad L W 388: 34 Mad L Tim 90: 1924 Mad W N 235: 46 Mad L Jour 343: 78 Ind Cas 133.

(5) *Manikam Pillai* v. *Kuppa Goundan*, (1916) 33 Ind Cas 69 (70) Mad; *Shankar Das* v. *Behari Lal*, 1925 Lah 445 (446): 7 Lah L Jour 239: 26 Pun L R 564: 6 Lah 442: 89 Ind Cas 932; *Doraivelu Mudaliar* v. *Audikesavalu Naidu*, 1924 Mad 557 (558): 46 Mad L Jour 343: 19 Mad L W 388: 1924 Mad W N 235: 34 Mad L Tim 90: 78 Ind Cas 133; *Muthu Vira Reddi* v. *Mayandi Venkatesa Mudali*, 1930 Mad 67 (68): 57 Mad L Jour 668: 30 Mad L W 713: 1929 Mad W N 739: 52 Mad 967: 120 Ind Cas 563; *Nadirshaw* v. *Purushottam Das*, 1929 Bom 279 (280): 31 Bom L R 320: 118 Ind Cas 694; *Bepin Behari Bose* v. *Bonnerjee*, 1921 Cal 422 (423): 70 Ind Cas 104: 26 Cal W N 361 [Conditional discharge—Condition not fulfilled—Receiver's powers continue].

(6) *Shankar Das* v. *Beharilal*, 1925 Lah 445 (446): 7 Lah L Jour 239: 6 Lah 442: 89 Ind Cas 932: 26 Pun L R 564.

(6-a) *Bhugwandas Sureka* v. *Heera Lal*, (1901) 5 Cal W N 417 (419); In the Goods of *Lachminarain Boda*, (1901) 5 Cal W N cclxi (cclxii).

(7) *Rameshwar Singh* v. *Hitendra Singh*, 1924 P C 202 (206): 5 Pat L Tim 491: 20 Mad L

O. 40, R. 1, Notes 48—49.

The removal of a receiver is a matter of discretion to be exercised by the Court with care after due and proper enquiry. A receiver should not be dismissed summarily merely at the instance of one of the parties.[8] The burden of proving the circumstances justifying the removal is on the party applying for such removal.[9] Where incapacity on the part of the receiver is alleged it should be clearly proved.[10] A receiver may be removed for partiality.[11]

A Court which appoints a receiver has authority to pass orders necessary to wind up his charge even though the suit has been disposed of.[12] It can also examine the receiver's accounts and pass all necessary orders.[13]

Where the receivership is put an end to pending a suit filed by the receiver, the party ascertained to be the true owner can continue the suit.[14]

Where a claim for restitution is made on the cancellation of an order of appointment of a receiver, the Court will not, in ordering restitution, consider the fact that the receiver's appointment was to the applicant's advantage.[15]

Where any property in the receiver's possession is duly sold away to another, the receiver cannot be allowed to continue in possession.[16]

49. Court may remove any person from the possession or custody of property.—The rule empowers the Court to remove any person from the possession of property in respect of which a receiver has been appointed. The only case in which the receiver's possession can be resisted is that provided for by sub-R. (2) according to which the Court has no power to deprive a *third* person of the possession of any property when no party to the suit has a present right to do so.[1] When therefore a third person in possession of property in respect of which a receiver has been appointed objects to deliver possession to the receiver, the Court must hold an enquiry into his claim with a view to ascertain if he was under a present liability to be removed from the possession of the property.[2]

W 456: 35 Mad L Tim 182: L R 5 P C 175: 40 Cal L Jour 431: 1 Oudh W N 457: 81 Ind Cas 576: 26 Bom L R 1153: 29 Cal W N 413, 22 All L J 968: 3 Pat L R 180: 47 Mad L Jour 286 P C.

(8) *Huree Sunkur* v. *Jogendro Coomar*, (1873) 19 Suth W R 66 (67).

(9) *Rukmani Ammal* v. *Advocate-General of Madras*, (1915) 31 Ind Cas 908 (909): (1916) 1 Mad W N 10.

(10) *Ramkumar Mahadev* v. *Ashutosh Ghatwal*, 1929 Pat 114 (115): 115 Ind Cas 881.

(11) *Sripati Datta* v. *Bibhuti Bhusan Datta*, 1926 Cal 593 (595), 53 Cal 319: 92 Ind Cas 940.

(12) *Ganga Ram* v. *Natha Ram*, 1924 Lah 583 (584): 75 Ind Cas 858. But compare *Yaminddowlah* v. *Ahmed Ali*, (1894) 21 Cal 361 (365) [Suit dismissed—In the interval before filing of appeal Court has no power to make order restraining Receiver from parting with the funds in his hands pending an appeal].

(13) *Administrator-General of Bengal* v. *Prem Lall Mullick*, (1895) 22 Cal 1011 (1015, 1016): 22 Ind App 203: 6 Sar 660: 5 Mad L Jour 157 P C: *Grey* v. *Woogra Mohun Thakur*, (1901) 28 Cal 790 (794).

(14) *Macleod* v. *Kissan Vithal Singh*, (1906) 30 Bom 250 (258): 6 Bom L R 995.

(15) *M S Naikwara* v. *Ma Aya Byu*, 1924 Rang 181 (181): 1 Rang 770: 79 Ind Cas 724.

(16) *Ganshan Das* v. *Raja of Kalahasti*, (1915) 28 Ind Cas 551 (552): 1915 Mad W N 247: 2 Mad L W 326.

Note 49.

(1) *Mahamed Kasim* v. *Panchapakesa Chetti*, (1912) 17 Ind Cas 233 (234, 235): 35 Mad 578; *Bhagwan Das* v. *Manindra Chandra*, 1927 Pat 397 (398): 8 Pat L Tim 717: 104 Ind Cas 295; *Kumaraswami Pillai* v. *Pasupathia Pillai*, (1921) 61 Ind Cas 605 (607, 608): 12 Mad L W 254.

(2) *Ranganayagammal* v. *Mahali Pillai*, (1907-1908) 4 L B R 356; *Rowland Hudson* v. *John Pierpont Morgan*, (1909) 1 Ind Cas 356 (358): 36 Cal 713: 9 Cal L Jour 563: 13 Cal W N 654; *Hamida Rahaman* v. *Jamila Khatun*, 1921 Cal 298 (299): 34 Cal L Jour 123: 65 Ind Cas 837; *Ramaswami Pillai* v. *Janaki Ammal*, 1923 Mad 129 (130): 1922 Mad W N 725: 16 Mad L W 833: 69 Ind Cas 393: 82 Mad L Tim 96.

O. 40, R.1, Notes 49—50

It has been held by the High Court of Calcutta that the person in possession of the property though he may have a right to continue in possession cannot interfere with the receiver but should apply to the Court for redress and that otherwise he will be guilty of contempt of Court.[3] According to the High Court of Patna on the other hand the third party in possession is not bound to deliver possession to the receiver pending the enquiry into his claim.[4]

Sub-R. (2) applies only to *third* persons in possession of the property and is no bar to the removal of any *party* to the suit, for possession.[5] Thus a mortgagee decree-holder who is in possession of the mortgaged property under an arrangement with the judgment-debtor for the liquidation of the mortgage debt is not entitled to possession as against a receiver who is subsequently appointed.[6]

The rule does not empower a Court to authorise a receiver to enter upon immovable property in the possession of another person without his consent, in order to take an inventory of such property as the plaintiff may indicate as the property in dispute.[7] The Court, instead of actually evicting the party in possession, may order him to pay the receiver a certain occupation rent.[8]

Sub-R. (1) (*b*) refers to the removal of persons *other than the receiver*. Hence, an order removing a receiver does not fall under Cl. (*b*).[9]

50. Summary jurisdiction.—A Court has power to enforce summarily a contract made by the receiver.[1] But where a lease has been granted by the receiver and the lessee has been put in possession, the lease cannot be set aside in summary proceedings.[2] Where a judgment-debtor took a sum of money from the receiver and refused to pay it back, it was held that the Court could order repayment and that such order could be enforced as a decree.[3] Although,

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(3) *Mr P Roy Choudhury* v. *Nolini Prokash Sen*, (1914) 22 Ind Cas 417 (419): 18 Cal W N 289: 15 Cr L Jour 65.

(4) *Inderdeo Narain Singh* v. *Gouri Shanker*, (1918) 45 Ind Cas 177 (178): 1918 Pat H C C 138: 4 Pat L W 414; *Mussamat Dulhin Sona Kuer* v. *Jamil Ahmed*, (1918) 48 Ind Cas 779 (781) Pat; *Bhagwandas Marwari* v. *Manindra Chandra Nandi*, 1927 Pat 397 (398): 8 Pat L Tim 717: 104 Ind Cas 295.

(5) *Ajapa Natesa Pandarasannadhi* v. *Ramalingam Pillai*, (1913) 20 Ind Cas 767 (767): 24 Mad L Jour 658; *Satya Narayan* v. *Keshabati*, (1914) 25 Ind Cas 406 (407): 18 Cal W N 537: *Amarnath* v. *Mt Tehal Kaur*, 1922 Lah 444 (446): 67 Ind Cas 383; *Paras Ram* v. *Puran Mal Ditta Mal*, 1925 Lah 590 (591); 85 Ind Cas 737; *Punjab National Bank, Ltd* v. *Moosaji Jafferji*, 1927 Sind 230 (231): 102 Ind Cas 353; *Babarao* v. *Narayanrao*, 1929 Nag 283 (284): 119 Ind Cas 687; *Tythilinga Pandarasannadhi* v. *Board of Control*, 1932 Mad 193 (195): 61 Mad L Jour 904: 35 Mad L W 22: 136 Ind Cas 771. See however *Kumarasawmi Pillai* v. *Pasupathia Pillai*, (1921) 61 Ind Cas 605 (607): 12 Mad L W 254 ["Any person" in sub-R (2) not confined to non-parties—*Per* Spencer, J]. But see contra *Gobind Ram* v. *Jwala Prasad*, (1918) 43 Ind Cas 533 (534) All.

(6) *Rameshar Singh* v. *Hitendra Singh*, 1924 P C 206 (207): 35 Mad L Tim 179: 22 All L J 968: 40 Cal L Jour 444: 82 Ind Cas 794: 26 Bom L R 1161: 20 Mad L W 437: L R 5 P C 188: 29 Cal W N 420: 3 Pat L R (Civ) 190: 47 Mad L Jour 294 P C. *Hitendra Singh* v. *Maharaja Sir Rameshwar Singh Bahadur*, 1921 Pat 43 (44): 2 Pat L Tim 593: 6 Pat L Jour 37: 61 Ind Cas 67.

(7) *Mussammat Mai Gujri* v. *Diwan Amar Nath* 1891 Pun Re No 69.

(8) *Ram Lochun* v. *Hogg*, (1868) 10 Suth W R 430 (431).

(9) *Sripathi Dutta* v. *Bibhuti Bhusan Dutta* 1926 Cal 593 (594): 53 Cal 319: 92 Ind Cas 940; *Ramaswami Naidu* v. *Ayyalu Naidu*, 1924 Mad 614 (614). 46 Mad L Jour 196: 19 Mad L W 247: 34 Mad L Tim 6; 78 Ind Cas 625.

Note 50.

(1) *Surendro* v. *Doorgasoondery*, (1888) 15 Cal 253 (258, 259).

(2) *Keshta Chandra Ghose* v. *Krista Sakha Ghose*, (1909) 1 Ind Cas 470 (471): 36 Cal 52: 12 Cal W N 1023. But see *Meyappa* v. *Nagammai Achi*, 1933 Mad 67 (69): 1932 Mad W N 1154: 36 Mad L W 651: 140 Ind Cas 281: 5 Mad Cr Cas 337: 33 Cr L Jour 956: 1933 Cr Cas 111 [Receiver appointed by criminal Court under S 146, Cr P C till decision of civil Court—Lease by him to one of the parties by practice of fraud on Court—Summarily set aside. 36 C 52 Dist 1929 Cal 828 appr]

(3) *Chandra Shekar Prasad* v. *Harendra Sahi*, (1911) 10 Ind Cas 898 (899): 15 Cal L Jour 254

O. 40, R. 1, Notes 50—51.

ordinarily, proceedings for contempt are started at the instance of the parties and not of the receiver, there is nothing in law to prevent the receiver from applying for process for contempt.[4]

51. **Appeal.**—Under O. 43, R. 1 (*s*) an appeal lies from an order under O. 40, R. 1 or R. 4. An order under R. 1 may be one either *appointing* a receiver or may be one *refusing to appoint* a receiver. In either case the order will be appealable.[1] The High Court of Calcutta has, in *Sripati Datta* v. *Bibhuti Bhusan Datta*[2] held that the power to appoint includes a power to *remove* and that therefore an order removing the receiver is an order under O. 40, R. 1 and is therefore appealable. The same High Court has held however, in earlier cases[3] that a *refusal to remove* a receiver is not an order either under R. 1 or R. 4 and is not appealable. The same view has been held by the High Court of Madras.[4] The High Court of Allahabad has dissented from the Calcutta view in *Sripati Datta's* case and has held that an order removing a receiver from office is not appealable.[4-a]

O. 40, R. 1 is a general provision and even an order appointing or refusing to appoint a receiver in *execution proceedings* falls under O. 40, R. 1, and therefore is appealable as an *appealable order* and not as a *decree*.[5] The reason is that the definition of a "decree" in S. 2, sub-S. (2) does not include an appealable order though it may fall within the terms of S. 47. It has been held by the High Court of Bombay that an order in execution proceedings *refusing to remove* a receiver comes within S. 47 of the Code and is appealable as a decree.[6]

It is only a *final* order of appointment or refusal that is appealable. Where an *ex parte* order is confirmed by a second order, an appeal lies only from the latter order.[7] An order appointing a receiver subject to his furnishing security is not complete or final till the security is given and is not appeal-

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(4) *Grey* v. *Woogramohan Thakur*, (1901) 28 Cal 790 (793).

Order 40, Rule 1—Note 51.

(1) *Rajah Mahomad Sardar Hussain Khan* v. *Nowroji & Co*, (1898) 1 Oudh Cas 168 (169) [Appointing a receiver]; *Nrisinga Charan Nandy* v. *Rajniti Prasad Singh*, 13 Pat L Tim 525 (526, 527). 1932 Pat 360, (Do); *Mt Chandra Wati* v. *Jagannath*, 1925 Lah 489 (489): 7 Lah L Jour 281: 26 Pun L R 576: 90 Ind Cas 611 [Appointing receiver in proceedings under Guardian and Wards Act]; *Godoobai* v. *Janabai*, 1929 Nag 119 (119, 120): 116 Ind Cas 642 [Appointing receiver in proceedings under the Guardian and Wards Act]; *Sangappa* v. *Shivabasappa*, (1900) 24 Bom 38 (40): 1 Bom L R 502 [Refusing to appoint]; *Boidyanath* v. *Makhanlal*, (1890) 17 Cal 680 (682), (Do.); *Venkatasami* v. *Siridavamma*, (1886) 10 Mad 179 (184), (Do.) [Overruling 6 Mad 355 (358)]; *Dulmir* v. *Het Narain*, (1880) 6 Cal L Rep 467 (468), (Do.); *Khagendar Narain* v. *Shashadar Jha*, (1904) 31 Cal 495 (498): 8 Cal W N 608, (Do.); *Sant Ram* v. *Ram Chand*, 36 Pun Re 1910: 72 Pun L R 1910: 53 Pun W R 1910: 6 Ind Cas 659, (Do.); *Lachmi* v. *Ram Charan*, (1913) 20 Ind Cas 653 (654): 11 All L J 613: 35 All 425, (Do.); *Cursetji Dinshaw Bolton* v. *Gangaram Limbaji Gaikwad*, (1915) 30 Ind Cas 545 (546): 17 Bom L R 680, (Do.); *Muni Lal* v. *Jagannath*, (1916) 33 Ind Cas 735 (735) All, (Do.); *Manindra Chandra* v. *Sunili Bala Debi*, 1926 Cal 1006 (1008): 95 Ind Cas 632, (Do.).

(2) 1926 Cal 593 (594): 53 Cal 819: 92 Ind Cas 940. But see *Saran Das* v. *Gulab Das*, (1903) 23 All W N 67 (68).

(3) *Eastern Mortgage Agency & Co, Ltd* v. *Permanand Saha*, (1916) 34 Ind Cas 789 (790): 23 Cal L Jour 217: 20 Cal W N 789; *Sahab Jada* v. *Fakir*, (1914) 24 Ind Cas 862 (863) Cal.

(4) *Ramaswamy Naidu* v. *Aiyavu Naidu*, 1924 Mad 614 (614): 46 Mad L Jour 196: 19 Mad L W 247: 34 Mad L Tim 6: 78 Ind Cas 625.

(4-a) *Anthony Ullyxess John* v. *Agra United Mills, Ltd*, 1931 All 72 (78): 1931 All L J 13: 184 Ind Cas 454.

(5) *Atta Ullah Khan* v. *Bala Mal*, 1927 Lah 190 (190): 100 Ind Cas 298; *Shridevi Amma* v. *Valia Narayan*, 1929 Mad 20 (21): 114 Ind Cas 839 [Dissenting from 1928 Mad W N 890]; *Srinivas Prosad* v. *Kesho Prosad*, (1911) 12 Ind Cas 745 (750): 14 Cal L Jour 489; *Hemendra Nath* v. *Prokash Chandra*, 1932 Cal 189 (193): 35 Cal W N 1066.

(6) *Mithibai* v. *Limji*, (1881) 5 Bom 45 (48): 5 Ind Jur 424.

(7) *Bidja Prosad Narain Singh* v. *Asrafi Singh*, (1913) 20 Ind Cas 269 (271): 40 Cal 862: 17 Cal W N 1070.

O. 40, R.1, Note 51.

able till then.[8] Suppose instead of *actually appointing* a receiver the Court simply makes an order that a receiver should be appointed adjourning the case to a future date does an appeal lie from such an order? Yes, according to the High Courts of Madras,[9] Lahore[10] and Patna.[11] No according to the High Courts of Allahabad,[12] Calcutta,[13] Bombay[14] and the Judicial Commissioner's Court of Sind.[15] An order merely expressing an intention of appointing a receiver and calling upon the parties to suggest names is not appealable.[16]

Where the effect of an order of appointment of a receiver and the directions given to him, is to remove any third person from the possession or custody of any property, it is an order under Cl. (*b*) of this rule and is open to appeal by such third party.[17] But a third party who is not in possession or custody of any property has no right of appeal against an order dismissing his objection to the appointment of a receiver inasmuch as there is no question of *removing him* from any possession of any property.[18]

An order under Cl. (*d*) of the rule giving directions as to the disposal of the income of the property, is appealable under O. 43, R. 1 (*s*).[19] But an order giving certain directions to the receiver in *passing his accounts,* does not fall under this rule but under R. 3 and hence is not appealable.[20] There is no right of appeal in the following cases:—

(*a*) An order that the receiver is liable to account for only one year;[21]
(*b*) an order for the examination of the receiver's accounts;[22]
(*c*) an order granting leave to sue the receiver[23] and

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(8) *Raja Shyam Lal* v. *Raj Kumar Thakur,* 1927 Cal 253 (255): 45 Cal L Jour 63: 31 Cal W N 285: 100 Ind Cas 140; *Srinivasa Prosad* v. *Kesho Prosad,* (1911) 12 Ind Cas 745 (751): 14 Cal L Jour 489.

(9) *Palaniappa Chetty* v. *Palaniappa Chetty,* (1917) 40 Ind Cas 185 (189): 40 Mad 18: 5 Mad L W 776: 32 Mad L Jour 304: 1917 Mad W N 393.

(10) *Firm, Raghbir Singh Jaswant Singh* v. *Narinjan Singh,* 1923 Lah 48 (50): 72 Ind Cas 569.

(11) *Gobind Ram* v. *Ganesh Ram,* 1922 Pat 577 (579): 69 Ind Cas 929: 4 U P L R (Pat) 68: 1 Pat 625: 1922 Pat H C C 250: 1 Pat L R 161: 4 Pat L Tim 210; *Nrisinga Charan* v. *Rajniti Prasad,* (1932) 13 Pat L Tim 525 (526, 527): 1932 Pat 360.

(12) *Ramji* v. *Koman Das,* (1915) 27 Ind Cas 646 (1): 13 All L J 79. See *Kanhaiya* v. *Kanhaiya Lal,* 1924 All 376 (377): 46 All 372: 22 All L J 345: 5 L R A Civ 238: 79 Ind Cas 363.

(13) *Upendra Nath* v. *Bhupendra Nath,* (1911) 9 Ind Cas 582 (1): 13 Cal L Jour 157; *Srimathi Mathuria Debi* v. *Shib Dayal Singh Hazari,* (1909) 3 Ind Cas 430.

(14) *Narbadashankar* v. *Kevaldas,* (1915) 29 Ind Cas 504 (504): 17 Bom L R 510.

(15) *Teoomal* v. *Giyanomal,* 1927 Sind 202 (202): 102 Ind Cas 176.

(16) *Muhammad Askari* v. *Nisar Husain,* (1920) 54 Ind Cas 520 (1): 18 All L J 212: 2 U P L R (A) 95.

(17) *Ramswarup* v. *Raghu Nandan,* 1924 Nag 165 (166): 78 Ind Cas 1031; *Ramaswamy* v. *Janaki Ammal,* 1923 Mad 129 (130): 1922 Mad W N 725: 16 Mad L W 833: 69 Ind Cas 393: 32 Mad L Tim 96; *Rowland Hudson* v. *John Pierpont Morgan,* (1909) 1 Ind Cas 356 (358): 36 Cal 713: 9 Cal L Jour 563: 13 Cal W N 654; *Agabeg* v. *Sundari,* (1918) 48 Ind Cas 133 (134): 3 Pat L Jour 573; *Dulhin Sona Kuar* v. *Jamil Ahmad,* (1918) 48 Ind Cas 779 (782) Pat. But see *Inderdeo Narain Singh* v. *Gouri Shankar,* (1918) 45 Ind Cas 177 (178): 1918 Pat H C C 138: 4 Pat L W 414.

(18) *Jai Indra* v. *Baldeo Singh,* 1928 Oudh 295 (296): 5 Oudh W N 463: 110 Ind Cas 410.

(19) *Anand Das* v. *Ram Prakash Das,* (1910) 5 Ind Cas 69 (69): 14 Cal W N 183. [Directions as to disposal of rent—No appeal]; *Eastern Mortgage and Agency Co, Ltd* v. *Fakuruddin Muhammad Chowdhury,* (1912) 17 Ind Cas 849 (851) [Order to receiver to pay certain sum of money to mortgagor to enable latter to appeal—Order is appealable]; *Komalathammal* v. *Srinivasachariar,* (1912) 14 Ind Cas 277 (278). 11 Mad L Tim 383 [Order to receiver to pay maintenance to appellant is appealable]. But see *Mt Ishri* v. *Shib Ram,* 1923 Lah 239 (240): 71 Ind Cas 743 [Point conceded]. *Also Kapurchand* v. *Narinjan Lal,* 1895 Pun Re No 107.

(20) *Mohini* v. *Ram Narain,* (1911) 12 Ind Cas 780 (785): 14 Cal L Jour 445; *Keshabati Kumari* v. *W O MacGregor,* (1908) 35 Cal 568 (570): 12 Cal W N 648.

(21) *Samhantta Singh* v. *Baghawati Singh,* (1920) 55 Ind Cas 15 (16): 5 Pat L Jour 97: 1920 Pat H C C 121.

(22) *Shamal Dhone* v. *Lakshimoni Dabi,* (1911) 6 Ind Cas 323 (324): 13 Cal L Jour 459; *Sriniwas* v. *Wazi,* (1920) 59 Ind Cas 421 (423): 1921 Bom 427: 22 Bom L R 1126: 45 Bom 99.

(23) *Srinivasa Kuppusamy* v. *Waz,* 1921 Bom 427 (428): 22 Bom L R 1126: 45 Bom 99; 59

O. 40, R.1, Note 51.

(*d*) an order raising the receiver's remuneration.[24]

But an order *passing* the receiver's accounts[25] or an order that the receiver should pay into Court a sum of money for loss caused by his neglect and directing the security furnished by him to be proceeded against in default[25-a] will be one falling under R. 4 and will thus be appealable.

There is no right of appeal to the Privy Council from an order refusing to appoint a receiver.[26]

In an appeal from an order appointing or refusing to appoint a receiver the appellate Court will not lightly interfere with the discretion of the lower Court[27] except on the ground of some overwhelming objection in point of propriety or principle[28] or on the ground that the Court was proceeding on a wrong view of the facts[29] or has failed to exercise its discretion according to legal principles.[30] The burden of showing that interference is necessary, is on the appellant.[31] Pending an appeal from an order appointing a receiver, the appellate Court can direct the receiver through the lower Court not to take any steps in pursuance of his appointment.[32]

Only those persons who are materially prejudiced by the appointment of the receiver need be made parties to the appeal. Third persons not in possession of the property are not necessary parties thereto.[33]

A party who suggests names for the receivership is not thereby estopped from objecting to the appointment of a receiver in appeal.[34]

Ind Cas 421.

(24) *Thomas Cunlif Tweedie* v. *Pokea Khatun*, (1914) 22 Ind Cas 352 (353).

(25) *Shriniras* v. *Waz*, 1921 Bom 427 (428): 45 Bom 99: 22 Bom L R 1126: 59 Ind Cas 421.

(25-a) *Gurumurthi* v. *Ramaswami*, 1931 Mad 760 (763, 767): 1931 Mad W N 830: 34 Mad L W 533: 135 Ind Cas 1: 62 Mad L Jour 199.

(26) *Chundi Datt Jha* v. *Pudmanund Singh*. (1895) 22 Cal 928 (930).

(27) *Emanjan* v. *Emanjan*, 1927 Rang 135 (135): 6 Bur L Jour 13: 100 Ind Cas 1020; *Amarnath* v. *Mt Tehal Kaur*, 1922 Lah 444 (446): 67 Ind Cas 383; 4 U P L R (Lah) 73; *Dhumi* v. *Nawab Muhammad Sajjad Ali Khan*, 1923 Lah 623 (625): 73 Ind Cas 600: 5 Lah L Jour 533: *Makhan Shah* v. *Mt Halima*, 1927 Lah 65 (65): 27 Pun L R 138: 94 Ind Cas 39; *Sant Ram* v. *Ram Chand*, (1910) 6 Ind Cas 659 (660): 53 Pun W R 1910: 36 Pun Re 1910: 72 Pun L R 1910; *Kadir Buksh* v. *Ghulam Muhammad*, (1920) 55 Ind Cas 50 (52): 2 U P L R (Lah) 56: 30 Pun W R 1920; *Kalikumari* v. *Bachhan Singh*, (1913) 19 Ind Cas 873 (873): 17 Cal W N 974; *Jambegathammal* v. *Kanakathammal*, (1914) 25 Ind Cas 645 (646) [Appeal from order of lower Court refusing to direct receiver not to spend money for certain litigation—Appellate Court not to interfere]; *Ram Sunder* v. *Kamal Jha*, (1905) 32 Cal 741 (745); *The Oriental Bank Corporation* v. *Gobind Lall Seal*, (1884) 10 Cal 713 (737); *Ghanasham* v. *Moroba*, (1894) 18 Bom 474 (193).

(28) *Monohar Das* v. *Kalyan Das*, 1924 Lah 421 (422): 69 Ind Cas 361; *Jabanessa Khatun* v. *Majidunnessa Khatun*, (1918) 18 Ind Cas 898 (400); 17 Cal W N 581; *Ramkumar Mahdev* v. *Ashutosh Ghatwal*, 1929 Pat 114 (114, 115): 115 Ind Cas 880 [But the principle applies only to cases where a receiver is appointed for the first time but not to cases in which a receiver is appointed in supersession of an old receiver].

(29) *Shiraji Rajah Saheb* v. *Aiswariyanandji Sahib*, (1915) 29 Ind Cas 485 (489): 29 Mad L Jour 209: 18 Mad L Tim 155.

(30) *Aiya Nadar* v. *Tenammal*, (1916) 35 Ind Cas 939: (1916) 2 Mad W N 256: 4 Mad L W 285; *Mikanbai* v. *Dassimal*, (1918) 45 Ind Cas 224 (226): 11 Sind L R 115; *Benoy Krishna Mukerjee* v. *Satish Chandra Giri*, 1928 P C 49 (50): 55 Ind App 131: 108 Ind Cas 848: 27 Mad L W 333: 5 Oudh W N 272: 54 Mad L Jour 423: 26 All L J 481: 47 Cal L Jour 424: 30 Bom L R 815: 32 Cal W N 681: 55 Cal 720 P C; *Jaswant Singh* v. *Punjab National Bank*, (1931) 133 Ind Cas 433 (434): 1932 Lah 82; *Kshitish Chandra* v. *Janki Nath Roy*, 1932 Cal 194 (195): 35 Cal W N 1141 [Order proceeding entirely upon what was alleged in an application made long before the passing of the preliminary and final decree in a mortgage suit and not upon circumstances existing at the time of its passing cannot be allowed to stand].

(31) *Raja Ram* v. *Sheorani Kuer*, (1910) 7 Ind Cas 344 (345) All; *Shadi* v. *Anup Singh*, (1890) 12 All 436 (438): 1890 All W N 95; *Jaipal Kunwar* v. *Indar*, (1904) 26 All 238 (243): 31 Ind App 67: 14 Mad L Jour 149: 7 Oudh Cas 239: 8 Cal W N 465: 6 Bom L R 495: 8 Sar 625 P C.

(32) *Mulchand Singh* v. *Tarni Prasad Singh*, (1920) 54 Ind Cas 222 (223): 1920 Pat H C C 40: 4 Pat L Jour 642.

(33) *Bupendranath Mookerjee* v. *Manohar Mukerjee*, 1924 Cal 456 (458): 28 Cal W N 86: 77 Ind Cas 783.

(34) *Mohammad Ashkari* v. *Nisar Husain*, (1920) 60 Ind Cas 901 (902): 19 All L J 50: 43 All 311.

The undermentioned cases[35] under S. 505 of the old Code regarding the right to appeal against an order under that section are no longer of any practical importance under the present Code as that section has been repealed.

52. **Letters Patent Appeal.**—An order appointing a receiver under R. 1 is a "judgment" and is appealable under the Letters Patent.[1] But an order directing a receiver to advance money to a guardian *ad litem* to conduct the defence on behalf of a minor defendant is not a "judgment" within the meaning of the Letters Patent and no appeal lies from the order.[2]

53. **Revision.**—An order appointing a receiver in a case in which the Court has no jurisdiction to appoint a receiver, as for instance, in a proceeding under the Succession Certificate Act, can be set aside in revision by the High Court.[1] Where an objection of a third party in possession of the property, to the appointment of a receiver was dismissed it was held by the Patna High Court that the third party had no right of appeal but could apply for revision of the order dismissing the objection.[2] In the undermentioned case, it was held by the Madras High Court, that the refusal of a Court to join a receiver as a party to proceedings for the sale of property in his hands, in execution of a decree for sale on a mortgage, was a material irregularity in the exercise of jurisdiction by the lower Court and that a revision lay.[3]

54. **Practice.**—Applications for the appointment of receivers should be made in the ordinary way by notice of motion in open Court and not in chambers.[1]

O. 40, R. 2.

Remuneration.

R. **2.** [S. 503, Cl. (*d*).] The Court *may by general or special order fix the amount to be paid as remuneration for the services of the receiver.*

[1877—S. 503.]

Local Amendment

RANGOON.

For R. 2, the following shall be *substituted*, namely:—

"2. The fees to be paid as remuneration for the services of the receiver shall be in accordance with the following scale:—

(*a*) On rents or outstandings recovered or on the proceeds of the sale of moveable or immoveable property,—unless for special reasons to be recorded, the Court orders the remuneration to be at some other rate,—5 per cent.

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[35] *Bai Mani* v. *Khimchand*, (1909) 1 Ind Cas 657 (1): 33 Bom 104: 10 Bom L R 1037: *Kayarunisa Begam* v. *Sakina Bibi*, (1910) 5 Ind Cas 991 (991): 20 Mad L Jour 78; *Sant Ram* v. *Ram Chand*, (1910) 6 Ind Cas 659 (659): 53 Pun W R 1910: 36 Pun Re 1910: 72 Pun L R 1910.

Note 52.

[1] *Arumugam Chettiar* v. *Kanappa Chettiar*, 1927 Rang 139 (139): 5 Rang 99: 101 Ind Cas 791.

[2] *Kuppusamy* v. *Rathnavelu*, (1901) 24 Mad 511 (513): 11 Mad L Jour 115.

Note 53.

[1] *Kanhaiya* v. *Kanhaiya*, 1924 All 376 (378): 22 All L J 345: 5 L R A Civ 238· 46 All 372: 79 Ind Cas 363.

[2] *Indradeo Narain Singh* v. *Gauri Shankar*, (1918) 45 Ind Cas 177 (178): 1918 Pat H C C 138: 4 Pat L W 414.

[3] *Fraser & Ross* v. *Krishnaswamy Iyer*, 1923 Mad 144 (2) (147): 71 Ind Cas 293: 43 Mad L Jour 211: 16 Mad L W 322: 31 Mad L Tim 290: 1922 Mad W N 745.

Note 54.

[1] *Mirza Masham* v. *Mirza Ahmad*, 1927 Bom 256 (256): 29 Bom L R 214: 100 Ind Cas 1031; *Stalkartt* v. *Stalkartt*, (1901) 28 Cal 250 (251).

(*b*) For taking charge of money or of moveable or immoveable property which is not sold, unless for special reasons it is otherwise ordered by the Court, on the estimated value—1 per cent.

(*c*) For any special work not provided for above, such remuneration as the Court on the application of the receiver shall order to be paid."

Synopsis.

1. Remuneration of receiver.
2. Receiver's lien.
3. Receiver's costs.
4. Appeal.

Inherent jurisdiction—Refund of receiver's charges and commission to successful party. See Note 1, Pt. (4).

1. Remuneration of receiver.—*See also* Note 35 to R. 1, *ante.*

A receiver being an officer of the Court, it is for the *Court* to determine his remuneration: an agreement without leave of the Court by a party to pay remuneration to the receiver is contrary to law and is not enforceable.[1] Where the managing partner of a partnership business consents to act as a receiver without remuneration and is appointed as receiver for the purpose of keeping the assets and profits and accounts of the partnership and for submitting proper accounts thereof, he does not, by such consent, forego his right to such remuneration as he would be entitled to for managing and carrying on the business.[2] A receiver is entitled to a commission on the *collections* made by him and cannot claim any commission where certain Government securities in deposit with a bank are converted under the authority of the Court, by the bank itself, into other securities issued by the Government.[3] Similarly where in a condiment business the receiver is ordered to retain 5 per cent. of the gross sale "proceeds" he cannot take such commission on "trade discounts" inasmuch as "proceeds" do not include trade discounts.[3-a] When a party is dismissed from an action as having been wrongly impleaded and the receivership of his property is cancelled, the Court has inherent jurisdiction to order restitution to be made to such party by ordering the plaintiff to refund to such party the commission and charges paid by him to the receiver.[4]

As to the remuneration of the receiver appointed under S. 145 of the Criminal Procedure Code, *see* the undermentioned case.[5]

2. Receiver's lien.—A receiver has a lien on the estate for all his just claims and allowances.[1] Where a receiver is sued for acts done by him as receiver for the benefit of the estate he is entitled to indemnity from the estate for the loss caused to him thereby.[2]

Order 40, Rule 2—Note 1.

[1] *Proknsh Chandra* v. *Adlam,* (1903) 30 Cal 696 (698). See also *Manick Lall* v. *Surrut Coomaree,* (1895) 22 Cal 648 (656) [Agreement restricting Receiver's powers is contempt of Court].

[2] *Mahomed Kamil* v. *Hedayetullah,* 1926 Cal 380 (380, 381): 90 Ind Cas 492.

[3] *G R Naidu* v. *Savitramma,* 1931 Mad 86 (86): 59 Mad L Jour 833: 33 Mad L W 92: 129 Ind Cas 682.

[3-a] *Kabalamurthi Pillai* v. *Subramania Pillai,* 1931 Mad 500 (501): 60 Mad L Jour 332: 131 Ind Cas 655.

[4] *M S Naikwara* v. *Ma Aya,* 1924 Rang 181 (181): 1 Rang 770: 79 Ind Cas 724.

[5] *Mt Yamunabai* v. *Emperor,* 1925 Nag 462 (462, 463): 8 Nag L Jour 167: 91 Ind Cas 54.

Note 2.

[1] *Prem Lall* v. *Sumbhoonath,* (1895) 22 Cal 960 (973); *Mahadeva* v. *Kuppusami,* (1892) 15 Mad 233 (234).

[2] *Mohari Bibi* v. *Shyama,* (1908) 30 Cal 987 (944): 7 Cal W N 799.

O. 40, R.2. Notes 3—4.

3. **Receiver's costs.**—A receiver is entitled to the costs, charges and expenses properly incurred by him in the discharge of his duties.[1]

4. **Appeal.**—An order increasing the receiver's remuneration is one falling under R. 2 and not under R. 1 and is not appealable.[1]

O. 40, R. 3, Notes 1—2.

Duties.

R. **3.** [S. 503, Cls. (*e*) to (*h*).] Every receiver so appointed shall—

(*a*) *furnish* such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;

(*b*) *submit* his accounts at such periods and in such form as the Court directs;

(*c*) pay the *amount* due from him as the Court directs; and

(*d*) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

[1877—S. 503, Cls. (*e*) to (*h*); 1859—S. 243.]

Synopsis.

1. **Security necessary—Cl. (a).**
2. **Liability of the surety.**
3. **Submission of accounts—Cl. (b).**
4. **Responsibility for loss—Cl. (d).**
5. **Appeal.**

Form of bond by receiver. See App. F, Form No. 10.

1. **Security necessary—Cl. (a).**—This rule provides for the duties of the receiver.[1] Though under the Code the Court has discretion to appoint a receiver without security, it should obviously be done only in the most exceptional circumstances.[2] Where the appellate Court directs the lower Court to appoint a receiver and take security from him but the lower Court appoints a receiver without taking any such security, the appointment cannot be said to be without jurisdiction.[3]

2. **Liability of surety.**—A surety for a receiver is liable to the payment of interest on balances improperly retained by him, as also for the costs of proceedings in Court necessarily or properly incurred in consequence of the receiver's default, such as the costs of a proceeding to take accounts, of an attachment for failure to account, of an application for his discharge and for the appointment of another person in his place, and of any proceedings taken to enforce the recognizance. The liability of a surety upon the bond of a

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Note 3.

(1) *Balaji v. Ramchandra,* (1895) 19 Bom 660 (662).

Note 4.

(1) *Tweedie v. Pokea Khatun,* (1914) 22 Ind Cas 852 (853) Cal.

Order 40, Rule 3—Note 1.

(1) *Gurumurthi Ayyar v. Ramaswami Chettiar,* 1931 Mad 760 (762): 1931 Mad W N 880: 34 Mad L W 538: 135 Ind Cas 1: 62 Mad L Jour 199.

(2) *Brij Indar Kuar v. Jai Indar,* 1932 P C 191 (193): 137 Ind Cas 900: 59 Ind App 311: 1932 All L J 747: 34 Bom L R 1188: 56 Cal L Jour 48: 36 Cal W N 882: 1932 Mad W N 830: 9 Oudh W N 571 P C [Parties females and minors—Security essential].

(3) *Bhairab Chandra v. Nandiram Agrani,* (1918) 43 Ind Cas 804 (806): 22 Cal W N 520: 27 Cal L Jour 395: 46 Cal 70.

O. 40, R. 3, Notes 2—3.

receiver conditioned for the due discharge of his duties is, however, limited to cases of a violation of those duties which may properly be said to be within the scope of his appointment as receiver; in other words, the surety is responsible only in respect of liability incurred by the receiver in his capacity as receiver. To determine whether a particular liability has been incurred by the receiver in his capacity as receiver the test to be applied is, could the receiver be made accountable in that respect in the account proceedings? If he could not, the surety is not liable, if he could be held liable in that proceeding as receiver, the surety is also liable. But a surety who has satisfied the claim against the receiver is entitled to stand in the place of the receiver and to reimburse himself from the sums ordered to be paid to the receiver.[1]

3. **Submission of accounts—Cl. (b).**—*See* Note 37 to R. 1, *supra.*

The sanction of the Court is necessary for all expenditure of special nature incurred by the receiver.[1] A receiver is liable for all unauthorised expenditure incurred by him such as salaries of unnecessary servants appointed without the leave of the Court, bribe to the Police for obtaining the release of a minor of whose estate he is the receiver, and sums advanced to the minor owner of the estate in excess of the limit sanctioned by the Court.[2] Where litigation expenses are incurred by the receiver, the latter must show not merely that he paid the expenses but the details of such expenditure.[3]

The liability of a receiver, not appearing on the face of the accounts, such as for imprudent management, for wilful default or neglect, for the malpractices of his servants, etc., cannot be properly gone into on the receiver's application for the passing of his accounts. A separate suit is the more appropriate procedure for the investigation of such matters.[4]

Before passing an order for the attachment of the receiver's property under R. 4, the Court should examine the accounts under this rule and give him an opportunity to pay the amount found due by him.[5]

If, on an application to discharge a receiver, the latter puts forward a claim to a larger amount than what is due to him, and such amount is deposited in Court, he is liable, if such amount is found to be in excess of that actually due, to interest on the excess amount; but if the receiver's action has compelled the owner of the estate to borrow money at a higher rate than usual, the question of the receiver's liability in consequence of that fact should form the subject of a separate suit.[6]

No order can be passed against the receiver to make good the loss to the estate due to his gross negligence, till the passing of the accounts.[7]

Note 2.

(1) *Rashmani Dasi* v. *Baroda Kant*, (1915) 28 Ind Cas 31 (32, 33 and 34): 20 Cal L Jour 123.

Note 3.

(1) See also *Chaitan Churn Mullick* v. *Gocool Chandra Mullick*, (1897) 1 Cal W N 303 (304) [In all applications for payment of money—Receiver should appear and give full particulars and information to the Court]: *Shamal Dhone Dutt* v. *Lakhimoni Debi*, (1910) 6 Ind Cas 323 (326): 13 Cal L Jour 459.

(2) *Baroda Kanta* v. *Rash Mani Dasi*, (1915) 28 Ind Cas 25 (26): 20 Cal L Jour 113.

(3) *Haji Teller Rahman* v. *Ghoam Gone*, 1924 Cal 1063 (1064): 40 Cal L Jour 28: 82 Ind Cas 419: *Baroda Kanta* v. *Rash Mani Dasi*, (1915) 28 Ind Cas 25 (27): 20 Cal L Jour 113.

(4) *Coomar Sattya* v. *Golapmonee Dabee*, (1901) 5 Cal W N 223 (228).

(5) *Palaniappa Chetti* v. *Palaniappa Chetti*, 1923 Mad 85 (86): 1922 Mad W N 741: 16 Mad L W 754: 43 Mad L Jour 707: 69 Ind Cas 203.

(6) *Baroda Kant* v. *Rash Mani*, (1915) 28 Ind Cas 25 (30): 20 Cal L Jour 113.

(7) *Kristachandra* v. *Krista Sakha*, (1909) 1 Ind Cas 470 (472): 38 Cal 52: 12 Cal W N 1023.

O. 40, R. 3. Notes 4—5.

4. **Responsibility for loss—Cl. (d).**—A receiver appointed to collect the rents due to an estate must make good the loss caused to it by a breach of his duties. Thus if he delegates his duties to another (which he is not competent to do) and the latter misappropriates the funds collected by him[1] or if he fails to realise rents by taking proper proceedings he will be liable for the loss. Mistaken proceedings though taken in good faith will not absolve the receiver from liability. A decree-holder is not bound to accept pro-notes obtained by the receiver from the tenants, for the rents due and the receiver must make good the amounts of the rent not collected. Any loss arising from the default of the receiver will, as between the parties, devolve on the *estate* to which the appointment relates and not on the decree-holder at whose instance he may have been appointed.[1-a] A receiver is not entitled to recover the costs of proceedings, initiated by him through mistake.[2] A succeeding receiver cannot sue a former receiver for funds which he should have realised and accounted for.[3] Ordinarily creditors advancing money to a receiver for the purposes of management can proceed both against the estate and the receiver personally. But the receiver's personal liability may be expressly excluded by the terms of a particular loan.[4] A receiver's liability on account of his wilful default or neglect can more appropriately be investigated in a separate suit against him than in an application in the suit wherein he was appointed as receiver.[5] *See* Notes 31 to 33 to R. 1.

5. **Appeal.**—An order under this rule is not one that is appealable under O. 43, R. 1 (*s*). Thus an order holding a receiver of an estate liable for a certain sum of money is not appealable. But where such an order is followed by another one under R. 4 for coercive action against the receiver, an appeal lies and in the appeal the prior order under R. 3 can be attacked.[1] An order directing the receiver to pay a certain sum of money as damages[2] or an order of the Court giving directions to the receiver in passing his accounts is not open to appeal.[3] No appeal lies against an order *construing* an order of appointment of receiver under R. 1.[4] Where a receiver is appointed subject to his furnishing security the appointment is not *complete* till security is given and till then there is no right of appeal.[5] *See also* Note 51 to R. 1.

An order under this rule is open to revision.[6]

Note 4.

[1] *Balaji Narayan* v. *Ram Chandra Govind*, (1895) 19 Bom 660 (662).

[1-a] *Orr* v. *Muthia Chetti*, (1894) 17 Mad 501 (504) [The liability of the Receiver remains].

[2] *Lakshmi Vencayanna* v. *Gopi Narayanaswami Naidu*, (1912) 14 Ind Cas 396 (398, 399): 11 Mad L Tim 90: 22 Mad L Jour 253: 1912 Mad W N 101.

[3] *K Dutt* v. *Shamal Dhone Dutt*, (1914) 24 Ind Cas 768 (771): 41 Cal 92.

[4] *Debi Prasad Dhan Dhania* v. *Mahesh Lal*, 1925 Pat 602 (604): 1925 Pat H C C 201: 89 Ind Cas 32: 7 Pat L Tim 129.

[5] *Subal Chandra Kar* v. *Jatindra Mohan Ghose*, 1927 Cal 175 (1): 53 Cal 881: 99 Ind Cas 761.

Note 5.

[1] *Ganesh Lal* v. *Kumara Satya Narayan Singh*, (1920) 54 Ind Cas 207 (209): 4 Pat L Jour 636: 1920 Pat H C C 35: *Palaniappa Chetty Palaniappa Chetty*, 1923 Mad 85 (86): 1922 Mad W N 741: 16 Mad L W 754: 43 Mad L Jour 707: 69 Ind Cas 203: *Khan Chand* v. *Abdul Majid*, 1924 Sind 35 (36, 37): 76 Ind Cas 203: 18 Sind L R 335

[2] *Arunachallam Chettiar* v. *U Po Lu*, 1925 Rang 266 (267): 92 Ind Cas 631: 4 Bur L Jour 91: 3 Rang 318.

[3] *Keshobati* v. *Mc Gregor*, (1908) 35 Cal 568 (570): 12 Cal W N 648; *Gurumurthi Ayyar* v. *Ramaswami Chettiar*, 1931 Mad 760 (762): 1931 Mad W N 830: 34 Mad L W 533: 135 Ind Cas 1: 62 Mad L Jour 199.

[4] *Sambautta Singh* v. *Bhagwanthi Singh*, (1920) 55 Ind Cas 15 (15): 5 Pat L Jour 97: 1920 Pat H C C 121.

[5] *Raja Shyam Lal* v. *Raj Kumar*, 1927 Cal 253 (253): 45 Cal L Jour 63: 31 Cal W N 235: 100 Ind Cas 140.

[6] *Khan Chand* v. *Abdul Majid*, 1924 Sind 35 (36): 76 Ind Cas 203.

O. 40, R. 4.

Enforcement of receiver's duties.

R. 4. [New.] *Where a receiver—*

(a) *fails to submit his accounts at such periods and in such form as the Court directs, or*

(b) *fails to pay the amount due from him as the Court directs, or*

(c) *occasions loss to the property by his wilful default or gross negligence,*

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

[*Cf.* R. S. C., O. 50, R. 18.]

Local Amendment.

MADRAS.

Substitute the following *for* R. 4:—

(1) If a receiver fails to submit his accounts at such periods and in such form as the Court directs, the Court may order his property to be attached until he duly submits his accounts in the form ordered.

(2) The Court may, at the instance of any party to any suit or proceeding in which a receiver has been appointed or of its own motion, at any time make an enquiry as to what amount, if any, is due from the receiver as shown by his accounts or otherwise, or whether any loss to the property has been occasioned by his wilful default or gross negligence, and may order the amount found due or amount of the loss so occasioned to be paid by the receiver into Court or otherwise within a period to be fixed by the Court. All parties to the suit or proceeding and the receiver shall be made parties to any such enquiry. Notice of the enquiry shall be given by registered post to the surety, if any, for the receiver, but the cost of his appearance shall be borne by the surety himself unless the Court otherwise directs:

Provided that the Court may, where the account is disputed by the parties and is of a complicated nature or where it is alleged that loss has been occasioned to the property by the wilful default or gross negligence of the receiver, refer the parties to a suit. In all such cases the Court shall state in writing its reasons for the reference.

(3) If the receiver fails to pay any amount which he has been ordered to pay under sub-R. (2) of this rule, within the period fixed in the order, the Court may direct such amount to be recovered either from the security (if any) furnished by him under R. 3, or by attachment and sale of his property, or, if his property has been attached under sub-R. (1) of this rule, by sale of the property so attached, and may apply the proceeds of the sale to make good any amount found due from him or any loss occasioned by him and shall pay the balance (if any) of the sale proceeds to the receiver.

Synopsis.

1. Scope and applicability of the rule.
2. Loss to property by wilful default or gross neglect.
3. "Court may direct his property to be

attached."
4. Removal of a receiver.
5. Appeal.

O. 40, R. 4,
Notes
1—2.

"Property" in Cl. (c) includes income. See Note 2, Pt. (1).
Property of receiver in the hands of his legal representative. See Note 3, Pt. (1).

1. **Scope and applicability of the rule.**—The rule provides for coercive steps against the receiver who fails to carry out his duties as laid down in R. 3. When the receiver is guilty of a wilful default or gross negligence the only provision for taking action against him apart from proceeding against the security, is that his property can be *attached;* arrest and imprisonment are not to be the methods of enforcement.[1]

2. **Loss to property by wilful default or gross neglect.**—"Property" includes not only *corpus* of the property entrusted to the receiver but also the *income* derived from it.[1] The rule is a residuary provision and covers a case of misappropriation also.[2] Even a partner who is appointed receiver of partnership assets will be guilty of gross misconduct if he appropriates to his own use any of the partnership assets.[3]

A separate suit is the proper procedure for proceeding against a receiver on the basis of a wilful default and neglect.[4] Such a suit may be filed even after his discharge if it transpires that he has in his hands moneys belonging to the estate.[5] Similarly his accounts may be re-opened on discovery of errors, even where he has been discharged after the passing of his accounts. The proper procedure, however, in such a case is to hold an enquiry to find out whether any loss has been occasioned by his wilful default or gross negligence and to pass an order under this rule or, if desired to proceed against him under S. 145 of the Code. A separate suit against him is not necessary in such circumstances.[6]

If money paid by a receiver does not reach the proper destination, he must make good the loss, unless he can show that he acted with perfect regularity and has used such a degree of prudence as would be expected from an ordinary individual in his own affairs.[7]

Where at the time of appointing a receiver, there was a decree in favour of the estate about 11 years old and after his appointment the receiver applied for the arrest of the debtor but not for attachment of his properties on the ground that it was very much encumbered, it cannot be said that the receiver is guilty of any negligence at all. It must be shown by the party wishing to

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Order 40, Rule 4—Note 1.

(1) *Gurumurthi Ayyar v. Ramaswami Chettiar,* 1931 Mad 760 (763): 1931 Mad W N 830: 34 Mad L W 533: 135 Ind Cas 1: 62 Mad L Jour 199.

Note 2.

(1) *Raman v. Gopala,* (1915) 30 Ind Cas 383 (384): 18 Mad L Tim 127: 39 Mad 584.

(2) *Raman v. Gopala,* (1915) 30 Ind Cas 383 (384): 18 Mad L Tim 127: 39 Mad 584.

(3) *Nag Koer v. Sham Lal,* 1925 P C 257 (259): 23 All L J 1045: 92 Ind Cas 274: 1926 Mad W N 101: 23 Mad L W 628: 7 Pat L Tim 275 P C.

(4) *Subal v. Jatindra,* 1927 Cal 175 (1): 53 Cal 881: 99 Ind Cas 761.

(5) *Harihar v. Jaharuddin,* 1921 Cal 516 (516): 26 Cal W N 992: 62 Ind Cas 768.

(6) *P L T L Chettyar Firm v. Maung Tha Lu,* 1927 Rang 334: 6 Bur L Jour 15: 100 Ind Cas 996.

(7) *R L Moore v. Asharfi Singh,* 1930 Pat 232 (232, 234): 125 Ind Cas 117 [In this case, the Receiver was held to have exercised the requisite degree of care].

O. 40, R. 4, Notes 2—5.

establish gross negligence on the part of the receiver, that it would have been profitable to the estate if the debtor's property had been attached.[7-a]

3. **Court may direct his property to be attached.**—Where a receiver dies, his property in the hands of his legal representatives may be attached.[1] But before directing the attachment of property under this rule, the Court must first determine the exact amount for which he is liable after due enquiry under R. 3, and give him an opportunity to pay the same.[2]

4. **Removal of a receiver.**—*See* Note 48 to R. 1, *supra.*

The Court has an inherent power in the exercise of its discretion, to remove a receiver appointed by it.[1] A receiver who has not complied with the Court's orders to keep proper accounts should be removed from office.[2] A receiver can be removed only by the Court appointing him.[3]

5. **Appeal.**—*See also* Note 51 to R. 1, *ante.*

An order under this rule is appealable under O. 43, R. 1 (*s*).[1]

No appeal lies from the following orders:—

(1) An order which merely declares that the receiver is liable to the estate for a certain sum of money and which is not accompanied by any order for the *attachment* of his property.[1-a]

(2) An order fixing the period for which an account is to be filed.[2]

(3) An order removing a receiver from office.[3]

(4) An order for refund of losses to the estate due to the receiver's neglect.[4]

(5) An order directing the receiver to pay a certain sum of money into Court without any order for the attachment of his property.[5]

[7-a] *Gurumurthi Ayyar* v. *Ramaswami Chettiar*, 1931 Mad 760 (764, 765): 1931 Mad W N 830: 34 Mad L W 533: 135 Ind Cas 1: 62 Mad L Jour 199.

Note 3.

[1] *Raman* v. *Gopala*, (1915) 30 Ind Cas 383 (384): 18 Mad L Tim 127: 39 Mad 584.

[2] *R M P Palaniappa Chetti* v. *M S A Pl Palaniappa Chetti*, 1923 Mad 85 (86): 1922 Mad W N 741: 16 Mad L W 754: 43 Mad L Jour 707: 69 Ind Cas 203.

Note 4.

[1] *Subramania Iyer* v. *Muthulakshmiammal*, (1912) 17 Ind Cas 583 (584): 1912 Mad W N 1208: *Rukmani* v. *Advocate-General of Madras*, (1915) 31 Ind Cas 908 (909): 1916 Mad W N 10. *A V John* v. *Agra United Mills, Ltd*, 1931 All 72 (73): 1931 All L J 13: 134 Ind Cas 454; Ex parte *Jijai Amba*, (1890) 13 Mad 390 (394): 5 Sar 584 P C.

[2] *Bihari Lal* v. *Shankar Das*, 1925 Lah 309 (312): 7 Lah L Jour 6: 86 Ind Cas 246.

[3] *Bihari Lal* v. *Shankar Das*, 1925 Lah 309 (310): 7 Lah L Jour 6: 86 Ind Cas 246.

Note 5.

[1] *Babu Ganesh Lall* v. *Kumar Satyanarayan Singh*, (1920) 54 Ind Cas 207 (208): 4 Pat L Jour 636: 1920 Pat H C C 35.

[1-a] *Gurumurthi Ayyar* v. *Ramaswami Chettiar*, 1931 Mad 760 (763 and 768): 1931 Mad W N 830: 34 Mad L W 533: 135 Ind Cas 1: 62 Mad L Jour 199 [Order of realisation out of Receiver's security—Appeal lies].

[2] *Samhautta Singh* v. *Bhagwanthi Singh*, (1920) 55 Ind Cas 15 (15): 5 Pat L Jour 97: 1920 Pat H C C 121.

[3] *A V John* v. *Agra United Mills, Ltd*, 1931 All 72 (73): 1931 All L J 13: 134 Ind Cas 454; *Manmohan Neogy* v. *Surendra Kumar Ray*, (1932) 36 Cal W N 903 (905, 906) [The Receiver cannot appeal—But parties may].

[4] *Gokal Chand* v. *Udheram*, 1922 Lah 224 (1): 70 Ind Cas 298.

[5] *Palaniappa Chetty* v. *Palaniappa Chetty*, 1922 Mad 234 (235): 65 Ind Cas 403: 1921 Mad W N 806. See also *Gurumurthi Ayyar* v. *Ramaswami Chettiar*, 1931 Mad 760 (764): 1931 Mad W N 830: 34 Mad L W 533: 135 Ind Cas 1: 62 Mad L Jour 199.

O. 40, R. 4, Note 5.

(6) An order directing the receiver to pay a certain sum of money by way of damages.[6]

But, in an appeal from an order for attachment under R. 4, the propriety of an order under R. 3 requiring the receiver to pay a certain sum of money to the estate can be attacked.[7]

It has been held by the High Court of Bombay that an order passing a receiver's account is appealable inasmuch as it is really an order refusing relief against the receiver under this rule.[8]

O. 40, R. 5, Note 1.

When Collector may be appointed receiver

R. 5. [S. 504.] Where the property is land paying revenue to *the* Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

[1877—S. 504; 1859—S. 92.]

Synopsis.

1. **Property seized by Collector as receiver.**

1. **Property seized by Collector as receiver.**—When attached property is seized and retained by a Collector acting as a receiver, his acts cannot be disputed by way of motion to discharge the attachment.[1]

ORDER XLI.

O. 41, R. 1.

APPEALS FROM ORIGINAL DECREES.

Form of appeal. What to accompany memorandum.

R. 1. [S 541.] (1) *Every* appeal shall be *preferred* in the form of a memorandum *signed* by the appellant *or his pleader*[1] *and presented*[2] *to the Court or to such officer as it appoints in this behalf. The memorandum* shall be accompanied by a copy of the decree appealed *from* and (unless the Appellate Court dispenses therewith) of the judgment[4] on which it is founded.

Contents of memorandum.

(2) *The* memorandum shall set forth, concisely and under distinct heads, the grounds of objection[11] to the decree appealed *from* without any argument or narrative; and such grounds shall be numbered consecutively.

[1877—S. 541; 1859—Ss. 333, 335. *See* S. 96.]

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(6) *Arunachellam Chettiar* v. *U Po Lu*, 1925 Rang 266 (266): 4 Bur L Jour 91: 3 Rang 318: 92 Ind Cas 631.

(7) *R M P Palaniappa Chetti* v. *M S A Pl Palaniappa Chetti*, 1923 Mad 85 (86): 1922 Mad W N 741: 16 Mad L W 754: 43 Mad L Jour 707: 69 Ind Cas 203; *Khan Chand* v. *Abdul Majid*, 1924 Sind 35 (36): 76 Ind Cas 203: 18 Sind L R 335.

(8) *Srinivas Kuppusawmi* v. *Waz*, 1921 Bom 427 (428): 45 Bom 99: 59 Ind Cas 421: 22 Bom L R 1126.

Order 40, Rule 5—Note 1.

(1) *Bissessuree* v. *Sookram Das Mohant*, (1871) 15 Suth W R 347 (348).

O. 41, R. 1.

Local Amendments.

LAHORE.

Add the following proviso to sub-R. (1):—

"Provided that when two or more cases are tried together and decided by the same judgment, and two or more appeals are filed against the decrees, whether by the same or different appellants, the officer appointed in this behalf may, if satisfied that the questions for decisions are analogous in each appeal, dispense with the production of more than one copy of the judgment."

MADRAS.

Add the following sentence to sub-R. (1) of R. 1:—

"The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for for the purpose of appeal."

Add the following as a proviso to sub-R. (1) of R. 1:—

"Provided that, in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act, IX of 1908, do not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal, the appellate Court may admit the memorandum of appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court."

Add the following sentence to sub-R. (2) of R. 1:—

"The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court Fees Act."

Add the following as a new sub-R. (3) to R. 1:—

"(3) When an appeal is presented after the period of limitation prescribed therefor, it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period, and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under R. 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice has been given to the respondent and his objections, if any, to the Court acting under the provisions of S. 5 of Act, IX of 1908, have been heard."

RANGOON.

The following shall be *substituted* for sub-R. (2) of R. 1:—

"(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from, without any argument or narrative; and such grounds shall be numbered consecutively. When Burmese dates are given the corresponding English dates shall be added. The memorandum shall also contain—

(*i*) the full names and addresses of all parties;

(*ii*) particulars (class, number, year and Court) of the original proceedings; and

(*iii*) the value of the appeal (*a*) for Court-fees, and (*b*) for jurisdiction.

Material corrections or alterations shall be authenticated by the initials of the person signing the memorandum."

To R. 1, the following shall be *added* as sub-R. (3):—

"(3) The appellant shall present, along with the petition of appeal, as many copies on plain paper of the grounds of appeal as there are respondents."

O. 41, R. 1, Notes 1—2.

Synopsis.

1. Memorandum of appeal to be signed by appellant or by his pleader.
2. Presentation of memorandum of appeal.
3. Presentation with defective vakalatnama.
4. Memorandum must be accompanied by copies of judgment and decree.
5. Date of presentation for purpose of limitation.
6. Omission to file copy of decree in rival appeal.
7. Two decrees in two cross appeals.
8. Limitation for appeal.
9. Exclusion of time in seeking review of judgment.
10. Misdescription in the memorandum of appeal.
11. Grounds of objection.
12. Grounds that may be taken in the memorandum of appeal for first time.
13. When appellate Court may not interfere with findings of fact.
14. Competency of appeal.
15. Consolidation of appeals.
16. Stamp on memorandum of appeal.
17. Refund where memorandum is overstamped.
18. Applicability of the order to other proceedings.

Delay in presenting appeal—Power of Court to excuse. See Note 8.

Exclusion of time requisite in obtaining copies. See Note 8.

Form of Memorandum of Appeal. See App. G, Form No. 1.

1. **Memorandum of appeal to be signed by appellant or his pleader.**—It is necessary that the memorandum of appeal should be signed by the appellant or his pleader. By virtue of the provisions of O. 3, R. 1, *supra*, an agent of the appellant, duly authorised may also sign the memorandum of appeal.[1] A defect in the authority will not necessarily invalidate the memorandum of appeal.[2] Where an appeal was filed on behalf of a company by one of its officers not duly authorised to do so, it was held that the defect could be cured by putting in a power of attorney duly authorising him to do so.[3] Similarly, where a memorandum of appeal was signed by a pleader whose vakalat was not signed by the party, it was held that the defect could be subsequently rectified by the party signing it.[4] It is immaterial, if the appellant has *signed* the appeal, that he has not *written* the memorandum of appeal himself.[5] Where an appeal consisted of two documents one containing the names of the parties and the other containing the grounds of appeal, the fact that the latter was not signed by the party is not fatal to the appeal.[6]

2. **Presentation of memorandum of appeal.**—O. 3, R. 1 provides that an appearance, application or act in or to any Court required or authorised by law to be made by a party may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in *person,* or by his *recognised agent* or by his *pleader*. The presentation of a memorandum of appeal by a pleader holding a power of attorney from the party expressly authorising him to present it is valid, though the power is not filed

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Order 41, Rule 1—Note 1.

[1] *Mst Shib Devni v. Ralla Ram,* 1923 Lah 484 (485): 83 Ind Cas 543.

[2] See Note 2 to O 3, R 2.

[3] *Bombay Fire Insurance Company v. Ahmed Bhoy,* (1909) 34 Bom 1 (11): 11 Bom L R 1: 1 Ind Cas 14.

[4] *Habeeb v. Naush Ali,* (1913) 21 Ind Cas 444 (445): 11 All L J 779; *Khaira v. Nathu,* (1920) 55 Ind Cas 990 (991): 2 U P L R (Lah) 88.

[5] *Shib Devi v. Ralla Ram,* 1923 Lah 484 (485): 83 Ind Cas 543.

[6] *Karman v. Bishna,* (1920) 55 Ind Cas 24 (24): 2 U P L R (Lah) 49.

O. 41, R. 1, Notes 2—3.

with the appeal.[1] A memorandum of appeal may be presented where the appellant is a minor, by the appellant's guardian *ad litem*.[2] But a presentation by an unauthorised agent is no presentation in the eye of the law.[3] As to a presentation by the clerk of the pleader, *see* Note 9 to O. 3, R. 4, *ante*.

The memorandum of appeal should be presented to the *Court* or to *such officer as it appoints* in this behalf. A presentation to the Judge at his private residence after Court hours on the last day of limitation, is sufficient compliance with the law.[4] A presentation during the vacation or even on a Sunday is valid, provided it is to the proper officer.[4-a] It was held in the undermentioned case[5] that a memorandum of appeal must be taken to have been validly presented where it was deposited in the box put up by the appellate Court for the purpose. But a presentation to an officer of the Court other than the one appointed by the Court in this behalf[6] or the placing of the memorandum on the table of the appointed officer when he was absent[7] or the sending of a memorandum by post[8] is not a valid presentation.

A debtor in Civil Jail is entitled to present an appeal without the assistance of a pleader.[9]

An omission to join the necessary parties to an appeal makes the appeal invalid.[10]

See also Notes to O. 4, R. 1 as to the presentation of *plaints*.

3. **Presentation with defective vakalatnama.**—The presentation of a memorandum of appeal by a vakil without any authority from the party is not valid.[1] But the mere fact that the party has omitted by oversight to sign the vakalatnama[2] or the fact that the vakalatnama was not filed with the memor-

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Note 2.

[1] *Kura* v. *Udmi*, 1925 Lah 331 (332): 7 Lah L Jour 29: 86 Ind Cas 207. See also *Muhammad Ghulam Mohiuddin* v. *Muhammad Abdul Karim*, (1894) 14 All W N 131 (131) [Presentation by muktar does not invalidate appeal]. But see *Shiam Karan* v. *Raghunandan*, (1900) 22 All 331 (332): 1900 All W N 96 [Presentation of appeal to High Court by authorised agent—Held not valid—The decision it is submitted is not correct].

[2] *Latafat Ali Khan* v. *Mohammad Yar Khan*, 1930 All 456 (457): 1930 All L J 771: 124 Ind Cas 474: 52 All 494.

[3] *Mahomed Qamar Shah Khan* v. *Mahomed Salamat Ali Khan*, 1930 All 112 (112): 121 Ind Cas 546: 1930 All L J 394 [Court not justified in treating such appeal as appeal in due form and rejecting it as statute barred].

[4] *Din Ram* v. *Hari Das*, (1912) 14 Ind Cas 744 (744): 9 All L J 743: 34 All 482: *Bala Das* v. *Mula Singh*, 1931 Lah 671 (672): 32 Pun L R 417: 133 Ind Cas 442.

[4-a] *Anand Ram Brahman* v. *Ram Gulam Sahu*, 1923 Pat 150 (151): 3 Pat L Tim 820: 1922 Pat H C C 365: 71 Ind Cas 426: 2 Pat 264: 1 Pat L R 12.

[5] *Mela Mal* v. *Natha Singh*, 1908 Pun W R 71.

[6] *Anand Ram* v. *Ramghulam*, 1923 Pat 150 (150): 3 Pat L Tim 820: 1922 Pat H C C 365: 71 Ind Cas 426: 2 Pat 264: 1 Pat L R 12 [Registrar authorised to receive appeals—Presentation to Deputy or Assistant Registrar in Registrar's absence not enough]; *Taguldeen* v. *Ghafoor-ul-nissa*, (1872) 3 N W P 341 [Presentation to *Moonserim* is not enough].

[7] *Tajudeen* v. *Ghafoor-ul-nissa*, (1871) 3 N W P H C R 341.

[8] *Kripasindhudas* v. *Kunjbandas Mafidar*, (1895) 8 C P L R 93 (93). See also Consult *Queen-Empress* v. *Ariappa*, (1892) 15 Mad 137 (138): 2 Weir 468 [Appeal under Criminal Procedure Code, S 419—Sending by post is not enough].

[9] *V Krishnappa*, In the petition of, (1870-71) 6 Mad H C R 38 (39) Ap: 2 Weir 662.

[10] *Fakirchand* v. *Municipal Committee, Hazro*, (1913) 18 Ind Cas 37 (39): 59 Pun L R 1913: 88 Pun W R 1913: 59 Pun Re 1913.

Note 3.

[1] *Sheikh Palat* v. *Sarwan Sahu*, (1920) 55 Ind Cas 271 (271) Bom; *Chittar* v. *Laxmi Narayan*, 1921 Nag 27 (27, 28): 4 Nag L J 22: 62 Ind Cas 259; *Sri Chandan Bhuya* v. *Haroo Serhi*, (1911) 11 Ind Cas 387 (388): 13 Cal L Jour 544.

[2] *Khaira* v. *Nathu*, (1920) 55 Ind Cas 990 (991): 2 U P L R (Lah) 88; *Habeeb* v. *Nawsh Ali*, (1913) 21 Ind Cas 444 (445): 11 All L J 779.

O. 41, R. 1, Notes 3—4.

andum of appeal[3] does not invalidate the appeal. Where an appellant executes a vakalatnama in favour of two persons, but one of them alone accepts it, the presentation of the appeal by the latter is a valid presentation.[3-a]

There is a difference of opinion as to whether the presentation of a memorandum of appeal is valid where the name of the vakil presenting it, is omitted in the vakalatnama. The High Court of Allahabad has held that it is not a valid presentation, the reason given being that the word "shall" in O. 3, R. 4 shows that the rule is of an imperative character.[4] The High Courts of Calcutta,[5] Lahore,[5-a] Patna[6] and the Judicial Commissioner's Court of Nagpur[7] on the other hand, have held that the presentation is not invalid, and that the defect is one that can be cured. *See also* O. 3, R. 4, Notes 14 to 16.

4. **Memorandum must be accompanied by copies of judgment and decree.**—It is absolutely essential that a memorandum of appeal should be accompanied with a copy of the decree appealed from.[1] A memorandum of appeal not accompanied by such a copy is not a valid appeal[2] and this is so even if the decree has not yet been prepared[3] or the appellant is under an erroneous impression that it has not yet been prepared.[4] It has been held that the Court may in such cases give time for getting a copy of decree prepared and filing the same.[4-a] But see the criticism of this view in S. 2 (2)

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[3] *Mohemad Jafer* v. *Sheikh Ahmed*, 1926 Bom 336 (336): 28 Bom L R 538: 95 Ind Cas 266. See however *Sri Chandan Bhuya* v. *Haroo Serhi*, (1894) 11 Ind Cas 387 (388): 13 Cal L Jour 544 [It would appear in this case there was no authority on the date the appeal was filed].

[3-a] *Ayyanna* v. *Nagabhooshanam*, (1893) 16 Mad 285 (286).

[4] *Chhita* v. *Mt Jafo*, 1931 All 767 (768): 132 Ind Cas 566: 1931 All L J 983; *Lokanath Misir* v. *Sheo Saran Misir*, 1927 All 816 (816): 102 Ind Cas 255; *Rani Rup Agrahri* v. *Naik Ram*, 1926 All 252 (253): 91 Ind Cas 865; *Mohamad Ali Khan* v. *Jas Ram*, (1914) 23 Ind Cas 464 (464): 36 All 46: 11 All L J 1015; *Muhamad Ali Khan* v. *Sukhu*, (1913) 19 Ind Cas 674 (674): 11 All L J 458. But see *Shambu Nath* v. *Badri Das*, 1921 All 210 (211): 43 All 392: 19 All L J 183: 61 Ind Cas 410.

[5] *Munfoozul Huq* v. *Muzhorul Huq*, (1917) 41 Ind Cas 685 (687) Cal.

[5-a] *Mangal Singh* v. *Babu Singh*, 1932 Lah 134 (135): 134 Ind Cas 114: 33 Pun L R 74.

[6] *Shyam Sundar Koer* v. *Rahmatunnissa*, 1932 Pat 3 (4): 133 Ind Cas 171: 12 Pat L Tim 558.

[7] *Maharashtraya Jhan Kosh Mandal, Ltd* v. *Bijjulal*, 1923 Nag 182 (185): 19 Nag L R 36: 6 Nag L J 100: 71 Ind Cas 436 [Distinguishing 37 Ind Cas 103]; *Mulchand* v. *Radhabai*, 1923 Nag 281 (281): 6 Nag L J 179: 73 Ind Cas 251; *Mt Masumbi* v. *Dongar Singh*, (1920) 55 Ind Cas 415 (416) Nag.

Note 4.

[1] *Sundaram Ayyar* v. *Raja Rajeswara Muthuramalinga Sethupathi*, 1923 Mad 482 (483): 17 Mad L W 352: 44 Mad L Jour 279: 32 Mad L Tim 232: 1923 Mad W N 164: 72 Ind Cas 308.

[2] *Ohameta* v. *Amir Khan*, (1894) 16 All 77 (78): 1893 All W N 228; *Chaturbhuj Sahay* v. *Muhammad Habib*, (1920) 54 Ind Cas 36 (37): 2 U P L R (Pat) 6; *Sitikantha Roy* v. *Bipra Das Charan*, (1915) 27 Ind Cas 447 (448) Cal; *Hemchandra* v. *Jadab Chandra*, (1912) 17 Ind Cas 99 (100): 16 Cal L Jour 116; *Kamaladasi* v. *Tarapada*, (1912) 14 Ind Cas 1006 (1007): 15 Cal L Jour 498; *Keamat* v. *Abhooram Mistry*, (1911) 11 Ind Cas 8 (8) Cal; *Bali Ram* v. *Ghasiram*, 1925 Nag 52 (53): 81 Ind Cas 1001; *Pandu* v. *Rajeswar*, 1924 Nag 271 (273): 20 Nag L R 131: 78 Ind Cas 996; *Maung Po Saung* v. *Ma Mun*, 1921 U B R 15 (16): 4 U B R 75: 65 Ind Cas 68; *Bashi Ram* v. *Municipal Committee, Chiniot*, 1922 Lah 191 (192): 4 Lah L Jour 193; *Akbar Ali* v. *Ramchand*, 1887 Pun Re No 53; *Bhag Singh* v. *Jhanda Singh*, 1879 Pun Re No 7; *Mt Narbadi* v. *Mt Gujri*, (1896) 9 C P L R 109 (109); *Municipal Committee, Chiniot* v. *Bashi Ram*, 1922 Lah 170 (171): 69 Ind Cas 895; *Surendra Mohan Rai Chowdhury* v. *Mohendra Nath Banerjee*, (1932) 59 Cal 781: 140 Ind Cas 662: 1932 Cal 589: 36 Cal W N 420 (428, 429) [Appeal from mortgage decree—Copy of preliminary judgment and final decree filed. *Held*, appeal not in order and appellant cannot impugn preliminary decree].

[3] *Bashi Ram* v. *Chiniot Municipality*, 1922 Lah 191 (192): 4 Lah L Jour 193: *Municipal Committee, Chiniot* v. *Bashi Ram*, 1922 Lah 170 (171): 69 Ind Cas 895.

[4] *Hem Chandra Bakshi* v. *Judub Chandra Bakshi*, (1912) 17 Ind Cas 99 (100): 16 Cal L Jour 116; *Benahani Debi* v. *Shashi Bhushan Sinha*, (1912) 17 Ind Cas 119 (120): 16 Cal L Jour 133; *Achhar Singh* v. *Nikku*, (1914) 23 Ind Cas 319 (320): 2 Pun W R 1914: 25 Pun L R 1914.

[4-a] *Kadir Baksh* v. *Kefait Ullah*, (1884) 4 All W N 224 (224); *Ranjit Singh* v. *Illahi Baksh*, (1883) 5 All 520 (528): 1883 All W N 151; *Mangal Singh* v. *Hirda Ram*, (1919) 49 Ind Cas 673: 19 Pun Re 1919; *Sher Mahomed* v. *Maho-*

O. 41, R. 1, Note 4.

Note 8. The Court may, however, where the copy of the decree is filed after the expiry of the period of limitation, excuse the delay under S. 5 of the Limitation Act.[4-b] The fact that a copy of the decree has already been filed in another proceeding is not sufficient.[5] In an appeal in a land acquisition case a copy of the award which is the decree in the case should be filed along with the memorandum of appeal.[6] Similarly in a probate case, a copy of the decree should accompany the memorandum of appeal.[7]

A memorandum of appeal should also be accompanied by a copy of the judgment appealed from. Only the *final* judgment need however be filed. It is not necessary to file *interim* orders and judgments disposing of preliminary issues in the case.[8] This rule makes a distinction between the filing of a copy of the decree and the filing of a copy of the judgment. The Court has no power to dispense with a copy of the *decree*[9] but it can dispense with a copy of the judgment. But unless dispensed with, a memorandum of appeal unaccompanied by a copy of the judgment is not valid.[10] Where, however, an appeal is admitted without a copy of the judgment, the order admitting the appeal may be taken to amount to an order dispensing with such copy.[11] The power to dispense with the copy of the judgment should, ordinarily, be exercised at the first hearing.[12] The fact that a copy of the judgment has been filed in another proceeding is not a sufficient ground for dispensing with the copy.[13] By force of O. 43, R. 2 a memorandum of appeal from an *Order* should be accompanied by a copy of the Order appealed from.[13-a] In cases,

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med Khan, 1924 Lah 352 (352): 69 Ind Cas 558.

(4-b) *Sundaram Ayyar* v. *Muthuramalinga Sethupathi* through *S Thirumalai Ayyangar*, 1923 Mad 482 (483): 17 Mad L W 352: 44 Mad L Jour 279: 32 Mad L Tim 232: 1923 Mad W N 164: 72 Ind Cas 808. See also *The Municipal Committee* v. *Bashi Ram*, 1922 Lah 170 (171): 69 Ind Cas 895.

(5) *Niadar* v. *Bhartu*, 1927 Lah 423 (424): 28 Pun L R 272: 101 Ind Cas 776.

(6) *Narsingh Das* v. *Secretary of State*, 1928 Lah 263 (264): 112 Ind Cas 797; *Nur Din* v. *The Secretary of State for India in Council*, 1927 Lah 49 (49): 7 Lah 539: 8 Lah L Jour 352: 27 Pun L R 698: 97 Ind Cas 187.

(7) *Hem Chandra Bakshi* v. *Jadhub Chandra Bakshi*, (1912) 17 Ind Cas 99 (100): 16 Cal L Jour 116.

(8) *Mt Saban* v. *Shahbai*, 1929 Lah 481 (483): 30 Pun L R 873: 115 Ind Cas 753: 10 Lah 587 F B [1926 Lah 638; 1927 Lah 449; 1927 Lah 451; 1928 Lah 45; 1928 Lah 46; 1928 Lah 60 overruled]. See also *Dwarka Das* v. *Telu Mal*, 1931 Lah 202 (203): 12 Lah L Jour 74; *Ram Narain Budha Singh* v. *Gwalior Light Railway*, 1932 Lah 136 (137): 33 Pun L R 100: 134 Ind Cas 300; *Jaswant Kuar* v. *Gajan Singh*, 1928 Lah 601 (603): 112 Ind Cas 602; *Ishar Das Dharam Chand* v. *Buta Mal Durga Das*, 1929 Lah 42 (43): 115 Ind Cas 67; *Thakar Singh* v. *Uttam Kaur*, 1929 Lah 295 (297): 30 Pun L R 328: 10 Lah 613: 118 Ind Cas 449; *Baloo* v. *Ganeshi Lal*, 1929 Lah 379 (380): 10 Lah L Jour 546: 30 Pun L R 48: 119 Ind Cas 282; *Lakshmi Das* v. *Ishar Das*, 1922 Lah 98 (98): 4 Lah L Jour 20; *Amar Nath* v. *Kishen Chand*, 1927 Lah 629 (630): 103 Ind Cas 224; *Dhani Ram* v. *Mt Goman*, 1927 Lah 640 (641): 103 Ind Cas 78. See however *Ganeshi Lal* v. *Sheo Singh Nihal*, 1927 Lah 905 (905, 906): 9 Lah L Jour 566: 106 Ind Cas 826 [No longer good law since the Full Bench decision referred to above].

(9) *Nur Din* v. *Secretary of State*, 1927 Lah 49 (50): 7 Lah 539: 8 Lah L Jour 352: 27 Pun L R 698: 97 Ind Cas 187; *Bhawani Prasad* v. *Kallu*, (1895) 17 All 537 (558): 1895 All W N 212 F B; *Prosonno Kumari Debi* v. *Ramachandra Singha*, (1912) 17 Ind Cas 155 (156): 17 Cal L Jour 66; *Parashram* v. *Likhan*, (1911) 10 Ind Cas 866 (867): 7 Nag L R 67; *U Po Thet* v. *Hauk Pat*, 1930 Rang 182 (183): 127 Ind Cas 167; *Mubarak* v. *Secretary of State*, 1925 Lab 438 (488): 6 Lah 218: 26 Pun L R 356: 94 Ind Cas 145; *C* v. *C*, 1903 Pun Re No 22: 91 Pun L R 1903.

(10) *Dhanpat* v. *Mela*, (1917) 41 Ind Cas 918 (918): 67 Pun Re 1917: 107 Pun L R 1917: 138 Pun W R 1917 F B; *Avudai Ammal* v. *Ganapathi Iyer*, (1914) 25 Ind Cas 28 (28) Mad; *Ramchandra Rao* v. *Maynram*, 1928 Nag 131 (132): 106 Ind Cas 57; *Labha Singh* v. *Basant Singh*, 1927 Lah 449 (451): 9 Lah L Jour 287: 28 Pun L R 407: 104 Ind Cas 645 [Copy dispensed with]; *Arif* v. *Akbar Ali*, 1930 Lah 935 (936): 130 Ind Cas 519, (Do.).

(11) *Agent, G I P Ry Co* v. *Jasrup Shrinath*, 1926 Nag 57 (60): 90 Ind Cas 185; *Mt Fazlunnissa* v. *Didar Hussain*, 1927 Lah 451 (452).

(12) *Joti Ram* v. *Harbaksh Singh*, 1928 Lah 60 (61): 9 Lah L Jour 393: 105 Ind Cas 658: 29 Pun L R 224.

(13) *Ghu'am Muhammad* v. *Rura*, 1927 Lah 721 (722): 104 Ind Cas 290.

(13-a) *Pisin Ali Khan* v. *Bhagwanta Kuar*, (1917) 42 Ind Cas 888 (889): 15 All L J 801: 40 All 12 [Appeal from order under S 47—Judgment and decree must be filed]; *Khirod Sundari* v. *Jnanendra Nath*, (1902) 6 Cal W N 283 (284) however, where a formal order is not drawn up[13b] or where the formal order is an exact copy of the concluding portion of the judgment[13c] the failure to file a copy of such order has been held not to invalidate the appeal.

An appeal from a decree which has been amended must be accompanied by a copy of the amended decree and not a copy of the original decree.[14] Where the decree is amended after the filing of the appeal the appellate Court may permit a copy of the amended decree to be attached to the memorandum of appeal, and the appeal becomes, from that moment, an appeal against the amended decree.[15] Where the amendment of the decree is only for the purpose of making the meaning of the decree clear, there is no such alteration as to make it a new decree and no copy of the amended decree need be filed in order to make the appeal, already filed, competent.[16]

The word "copy" in the rule means a certified copy.[17] A copy of the translation of the decree is not enough.[18] Nor does the rule require a printed copy of the judgment to be filed.[19] It is also not necessary that the copy should be one obtained by the *appellant* himself.[20] *See also* the case cited below.[21]

As to whether in second appeal a copy of the trial Court's judgment should be filed, *see* O. 42, R. 1, and the cases cited in Note 2 thereof. A copy of the trial Court's *decree* need not, under this rule, be filed along with a memorandum of second appeal.[21-a] The rule does not apply to appeals under the Madras Rent Recovery Act[22] or under the Oudh Rent Act.[23]

5. **Date of presentation for purpose of limitation.**—An appeal will be deemed to be validly presented for the purposes of limitation only when it is accompanied by a copy of the decree appealed from and of the judgment on which it is founded. Hence, though the memorandum of appeal may be filed

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[Appeal from order under S 47—Order must be filed]; *Dadabhai* v. *Cowasji*, 1928 Bom 177 (181): 24 Bom L R 1111: 77 Ind Cas 88: 47 Bom 849. But see *Indar Singh* v. *Gurdayal Singh*, 1924 Oudh 229 (229): 74 Ind Cas 86 [Conditional order setting aside *ex parte* decree—Appeal—Petition meanwhile dismissed for non-compliance with the condition—Order of dismissal should also be filed but objection on the ground of failure to file was only technical and the defect was condoned].

(13-b) *Kedarnath* v. *Nanak*, 1924 All 162 (162, 163): 74 Ind Cas 486; *Kamala Dasi* v. *Tarapada Mukerjee*, (1912) 14 Ind Cas 1006 (1006-1007): 15 Cal L Jour 498.

(13-c) *Mt Kausilla Kuer* v. *Mt Sukhdei*, 1928 All 579 (579): 21 All L J 452: 4 L R A Civ 246: 74 Ind Cas 761.

(14) *Keamat* v. *Abhooram Mistry*, (1910) 11 Ind Cas 8 (8) Cal. See also *Subramania Iyer* v. *Venkataramier*, (1915) 31 Ind Cas 4 (4) Mad.

(15) *Sadupadhya Umeshanand* v. *Revaneswar Prosad*, (1918) 43 Ind Cas 772 (774).

(16) *Kumar Birendra Nath Roy Bahadur* v. *Satish Chandra Joardar*, 1926 Cal 1166 (1167): 44 Cal L Jour 121: 97 Ind Cas 1003.

(17) *Reasat Ali Khan* v. *Mahfuz Ali Khan*, 1929 Lah 771 (772): 30 Pun L R 587: 11 Lah L Jour 363. But see *Firm, Chhota Lal Amba Prasad* v. *Firm, Basdeo Mal Hira Lal*, 1926 Lah 404 (404): 94 Ind Cas 2 [Where it was held that an unattested copy was enough where the report was that the record could not be traced].

(18) *Daim* v. *Hayat*, 1921 Lah 266 (267): 4 Lah L Jour 381; *Sher Dil Khan* v. *Samundar Khan*, (1931) 132 Ind Cas 3 (4): 12 Lah L Jour 305: 32 Pun L R 127.

(19) *Ramakrishna Pillai* v. *Muthuperumal Pillai*, (1915) 31 Ind Cas 924 (926, 927): 29 Mad L Jour 668.

(20) *T Aminudeen Sahib* v. *Pyari Bi*, (1920) 56 Ind Cas 73 (74): 11 Mad L W 370: 38 Mad L Jour 340: 1920 Mad W N 246: 43 Mad 683.

(21) *Ram Peara* v. *Ruptal*, (1918) 48 Ind Cas 102 (102): 80 Pun Re 1918: 181 Pun W R 1918 [Second appeal—Copy of decree of lower Court not containing grounds of appeal to that Court is enough].

(21-a) *Chuni Lal* v. *Dahyabhai*, 32 Bom 14 (24): 9 Bom L R 1138 [But under the rules of the appellate side it should be filed]; *Pirathi* v. *Venkatramanayyan*, (1882) 4 Mad 419 (420).

(22) *Kumara Akkappa* v. *Sithala*, (1892) 20 Mad 476 (479).

(23) *Abdul Hasan Khan* v. *Raj Kumar*, (1916) 34 Ind Cas 706 (706): 3 Oudh L J 209.

O. 41, R. 1, Notes 5—7.

within the period of limitation, it will be barred if the copies of the decree and judgment are not filed, till after the expiry of the period of limitation.[1] Where an appeal is filed against a minor respondent, the mere fact that the name of a guardian *ad litem* was not brought on record till after the period of limitation, will not make the appeal itself barred by limitation.[2]

As to when an application for revision may be converted into an appeal, *see* S. 115, Note 18.

6. **Omission to file copy of decree in rival appeal.**—Where there are several appeals from one judgment by different appellants, a copy of the judgment and of the decree should be filed in *each* appeal.[1] Thus in an appeal from an award under the Land Acquisition Act, the fact that the award disposed of many references, and it was filed in an appeal filed by a party in one appeal does not enable its being dispensed with in the other appeals.[2] But where the same appellant files different appeals from the *same* judgment, it has been held that it is sufficient if he files a copy of the judgment in one of the appeals only.[3]

7. **Two decrees in two cross-appeals.**—Where two cross-appeals are heard together and disposed of by a single judgment but two separate decrees are drawn up one in each appeal, there is a conflict of opinion as to whether an appeal against the judgment, filing a copy of one of the decrees only is valid.[1] The conflict is due to another aspect of the question namely whether an appeal against one of such decrees only is barred by *res judicata* by the non-filing of an appeal from the other. This aspect is discussed in Note 29, to S. 11, *ante*.

Note 5.

[1] *Chuni Lal* v. *Dahyabhai*, (1908) 32 Bom 14 (22, 23): 9 Bom L R 1138; *Akshoy Kumar* v. *Chunder Mohun*, (1889) 16 Cal 250 (251); *Balkaran Rai* v. *Gobind Nath*, (1890) 12 All 129 (139): 1890 All W N 39 F B; *Chaturbhuj Shay* v. *Muhammad Habib*, (1920) 54 Ind Cas 36 (37): 2 U P L R (Pat) 6; *Abdul Hakim* v. *Hem Chandra Das*, (1915) 30 Ind Cas 165 (166): 42 Cal 433; *Bhag Singh* v. *Jhanda Singh*, 1879 Pun Re No 7; *Nihal Singh* v. *Ishar Singh*, 1879 Pun Re No 147; *Lullee* v. *Ram Pershad*, (1867) 2 Agra 34; *Masum Begam* v. *Madan Mohan*, (1911) 9 Ind Cas 222 (222): 8 Pun W R 1911; *Dhanpat Mal* v. *Mela Mali*, (1917) 41 Ind Cas 918 (918, 919): 67 Pun Re 1917: 133 Pun W R 1917.

[2] *Rupchand* v. *Dasodha*, (1908) 30 All 55 (56): 1907 All W N 290: 3 Mad L Tim 58.

Note 6.

[1] *Riajan Thakur* v. *Charitar Thakur*, 1922 Pat 580 (581): 1 Pat 570: 4 Pat L Tim 290: 69 Ind Cas 686.

[2] *Mubarak Ali Shah* v. *Secretary of State*, 1925 Lah 438 (439): 6 Lah 218: 26 Pun L R 356: 94 Ind Cas 145; *Nur Din* v. *Secretary of State*, 1927 Lah 49 (49, 50): 7 Lah 539: 8 Lah L Jour 352: 27 Pun L R 698: 97 Ind Cas 187; *Secretary of State for India* v. *Tirath Ram*, 1928 Lah 216 (217, 218): 9 Lah 76: 104 Ind Cas 281.

[3] *Riajan Thakur* v. *Charitar Thakur*, 1922 Pat 580 (581): 1 Pat 670: 4 Pat L Tim 290: 69 Ind Cas 686; *Avudai Ammal* v. *Ganapathi Iyer*, (1914) 25 Ind Cas 28 (28, 29) Mad. See *Abdul Hakim Chowdhury* v. *Hem Chandra Das*, (1915) 30 Ind Cas 165 (166): 42 Cal 433 [Copy filed in rival appeal after the expiry of limitation—Appeal bad].

Note 7.

[1] *Murad Khatun* v. *Muhammad Baksh*, (1916) 33 Ind Cas 742 (743): 85 Pun W R 1916: 84 Pun Re 1916 [Yes]; *Mt Bhuri* v. *Mt Asghari, Begam*, 1926 Lah 458 (458): 94 Ind Cas 959: 7 Lah 447: 8 Lah L Jour 521: 27 Pun L R 660 [Yes]; *Sheoram* v. *Hiraman*, 1929 Nag 229 (232): 25 Nag L R 183: 12 Nag L J 101 [Yes]; *Bijai Bahadur* v. *Parameshwari Ram*, 1924 All 834 (835): 78 Ind Cas 1026 [Yes]; *Mathoornath* v. *Kisen Mohun*, 1864 Suth W R Mis 9 (9) [Yes]; *Muhammad Hussain-ud-din* v. *Saif Ali Shah*, 1924 Lah 41 (42): 4 Lah 122: 5 Lah L Jour 246: 74 Ind Cas 451 [Yes]. See *Mahabir Prasad* v. *Bisheshwar Prasad*, (1917) 42 Ind Cas 424 (425): 4 Oudh L J 512 [Appellant to be allowed to elect to which decree he would confine his appeal]; *Bhan Singh* v. *Gokal Chand*, (1919) 53 Ind Cas 137 (138, 139): 1 Lah 83: 84 Pun W R 1919 [No]; *Mohammad Din* v. *Tebunnissa*, 1922 Lah 390 (391): 3 Lah 257: 77 Ind Cas 541 [No]; *Kishori Lal* v. *Tilak Ram*, 1926 Lah 540 (541): 8 Lah L Jour 347: 95 Ind Cas 256: 27 Pun L R 745 [Yes]; *Devi Dittamal* v. *Official Liquidator, Amritsar Bank*, (1920) 56 Ind Cas 69 (70): 13 Sind L R 210 [No]; *Rakhal Chandra Tewary* v. *Manmathanath Mitter*, (1911) 10 Ind Cas 415 (416): 15 Cal W N 994 [No]; *Seetla Bin* v. *Debi Dayal*, 1926 Jour 137 (4): 13 Oudh L J 609: 96 Ind Cas 336 [No]; *Rakhal Chandra Tewari* v. *Manmatha Nath*, (1914) 24 Ind Cas 436 (439) Cal [No]; *Ram Narain* v. *Hari Kishen*, (1918) 44 Ind Cas 418 (419): 3 Pat L Jour 96 [No].

O. 41, R. 1,
Note 8.

8. **Limitation for appeal.**—*See* Arts. 152 and 156 of the Limitation Act.

The said Act provides for the *extension* of the period of limitation prescribed in certain cases, and for *exclusion* of certain periods in computing the period of limitation prescribed.

Extension of the period.—S. 4 of the Act provides that where the period prescribed expires on a day when the Court is closed, the suit, appeal or application may be instituted preferred or made on the day that the Court reopens.[1] Under S. 5 of the Act the Court has a discretion to admit the appeal after the expiry of the limitation period, if it is satisfied that there was "sufficient cause" for not preferring the appeal within the time.[2] In exercising the discretion under the section, the Court must, on the one hand, be fully satisfied of the justice of the grounds on which the delay is sought to be excused.[3] On the other hand, the expression "sufficient cause" should be liberally construed so as to advance substantial justice when no negligence, nor inaction nor want of *bona fides* is imputable to the appellant.[4] So construed, it will include not only those circumstances which the law expressly recognises as extending the time, but also such circumstances as are not expressly recognised but which may appear to the Court to be reasonable looking to the facts of the case.[5] As to what constitutes "sufficient cause" within the meaning of that section, *see* the undermentioned cases.[6]

Note 8.

(1) *Boyamma* v. *Balajee Rau,* (1897) 20 Mad 469 (469) [Though the Judge held Court on the gazetted holiday].

(2) *Bhairon Ghulam* v. *Ram Autar Singh,* 1921 All 23 (26): 43 All 660: 19 All L J 598: 63 Ind Cas 838: 3 U P L R (All) 165; *Doorga Churn* v. *Dookhiram,* (1899) 26 Cal 925 (929); *Binapani* v. *Sashi,* (1912) 17 Ind Cas 119 (120): 16 Cal L Jour 133; *Prosonno* v. *Ramchandra,* (1912) 17 Ind Cas 155 (156): 17 Cal L Jour 66; *Hem* v. *Jadab,* (1912) 17 Ind Cas 99 (100): 16 Cal L Jour 116; *Jugannath* v. *Shewratan,* (1875) 24 Suth W R 105 (105, 106): 15 Beng L R 272: F B; *Lakhmi Das* v. *Ishar Das,* 1922 Lah 93 (93): 4 Lah L Jour 20; *Sundaram Ayyar* v. *Muthuramalinga Sethupathy,* 1923 Mad 482 (483): 17 Mad L W 352: 44 Mad L Jour 279: 32 Mad L Tim 232: 1923 Mad W N 164: 72 Ind Cas 308; *Krishna* v. *Nallaperumal,* 1920 P C 56 (58): 43 Mad 550: 47 Ind App 33: 18 All L J 489: 22 Bom L R 568: 38 Mad L Jour 444: 28 Mad L Tim 28: 12 Mad L W 92: 1920 Mad W N 419: 2 U P L R 118: 56 Ind Cas 163 P C [Excusing delay under S 5, Limitation Act, may be implied by allowing appeal to be argued].

(3) *Karsondas* v. *Gungabai,* (1906) 30 Bom 329 (330).

(4) *Rakhal Chandra Ghosh Mozumdar* v. *Ashutosh Ghosh,* (1913) 19 Ind Cas 931 (933): 17 Cal W N 807; *Sarat Chandra Bose* v. *Saraswati Debi,* (1907) 34 Cal 216 (219): 5 Cal L Jour 380; *Gurprasad* v. *Ramasamajh Singh,* (1915) 31 Ind Cas 876 (877): 13 All L J 1101.

(5) *Kichilappa Naicker* v. *Ramanujam,* (1902) 25 Mad 166 (171): 11 Mad L Jour 406; *Cursandas* v. *Ladkavahoo,* (1896) 20 Bom 104 (109) [It is impossible to exactly define what is "sufficient cause"].

(6) **A bona fide mistake of law is sufficient cause:**—*Krishna* v. *Chathappan,* (1890) 13 Mad 269 (270); *Secretary of State for India* v. *Tirath Ram,* 1928 Lah 216 (218): 9 Lah 76: 104 Ind Cas 281; *Muhammad Hussanuddin* v. *Saif Ali Shah,* 1924 Lah 41 (42): 4 Lah 122: 5 Lah L Jour 246: 74 Ind Cas 451 [Second appeal—Rule requiring copy of trial Court's judgment having come into force only recently—Delay in filling the same was excused]; *Goverdhandas Vishindas* v. *Rijhibai,* 1930 Sind 252 (253) [Order under O 7, R 10—Appeal against—Returned plaint with the endorsement thereon filed but not copy of order under R 10—Appellant being under belief that filing of the returned plaint with the endorsement was enough—Order filed after expiry of limitation—Delay excused under S 5, Limitation Act]. But see *Bechi* v. *Ashanullah,* (1890) 12 All 461 (481): 1890 All W N 149 F B [Bare mistake of law is no excuse]. See also *Sitaram* v. *Nimba Valad,* (1888) 12 Bom 320 (322) [Mere ignorance of law is no excuse].

A bona fide mistake in calculating the period of limitation is sufficient cause:—*Zaibulnissa* v. *Kulsum,* (1876) 1 All 250 (252); *Huro Chunder* v. *Surna Moyi,* (1886) 13 Cal 266 (267, 268); *Bishendut Tewari* v. *Nundan Prasad Dubay,* (1907) 12 Cal W N 25 (27); *Rakhal Chandra Ghosh Mozumdar* v. *Ashutosh Ghosh,* (1913) 19 Ind Cas 931 (933): 17 Cal W N 807; *Kura Mal* v. *Ram Nath,* (1906) 28 All 414 (416): 1906 All W N 67: 3 All L J 218 [Mistake of appellant's pleader—Delay excused]. See also *Promoda Nath* v. *Kinoo Mollah,* (1909) 4 Ind Cas 495: 8 Cal L Jour 135: 13 Cal W N 167 [Respondents not added in time, due to mistake of clerk of appellant's pleader—Delay excused].

Delay due to amendment of decree in material particulars is sufficient cause:—*Brijo Lal* v. *Tara Prosanna,* (1906) 3 Cal L Jour 188 (192); *Amarchandra* v. *Asad Ali,* (1905) 32 Cal 908 (909, 910). *Miscellaneous:*—*Devi Dittamal* v. *Offical Liquidator,* (1920) 56 Ind Cas 69 (71): 13 Sind L R 210 [Joint appeal filed under mistaken impression that the cases had been consolidated—Separate appeal allowed to be filed though limitation had expired]; *Anand Moyee Dossee* v. *Poorno Chunder Roy,* (1861) 9 Moo

O. 41, R. 1, Note 8.

A Judge sitting in the Admission Court has power to excuse the delay in filing the appeal under S. 5 of the Limitation Act.[7] But an *ex parte* order admitting an appeal after the period of limitation can be set aside by the Court on objection by the opposite side after notice.[8] Such an objection should, however, be taken at the earliest possible opportunity after becoming aware of the order.[8-a] If an appeal is transferred from a District Judge, who has admitted the appeal *ex parte*, to a subordinate Judge for hearing, the latter can decide the question of limitation.[9]

An order admitting an appeal beyond limitation can be attacked in second appeal preferred against the appellate decree.[10] But the lower Court's discretion in allowing or refusing to allow an appeal to be filed beyond limitation under S. 5 of the Limitation Act, will not be lightly interfered with.[11] S. 5 of the Limitation Act does not apply to appeals in *forma pauperis*.[12]

Exclusion of period under S. 12 of the Limitation Act.—In computing the period of limitation for an appeal, the appellant is entitled under S. 12 of the Limitation Act, to a deduction of the time required for obtaining copies of the decree and of the judgment appealed from.[13] It is not necessary for

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Ind App 26 (38) [Unavoidable accident—Delay excused]; *Tirath Ram v. Municipal Committee, Amritsar*, 1926 Jour 101 (1): 8 Lah L Jour 239: 96 Ind Cas 416: 27 Pun L R 841 [Delay in filing connected judgment was excused]; *Harjas v. Kahni*, (1918) 19 Ind Cas 438 (439): 104 Pun W R 1913: 173 Pun L R 1913: 85 Pun Re 1913 [Copy of witness's deposition filed in place of copy of decree—Court clerk overlooking error—Delay excused].

Poverty of appellant—Not a sufficient cause:—*Husaini v. Collector of Muzaffarnagar*, (1887) 9 All 655 (659): 1886 All W N 245 [Confirming judgment of Mahmood, J in 9 All 11 (18); *Moshaullah v. Ahmedullah*, (1886) 13 Cal 78 (79).

Appellant being pardanashin woman is not a sufficient cause:—*Hussaini Begam v. Collector of Muzaffarnagar*, (1887) 9 All 11 (18): 1886 All W N 245 [Per Mahmood, J].

Carelessness is not a sufficient cause: —*Gurprasad Singh v. Ram Samajh Singh*, (1915) 31 Ind Cas 876 (877): 13 All L J 1101; *Achhar Singh v. Nikku*, (1914) 28 Ind Cas 319 (320): 2 Pun W R 1914: 24 Pun L R 1914: 32 Pun Re 1914. *Other cases:*—*Thucker Vussonji v. Oanji*, (1890) 14 Bom 365 (369) [Two suits involving same question—Similar decisions—One decision reversed in appeal—Subsequent appeal against the other decision—Delay not excused]; *Avudai Ammal v. Ganapathi Ayyar*, (1914) 25 Ind Cas 28 (28, 29) Mad [No merits in appeal—Delay in filing copy of judgment not excused].

(7) *T Ruthna Gramany v. N Veerabadra Ayyar*, (1913) 21 Ind Cas 96 (98): 25 Mad L Jour 281: 1913 Mad W N 751; *Sunderbai v. Collector of Belgaum*, 1918 P C 135 (136): 43 Bom 376: 46 Ind App 15: 21 Bom L R 1146: 23 Cal W N 753: 1919 Mad W N 254: 52 Ind Cas 897 P C.

(8) *Abdul Hakim v. Hem Chandra*, (1915) 30 Ind Cas 165 (166): 42 Cal 433; *Venkatrayadu v. Nagadu*, (1886) 9 Mad 450 (451); *Beshandut Tewari v. Nandan Pershad Dubay*, (1907-08) 12 Cal W N 25 (27); *Krishnaswami Pani Kondar v. Ramasami Chettiar*, 1917 P C 179 (180): 41 Mad 412; 45 Ind App 25: 16 All L J 57: 20 Bom L R 541: 27 Cal L Jour 258: 22 Cal W N 481: 2 Pat L R 1918: 4 Pat L W 54: 34 Mad L Jour 63: 23 Mad L Tim 101: 7 Mad L W 156: 1918 Mad W N 906: 11 Bur L Tim 121: 43 Ind Cas 493 P C; *Secretary of State v. Mootoo Sawmy*, (1870) 13 Suth W R 245 (246): 4 Beng L R App 84.

(8-a) *Murugappa Naicker v. Thayammal*, 1923 Mad 82 (83): 16 Mad L W 662: 1922 Mad W N 727: 31 Mad L Tim 456: 70 Ind Cas 827.

(9) *Mulna v. Krishnaji*, (1890) 14 Bom 594 (596); *Krishna Bhatta v. Subraya*, (1898) 21 Mad 228 (229): 7 Mad L Jour 188; *Manick v. Naibulla*, (1897) 2 Cal W N 461 (462). But see *Jhotee Sahoo v. Omesh Chunder*, (1880) 5 Cal 1 (1, 2): 8 Shome L R 81 [Sub-Judge cannot interfere with District Court's order—But District Court itself can set it aside].

(10) *Mowree Bewa v. Soorundarnath Roy*, (1868) 10 Suth W R 178: 2 Bom L R A C 184 Note.

(11) *Fatima Begam v. Hansi*, (1887) 9 All 244 (246): 1887 All W N 29; *Ram Narain v. Parameswar Narain*, (1903) 30 Cal 309 (315, 316): 30 Ind App 20: 8 Sar 481 P C; *Hamid Ali v. Gaya Din*, (1904) 26 All 327 (328, 329): 1904 All W N 28; *Parvati v. Ganpati*, (1899) 23 Bom 513 (518).

(12) *Berhi v. Asanullah*, (1890) 12 All 461 (489): 1890 All W N 149 F B.

(13) *Ramey v. Broughton*, (1884) 10 Cal 652 (660); *Gopal Chandra v. Preonath*, (1905) 32 Cal 175 (177); *Pandhari Nath v. Shankar*, (1901) 25 Bom 586 (588): 3 Bom L R 244; *Tukaram v. Pandurang*, (1901) 25 Bom 584 (585, 586): 3 Bom L R 148; *Kedarnath v. Nanak*, 1924 All 162 (162, 163): 74 Ind Cas 486; *Nobin Chunder v. Brojendro*, (1882) 12 Cal L R 541 (545); *Jijibhoy N Surty v. T S Chettiar*, 1928 P C 103 (104): 5 Oudh W N 479: 30 Bom L R 842: 47 Cal L Jour 510: 54 Mad L Jour 696: 109 Ind Cas 1: 6 Rang 302: 26 All L J 657: 32 Cal W N 845: 55 Ind App 161: 28 Mad L W 207 P C [Even though the High Court Rules dispense with the production of such a copy]; *Fazal Muhammad v. Phul Kuar*, (1878-80) 2 All 192 (193), (Do.). But see *Avudai Ammal v. Ganapathi Ayyar*, (1914) 25

O. 41, R. 1, Note 8.

the extension of time under S. 12, that the copy must have been applied for by the *appellant* himself or his authorised agent.[14]

The following points should be noted in computing the "Time requisite" for obtaining the copies:—

(1) The period between the date of the application and the date on which the stamp papers and the necessary amounts are called for should be excluded.[15]

(2) The period between the date on which the stamp papers are supplied and the date on which the copy is ready for delivery should be excluded.[16] In calculating such period the day on which the stamp papers are supplied and the day on which the copy is ready should *both* be excluded.[17]

(3) The interval between the date on which the copy is ready and the actual date on which the party takes delivery thereof cannot be excluded.[18]

(4) Where separate applications are made for copies of the judgment and of the decree, the periods necessary for obtaining each of the copies can be excluded except to the extent to which such periods overlap each other.[19]

(5) Holidays intervening in such a way as to prevent a party from taking the necessary steps for obtaining copies should be regarded as part of the time requisite for obtaining copy.[20] But to claim the benefit of S. 12 the application for copy must be made before the expiry of the period of limitation for the appeal.[21] If the period of limitation for the appeal expires on a day on which the Court is closed, the appellant applies for copy on the reopening day, he is not entitled to any extension of time on account of the intervention of the holidays.[22]

Ind Cas 26 (28) Mad; *Ram Kishen Shastari* v. *Kashi Bai*, (1907) 29 All 264 (266): 4 All L J 152: 1907 All W N 67.

(14) *Radha Kishen* v. *Gulzari Lal*, (1920) 56 Ind Cas 73 (74): 2 U P L R (All) 156: 18 All L J 569; *Ram Kishen* v. *Kashi Bai*, (1907) 29 All 264 (266): 4 All L J 152: 1907 All W N 67; *Dulali Bewa* v. *Saroda Kinkar*, (1898) 3 Cal W N 55 (56).

(15) *Kali Sankar* v. *Baikanta Nath*, (1902) 7 Cal W N 109 (110). But see *Gunga Das* v. *Ram Joy*, (1886) 12 Cal 80 (82, 83) [Time taken in ascertaining requisite number of folios not to be deducted].

(16) *Haji Hassum* v. *Nur Mahomed*, (1904) 28 Bom 643 (644): 6 Bom L R 920; *Gopee Nath* v. *Gopee Nath*, (1866) 6 Suth W R Mis 106 (106); *Lal Gopal Nath* v. *Pudum Koonwar*, (1866) 5 Suth W R Mis 44. See *Ramanuja Ayyangar* v. *Narayana Ayyangar*, (1895) 18 Mad 374 (377) [Application for copies struck off for non-deposit of stamp papers—Subsequent application for restoration granted—Subsequent application was continuation of former one].

(17) *Beer Cunder* v. *Mahomed Asgur*, (1864) Suth W R 145.

(18) *Gopal Chunder* v. *Brojo Behari*, (1882) 9 Cal L Rep 293 (294).

(19) *Selamban Chetty* v. *Ramanadhan Chetty*, (1909) 4 Ind Cas 301 (302): 7 Mad L Tim 29: 1910 Mad W N 141: 33 Mad 256: 21 Mad L Jour 152.

(20) *Amir Hossain* v. *Tulsi Das*, (1903) 8 Cal W N 141 (142) [Additional stamps for the preparation of copy of decree called for on a day when Court closes for vacation and stamps supplied on the reopening day—Intervening time should not be counted against the appellant]; *Ramaswami Chetty* v. *Ramanathan Chetty*, (1913) 21 Ind Cas 192 (192): 14 Mad L Tim 194: 25 Mad L Jour 354: 1913 Mad W N 805; *Saminatha* v. *Venkatasubba*, (1904) 27 Mad 21 (23): 13 Mad L Jour 300.

(21) *The New Piece Goods Bazaar Co, Ltd* v. *Jivabhai Vadilal*, (1913) 20 Ind Cas 537 (538): 15 Bom L R 681.

(22) *Guran Rakha* v. *Bindraban*, (1916) 35 Ind Cas 233 (233, 234): 55 Pun W R 1916: 79 Pun Re 1916: 125 Pun L R 1916; *Venkata Row* v. *Venkatachala*, (1903) 28 Mad 452 (458): 15 Mad L Jour 109; *Siyadatunnissa* v. *Mahmud*, (1897) 19 All 342 (347): 1897 All W N 76.

O. 41, R. 1; Notes 8—10.

(6) An appellant is entitled to deduct as time requisite for obtaining copy of decree, any period during which the decree remains unsigned.[23] But he is not entitled to do so if the delay in signing the decree was *before* his application for copy.[24]

Exclusion of period under S. 14 *of the Limitation Act.*—S. 14 of the Limitation Act does not apply to appeals. But where time has been spent in prosecuting an appeal in a wrong Court through a *bona fide* mistake the delay in filing the appeal may be excused in the exercise of the discretion of the Court under S. 5 of the Limitation Act.[25] But where the appellant has been guilty of carelessness he is not entitled to extension of time on the ground of having prosecuted his remedy in a wrong Court.[26] In the case cited below[27] it was held that the time during which an appellant was prosecuting an application under O. 9, R. 13 cannot be deducted in calculating the period of limitation against him.

9. **Exclusion of time in seeking review of judgment.**—An appellant is not entitled, as of right, to the exclusion of the time spent by him in seeking a review of the judgment, in computing the period of limitation for his appeal.[1] But if the appellant can show that he had reasonable grounds for applying for review instead of preferring an appeal and that he had exercised due diligence, the time taken up by the review application may be excused under S. 5 of the Limitation Act in computing the limitation for the appeal.[2]

10. **Misdescription in the memorandum of appeal.**—The mere misdescription of an appeal as where, it is described as being an appeal from an order instead of its being described as one from a *decree* will not invalidate the appeal.[1]

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(23) *Bechi* v. *Ahsanulla,* (1890) 12 All 461 (469): 1890 All W N 149 F B; *Beni Madhaub* v. *Matungini,* (1886) 13 Cal 104 (107) F B.

(24) *Yamaji* v. *Antaji,* (1899) 23 Bom 442 (445): In the matter of *Chowdhry Mohendra Narain Roy,* (1872) 18 Suth W R 512.

(25) *Maqbul Ahmad* v. *Muria,* (1916) 33 Ind Cas 546 (547): 14 All L J 212; *Balaram* v. *Shamsunder,* (1896) 23 Cal 526 (531); *Dadabhai Jamsetji* v. *Maneksha,* (1897) 21 Bom 552 (555). See also *Nawab* v. *Muhammad Hayat,* (1916) 33 Ind Cas 1006 (1007): 29 Pun W R 1916 [Appeal erroneously returned by appellate Court for presentation to proper Court—To be deemed as filed in proper time if re-presented with due diligence].

(26) *Jog Lal* v. *Har Narain,* (1888) 10 All 524 (529, 530): 1888 All W N 218 [The mistake must be in spite of due care and attention]; *Dadabhai* v. *Emnabhai,* (1904) 28 Bom 235 (237): 5 Bom L R 947 [Appellant guilty of laches—Delay not excused]; *Ram Jiwan* v. *Chand Mal,* (1888) 10 All 587 (598): 1888 All W N 258 [Ignorance or mistake of law is no excuse—*Bona fide* mistake of *fact* may justify extension of time]; *Bhimrao* v. *Ayyappa,* (1907) 31 Bom 33 (36): 8 Bom L R 858 [Appellant having known that the correctness of course being pursued by him was doubtful, delay not excused]; *Sarat Chandra* v. *Saraswati Debi,* (1907) 34 Cal 216 (219): 5 Cal L Jour 380 [Mere inadvertence not enough]; *Umed Ali* v. *The Municipal Committee, Jhang Maghiana,* 1922 Lah 233 (234): 2 Lah 1: 2 Lah L Jour 486: 56 Ind Cas 143 [Revision filed though appellant knew that appeal lay—Delay not excused].

(27) *Ardha Chandra* v. *Matangini,* (1896) 23 Cal 325 (327).

Note 9.

(1) *Peresh Nath* v. *Goral Krishte,* (1871) 15 Suth W R 61 (61); *Govinda* v. *Bhandari,* (1891) 14 Mad 81 (81, 82); *Vasudeva* v. *Chinnasami,* (1884) 7 Mad 584 (585, 586).

(2) *Gobinda Lal* v. *Shibdas,* (1903) 33 Cal 1323 (1325): 10 Cal W N 986: 8 Cal L Jour 545; *Vasudeva* v. *Chinnasami,* (1884) 7 Mad 584 (585, 586); *Ashanulla* v. *Collector of Dacca,* (1888) 15 Cal 242 (244); *Haradhan* v. *Pran Krishna,* (1909) 2 Ind Cas 961 (962): 10 Cal L Jour 89; *Raman* v. *Hussan,* (1886) 9 Mad 247 (248): 10 Ind Jur 68; *Pundlik* v. *Achut,* (1894) 18 Bom 84 (85, 86); *Kuller Singh* v. *Jawan Singh,* (1874) 22 Suth W R 79 (79): 13 Beng L R 461; *Nobokisan* v. *Kaminee,* (1865) 2 Suth W R Mis 35 (36); Beng L R Sup Vol 349: Bourke A O C 38 F B; In the petition of *Brojendar Coomar,* (1867) 7 Suth W R 529 (531): Bom L R Sup Vol 728 F B.

Note 10.

(1) *Sant Lal* v. *Sri Kishen,* (1892) 14 All 221 (222, 223): 1892 All W N 66. But see *Umrao Ali Khan* v. *Abdul Subhan Khan,* (1908) 5 All L J 545 (546): 1908 All W N 40; *Nanjundier* v. *Venkata Rao,* (1910) 7 Ind Cas 797 (797): 8 Mad L Tim 199 [Appellate Court can allow amendment of the section given in the heading of the appeal]. But see *Kedarnath* v. *Lalji Sahai,* (1890) 12 All 61 (63): 1889 All W N 198 F B [Appeal erroneously presented as appeal from order was refused to be converted into appeal from decree].

O.41, R.1, Notes 11—12.

11. Grounds of objection.—The general principle is in favour of the correctness of the lower Court's judgment and the *onus* is on the appellant to show that it is wrong.[1] Accordingly this rule provides that the memorandum of appeal should state the grounds of objection on which the decree is attacked.[2] Such grounds should not be vague[3] but must raise specific issues.[4] R. 2 of this order provides that where an objection has not been raised in the *memorandum of appeal,* the appellant is not entitled, without the leave of the Court, to raise it at the *hearing*.

It is open to the appellant to set up any circumstance showing that the Judge of the lower Court was disqualified to try the case.[5]

12. Grounds that may be taken in the memorandum of appeal for the first time.—The general rule is that the appellant cannot be allowed to raise in his memorandum of appeal, a new case,[1] or a plea abandoned by him in the trial Court,[2] or a case inconsistent with that alleged by him in the lower

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Note 11.

(1) *Naba Kishore Mandal* v. *Upendra Kishore Mandal,* 1922 P C 39 (40): 20 All L J 22: 35 Cal L Jour 116: 42 Mad L Jour 253: 1922 Mad W N 95: 65 Ind Cas 305: 26 Cal W N 322: 3 Pat L Tim 311: 24 Bom L R 346: 15 Mad L W 417: 30 Mad L Tim 234 P C; *Fakrunissa* v. *Izarus Sadik,* 1921 P C 55 (56): 25 Cal W N 866: 17 Nag L R 72: 63 Ind Cas 898 P C; *Wise* v. *Sunduluvmissa,* (1866-67) 11 Moo Ind App 177 (181): 7 Suth W R P C 13: 1 Suth 667: 2 Sar 249 P C; *Marian Bibi* v. *Md Ibrahim,* (1918) 48 Ind Cas 561 (580, 581): 28 Cal L Jour 306; *Tahbonnissa* v. *Sham Kishore,* (1871) 15 Suth W R 228 (229): 7 Beng L R 621; *Shetabdeo* v. *Molamdee,* (1876) 25 Suth W R 30 (31); *Lal Shah* v. *Hira Lal,* (1917) 41 Ind Cas 163 (166): 119 Pun W R 1917: 106 Pun Re 1917; *Ghulam Nabi* v. *Allah Din,* (1913) 19 Ind Cas 964 (966): 241 Pun L R 1913: 143 Pun W R 1913; *Mariam Begam* v. *Qamrunnissa Begam,* (1925) 89 Ind Cas 703 (704) Oudh; *Manni Lal* v. *Mool Chand* 1925 Oudh 224 (224): 80 Ind Cas 683; *Jalal Ram* v. *Rai Bakadur,* 1924 Oudh 326 (328): 11 Oudh L J 87: 83 Ind Cas 563.

(2) *Ranchodji* v. *Lallu,* (1881-82) 6 Bom 304 (306).

(3) *Raghoba* v. *Bhairaosing,* (1895) 8 C P L R 81 (82).

(4) *Banke Lal* v. *Kanhaiya Lal,* 1923 Oudh 113 (113): 9 Oudh L J 637: 77 Ind Cas 839.

(5) *Zamindar of Tuni* v. *Bennayya,* (1899) 22 Mad 155 (159, 160): 8 Mad L Jour 304. See *Ram Koomar* v. *Sonatun,* (1879) 3 Cal L Rep 23 (24) [If party wishes to make misconduct of Judge a ground of appeal he ought to draw Judge's attention to the matter].

Note 12.

(1) See *generally Note 55 to Section* 100—See also *Hunnera Bibi* v. *Zubeda Bibi,* (1905) 2 All L J 485 (487): 1905 All W N 125; *Jey Devi* v. *Mahadeo Prasad,* (1910) 6 Ind Cas 373 (374) All [The plea that a certain defendant is a minor —Not raised in the first Court and a decree is allowed to be passed—The plea cannot be raised in appeal]; *Sohan Bibi* v. *Hiran Bibi,* (1911) 10 Ind Cas 230 (231) All; *Md Abbas Ali Khan* v. *Chotey Lal,* 1927 All 28 (35): 24 All L J 1025: 97 Ind Cas 594: 49 All 162 [New plea cannot be raised for the first time in Letters Patent Appeal]; *Tasadduq Husain* v. *Chaturbhuj,* 1927 All 63 (65): 97 Ind Cas 483 [Point deliberately omitted to be taken in lower Court not allowable]; *K Bin Gulabchand* v. *Krishnabai Kom Babaji,* (1877-78) 2 Bom 635 (637); *Punchanun Roy* v. *Troyluckho Mohinee Dossee,* (1870) 14 Suth W R 466 (466); *Gopee Lal* v. *Chandraolee,* (1873) 19 Suth W R 12 (14): 11 Beng L R 391: Ind App Sup Vol 131: 3 Sar 217 P C; *Dursun Sahoo* v. *Prayag Ram,* (1877) 2 Cal L Rep 538 (542); *Moung Hmoon* v. *Mah Hpwah,* (1884) 10 Cal 777 (785): 11 Ind App 109: 4 Sar 505: 1 L B R 258: 8 Ind Jur 276 P C; *Rani Hemanta Kumari Debi* v. *The Secretary of State for India in Council,* (1906) 3 Cal L Jour 560 (567, 568): 1 Mad L Tim 175 P C; *Rajlakshmi Dasya* v. *Prodyot Kumar Tagore,* (1918) 46 Ind Cas 184 (186) Cal; *Sailendra Nath Palit* v. *Syed Hade Kaza,* 1932 Cal 356 (362): 54 Cal L Jour 328: 36 Cal W N 193: 59 Cal 586: 137 Ind Cas 500; *Sharif Husain* v. *Md Yusuf,* 1905 Pun Re No 88: 179 Pun L R 1905: 113 Pun W R 1905; *Hanwanta* v. *Padman,* (1909) 4 Ind Cas 1164 (1166): 245 Pun L R 1913: 160 Pun W R 1909; *Nathu* v. *Kanji,* (1913) 18 Ind Cas 608 (609): 138 Pun L R 1913: 4 Pun W R 1913; *Mahiditta Mal* v. *Mrs Nicholson,* (1913) 19 Ind Cas 770 (775): 224 Pun L R 1913: 133 Pun W R 1913; *Murad Ali* v. *Chiragh Din,* (1915) 28 Ind Cas 550 (550): 104 Pun L R 1915: 40 Pun W R 1915; *Ramchand* v. *Ramanand,* 1921 Jour 22 (2): 68 Ind Cas 227: 3 Lah L Jour 392; *Girdhari Lal* v. *Jugal Kishore,* 1932 Lah 264 (265): 33 Pun L R 151: 136 Ind Cas 733; *Thasi Muthukannu* v. *Shanmugavelu Pillai,* (1905) 28 Mad 413 (420): 15 Mad L Jour 286; *Ellusah* v. *Ruppa Rangayyan,* (1909) 4 Ind Cas 1102 (1102): 5 Mad L Tim 126; *Rayar Sivaramakrishnier* v. *Sankaralinga Konar,* (1910) 8 Ind Cas 354 (355): 8 Mad L Tim 247; *Srinivasa Ayyar* v. *Lakshmi Ammal,* 1928 Mad 216 (222): 54 Mad L Jour 530: 108 Ind Cas 712: 28 Mad L W 828 [Widow—Expenses of vritham—Question as to time of allocation of the amount was not allowed to be raised in appeal for the first time]; *Farkhand* v. *Mohamed Sahib,* (1918) 44 Ind Cas 624 (625): 4 Oudh L J 731; *Musst Isad* v. *Dhaman Mal,* (1913) 19 Ind Cas 368 (369): 6 Sind L R 135.

(2) *Hardeo Prasad* v. *Ganga Sahai,* 1921 All 197 (197): 19 All L J 155: 61 Ind Cas 48 [Plaintiff accepting decision of trial Court and not appealing—Cannot challenge in second appeal]; *Jaimal* v. *Lal Singh,* (1911) 11 Ind Cas 408 (409): 88 Pun W R 1911; *Fakira Shah* v. *Brij Lal,* (1917) 39 Ind Cas 381 (382): 6 Pun W R 1917: 20 Pun L R 1917; *Ramaswami Goundan* v. *Thirupathi Goundan,* 1926 Mad 1167 (1168): 50 Mad 10: 24 Mad L W 460: 98 Ind Cas 291: 52 Mad L Jour 259; *Narayan* v. *Beharilal,* 1926

O. 41, R. 1, Note 12.

Court, especially when the opponent is thereby placed at a disadvantage.[3] Nor can he raise in his memorandum of appeal an objection which, if it had been taken in the lower Court, might have been cured, by appropriate amendments or otherwise.[4] Thus objections as to joinder of parties or causes of action which might have been cured by amendment even in the trial Court cannot be raised for the first time in the memorandum of appeal.[5] Again,

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Nag 160 (161): 89 Ind Cas 18; *Ghulam Sarwar v. Nayaz Ali*, 1921 Oudh 41 (42): 24 Oudh Cas 181: 64 Ind Cas 185; *Mahadeo Tewari v. Sitla Baksh*, 1922 Oudh 102 (105): 65 Ind Cas 408: 8 Oudh L J 660. See however *Govindarav Krishna v. Balubin Monapa*, (1892) 16 Bom 586 (589) [Ground abandoned at the trial—Appellate Court should not dismiss the suit on this ground].

(3) *Lakshmi Venkayamma Row v. Venkatadri Appa Rao*, 1921 P C 27 (29): 19 All L J 97: 23 Bom L R 713: 33 Cal L Jour 171: 25 Cal W N 654: 40 Mad L Jour 144: 13 Mad L W 77: 1921 Mad W N 77: 59 Ind Cas 767: 29 Mad L Tim 164 P C; *Sultan Bahadur Garu v. Secretary of State for India*, 1926 P C 18 (20): 53 Ind App 64: 50 Mad L Jour 391: 49 Mad 249: 43 Cal L Jour 378: 94 Ind Cas 501: 28 Bom L R 865: 24 Mad L W 9: 1926 Mad W N 585 P C; *Naiku Khan v. Gayani Kuar*, (1893) 15 All 186 (187): 1893 All W N 69 [Allegation that defendant was tenant precludes contention that he was trespasser]; *Puran Mal v. Krant Singh*, (1898) 20 All 6 (10): 1897 All W N 154; *Ilahikhan v. Sher Ali*, (1904) 26 All 331 (334); *Masuma Khatum v. Tahira Khatun*, (1913) 19 Ind Cas 661 (662): 11 All L J 580 [Suit based on *mortgage* not allowed to be changed into suit on *charge*]; *Lalta Prasad v. Nasir Khan*, (1920) 56 Ind Cas 179 (180) All; *Mukhlal v. Hiranand*, 1921 All 154 (155): 19 All L J 442: 62 Ind Cas 884; *Hari Ravji Chiplunkar v. Shapurji Hormasji*, (1886) 10 Bom 461 (467): 13 Ind App 66: 4 Sar 719: 10 Ind Jur 310 P C; *Somna v. Gadigaya*, (1911) 9 Ind Cas 941 (942): 13 Bom L R 113: 35 Bom 231 [Plea of separate oral agreement cannot be converted into one of fraud]; *Kisan Yamaji v. Shripat Tatya*, 1929 Bom 114 (115): 30 Bom L R 889: 112 Ind Cas 462; *Doorga Pershad v. Doorga Koonwaree*, (1870) 13 Suth W R 10 (11): 9 Beng L R 306 Note [Suit by a Hindu widow for possession and declaration of title—Defendant cannot urge for the first time in appeal that by a family custom, females could not inherit]; *Bunsee Lal v. Aoladh Ahsan*, (1874) 22 Suth W R 552 (553); *Protab Chunder v. Collector of Gowalparah*, (1874) 22 Suth W R 216 (218, 219) [Inconsistent plea of title by adverse possession cannot be raised for first time in appeal]. See also *Bijoya Debia v. Bydonath*, (1875) 24 Suth W R 444 (445) [Plaintiff cannot succeed on title different from that alleged in the plaint]; *Madhub Ali Khan v. Hossain Reza Khan*, (1879) 4 Cal L Rep 52 (54); *Satyabhama v. Krishnachunder*, (1881) 6 Cal 55 (58): 6 Cal L Rep 375 [Ejectment suit—Defendant claiming adverse title in himself cannot in appeal contend his occupancy ryot and as such not liable to ejectment]; *Indur Chunder v. Radha Kishore*, (1892) 19 Cal 507 (512): 19 Ind App 90: 6 Sar 185 P C; *Ram Dao Mondal v. Indromani*, (1899) 3 Cal W N 325 (328) [A suit for possession based on fraud, cannot be converted on appeal into one for redemption]; *Ghurphekni v. Purmeshar Dayal*, (1907) 5 Cal L Jour 658 (662): *Pandit Prayag Raj v. Goukaran*, (1902) 6 Cal W N 787 (791) [Plea of fraud cannot be raised for first time in appeal]; *Sujjad Ahmed Chowdhury v. Ganga Charan Ghose*, (1905) 1 Cal L J 116 (117): 9 Cal W N 460 [Defendant repudiating plaintiff's title in an ejectment suit in the trial Court—In appeal he cannot set up a plea of tenancy and want of notice]; *Choudurani v. Sourendra Mohan Tagore*, (1910) 5 Ind Cas 105 (106): 11 Cal L Jour 601; *Narendra Chandra Lahiri v. Saroda Kanta Moitra*, (1910) 6 Ind Cas 829 (830) Cal [Fraud alleged in first Court—Plea cannot be changed into that of negligence in appeal]; *Epasan Ali v. Ram Kumar Dei*, (1920) 55 Ind Cas 375 (377) Cal; *Hari Charan Das v. Tara Prasunna Sen*, 1925 Cal 541 (544): 79 Ind Cas 354; *Siteswar Roy v. Tepua Barman*, 1926 Cal 589 (590): 92 Ind Cas 908 [Actual possession pleaded and found against—Constructive possession through the defendant cannot be set up for the first time in appeal]; *Bhag Bhari v. Gujar Mal*, (1917) 38 Ind Cas 623 (624): 40 Pun W R 1917: 63 Pun Re 1917 [Case solely based on hundi—Plaintiff cannot in appeal seek to rely on original cause of action]; *Ram Das v. Panna Devi*, 1921 Lah 201 (202): 5 Lah L Jour 117: 84 Ind Cas 1089 [Plea of invalidity of marriage is not necessarily inconsistent with a plea denying the factum of marriage]; *Basant Ram v. Muhammad*, 1921 Lah 326 (327): 4 Lah L Jour 293; *Mahomed v. Sitaramayyar*, (1892) 15 Mad 50 (52) [Case founded on allegation of fraud—Cannot be converted into one on basis of implied covenant for title]; *Gajapathi Badhika v. Vasudeva*, (1892) 15 Mad 503 (511): 19 Ind App 179: 6 Sar 218 P C; *Ellusah v. Ruppu Rangayan*, (1908) 18 Mad L Jour 562 (568) [Plaintiff decree-holder having asserted right to rateable distribution in lower Court cannot in appeal demand entire sale proceeds]; *Sankaralinga v. Poonamalai*, (1910) 6 Ind Cas 423: 8 Mad L Tim 87 [Plaintiff suing only for partition cannot in second appeal be permitted to set up new case in nature of easement]; *Barkhurdas v. Munawar Din*, (1910) 7 Ind Cas 568 (569, 570): 1910 Mad W N 391: 8 Mad L Tim 251 [Suit based on alleged completed sale—Plaintiff not entitled in special appeal to have suit treated as suit for specific performance of contract of sale]; *Maikal v. Thambusami*, (1914) 25 Ind Cas 934 (935): 1 Mad L W 858: 1914 Mad W N 784; *Mommad Kutti v. Kizha Kalagot Puthiyatath*, 1928 Mad 962 (963): 109 Ind Cas 245; *Chanharaja Baksh v. Ram Harkah*, (1916) 32 Ind Cas 740 (741): 2 Oudh L J 601; *Kasham Khan v. Savitri*, (1913) 19 Ind Cas 547 (548): 9 Nag L R 88 [Issue in lower Court whether mortgage debt has or has not been satisfied—Plea that occupier has no interest entitling him to be joined as party to the suit cannot be raised for first time in appeal]; *Jagat Pal Singh v. Harnam Singh*, (1916) 34 Ind Cas 745 (746): 3 Oudh L J 244: 19 Oudh Cas 166 [Redemption suit—Defendant pleading in first Court that he had also purchased the equity of redemption—He cannot in appeal plead that there has been a foreclosure]; *Singheshwar Missir v. Rameshwar Jha*, (1916) 34 Ind Cas 466 (470) Pat [Plaintiff claiming direct possession cannot in appeal allege possession through co-sharers]; *Ma Min Kyin v. Maung Wa*, (1915) 31 Ind Cas 875 (875): 9 Bur L Tim 58.

(4) *Madho Prasad v. Firm of Ashan Ilahi*, 1921 Jour 25 (8): 5 Lah L Jour 108: 79 Ind Cas 977.

(5) *Nurul Hossein v. Sheosahai*, (1893) 20 Cal 1 (6): 19 Ind App 221: 6 Sar 205 P C; *Nakur Chunder v. Jodoo Nath*, (1875) 24 Suth W R 389 (389). See also *Subbien v. Ramaswami Chetty*, (1903) 26 Mad 363 (364) [Want of notice as required by S 39 of the Rent Recovery Act (Madras Act VIII of 1865) should be pleaded in the plaint; it cannot be allowed at a later stage in appeal].

O. 41, R.1, Note 12.

there are certain objections such as those relating to the place of suing, or the valuation of the suit, that cannot, under the specific provisions of the statute, be raised for the first time in appeal (*see* S. 21 of the Code and S. 11 of the Suits Valuation Act, 1887). Such objections therefore cannot be allowed to be raised for the first time in the memorandum of appeal.[6] An objection that a declaratory decree cannot be passed with respect to a future right will not also be allowed to be raised for the first time in the memorandum of appeal.[7]

The following are, however, recognised as exceptions to the general rule that a new case cannot be raised for the first time in the memorandum of appeal:—

(1) Objections as to jurisdiction apparent on the face of the record.[8]

(2) Pleas going to the root of the case, and which are obvious on the face of the record,[9] such as non-joinder of essential parties[10] or want of notice to quit,[11] or insufficiency of notice in suits for foreclosure.[12]

(3) Questions of law[13] such as a question of limitation[14] or of *res*

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[6] *Maharaja of Jeypore* v. *Mathra Das*, (1910) 6 Ind Cas 1006 (1007): 78 Pun W R 1910; *Aukil Chunder* v. *Mohinee Mohan*, (1879) 4 Cal L Rep 491 (496): 5 Cal 489; *Kali Kumar Chatterjee* v. *Kristo Kishore Poddar*, (1870) 14 Suth W R 196 (196); *Shajan Bibi* v. *Earsin Dewan*, (1912) 16 Ind Cas 46 (47) Cal [Case turning on S 11 of Suits Valuation Act]; *Wilayat Ali* v. *Umardaraz*, (1897) 19 All 165 (168): 1897 All W N 33 [Case turning on S 12 of the Court Fees Act]; *Subah Roy* v. *Buldeo Singh*, (1875) 24 Suth W R 225 (226); *Mi Mi* v. *Sohan Singh*, (1916) 33 Ind Cas 595 (595) Rang: 8 Bur L Tim 290 [Objection as to stamp]; *Chimaji Govind* v. *Dinkar Dhond Dev*, (1887) 11 Bom 320 (324): 11 Ind Jur 342 [Reception of inadmissible document in evidence]; *Hridoy Krishna* v. *Prosunna*, (1901) 28 Cal 142 (145), (Do.); *Akbar Ali* v. *Bhuea Lal*, (1881) 6 Cal 666 (670): 7 Cal L Rep 497: 3 Shome L R 260, (Do.); *Mohaber Das* v. *Lalla Roy*, (1864) 1 Suth W R 12 (12), (Do.); *Gour Surun Dos* v. *Kanhia Singh*, (1865) 2 Suth W R 237 (238), (Do.); *Luchmeeput* v. *Moshuriff*, (1876) 25 Suth W R 80 (80), (Do.); *Hur Chunder* v. *Wooma Soonduree*, (1875) 23 Suth W R 170 (170), (Do.); *Baij Nath* v. *Mathura Das*, (1910) 6 Ind Cas 1006 (1007): 78 Pun W R 1910, (Do.); *Mi Ke* v. *Nga Kan Gyi*, (1909) 4 Ind Cas 1086 (1088): U B R 1907-09 Stamp Act, page 3, (Do.); *Bishen Singh* v. *Nathu*, (1909) 4 Ind Cas 892 (893): 83 Pun L R 1909: 93 Pun W R 1909, (Do.).

[7] *Bombay Burma Trading Corporation* v. *Smith*, (1893) 17 Bom 197 (220, 221); *Maganlal* v. *Govindlal*, (1891) 15 Bom 697 (701). See also *Limba* v. *Rama*, (1889) 13 Bom 548 (551) [Objection as to suit being bad under S 42, Specific Relief Act not taken in trial Court—Appellate Court can't dismiss suit on such objection].

[8] See *generally Note 59 to Section* 100:—*Motilal* v. *Jamnadas*, (1864-66) 2 Bom H C R 40 (45); *Ramrattan Bhuggat* v. *Buckullah*, (1864) 1 Suth W R 259 (260); *Aukhil Chunder Sen Roy* v. *Mohiny Mohun Das*, (1880) 5 Cal 489 (492): 4 Cal L Rep 491; *Rajendra Narain Chowdhury* v. *Satish Chandra Chowdury*, 1924 Cal 233 (233): 50 Cal 948: 77 Ind Cas 795 [Point though abandoned in trial Court can be raised in appellate Court]. See also *Sethu* v. *Venkatarama*, (1886) 9 Mad 112 (114); *Nagamma* v. *Subba*, (1888) 11 Mad 197 (199); *Suraj Bhan* v. *Punjab Cotton Press*, (1913) 18 Ind Cas 130 (131): 45 Pun L R 1913: 40 Pun W R 1913 [Objection as to place of suing cannot be allowed unless there is consequent failure of justice].

[9] See *generally Note 58 to Section* 100.—See also *Trustees of the Land Mortgage Bank* v. *Barbara Elias*, (1869) 11 Suth W R 40 (41): 2 Beng L R A C 212 [Apparent defect in plaint—Objection can be raised at any stage].

[10] *Ghulam Kadir* v. *Mustakim Khan*, (1896) 18 All 109 (112): 1896 All W N 7.

[11] *Dodhu* v. *Madhaorao Narayan Gadre*, (1894) 18 Bom 110 (114); *Subba* v. *Nagappa*, (1889) 12 Mad 353 (354): 13 Ind Jur 256.

[12] *Madho Pershad* v. *Gajadhur*, (1883) 11 Cal 111 (118): 11 Ind App 186: 4 Sar 574: 8 Ind Jur 694: R & J 85 P C.

[13] See *generally Note 56 to Section* 100.—See also *Ramachandra Balwant Tilak* v. *Narasimha Chitaman*, 1931 Bom 466 470): 33 Bom L R 590: 133 Ind Cas 839; *Jai Narain* v. *Ramji Lal*, 1923 Lah 608 (609): 80 Ind Cas 181; *Safdar Ali Khan* v. *Lachman Das*, (1878-80) 2 All 554 (559): 5 Ind Jur 92 [Invalidity of document on the ground of registration]; *Lakshminarayana Ayyar* v. *Packiri Chettiar*, (1925) 88 Ind Cas 392 (392) Mad; *Ramadhin* v. *Bisheshar*, (1915) 37 Ind Cas 111 (112): 3 Oudh L J 508; *Raja Makund Deb* v. *Sri Jagannath Jenamani*, 1923 Pat 423 (429): 2 Pat 469: 4 Pat L Tim 427: 1 Pat L R 201: 1923 Pat H C C 97: 72 Ind Cas 230; *Basi Mohan Malakar* v. *Gobinda Chandra Karmakar*, (1914) 22 Ind Cas 553 (555) Cal; *Mt Kalka Devi* v. *Ganga Baksh Singh*, 1925 Oudh 435 (437): 12 Oudh L J 306: 88 Ind Cas 127; *Chuha Mal* v. *Hari Ram*, (1866) 8 All 548 (550): 1886 All W N 179 [Objection as to the validity of an award on the ground that it was made beyond time can be raised in appeal for the first time].

[14] *Sunduri* v. *Mudhoo Chunder*, (1887) 14 Cal 592 (597); *Okhetunnissa* v. *Koochil Sirdar*, (1865) 2 Suth W R 45 (45); *Gulab Mal* v. *Shujawal*, (1914) 25 Ind Cas 854 (355): 259 Pun L R 1914: 171 Pun W R 1914; *Karam*

judicata[15] which can be substantiated on the facts already on the record.

13. When appellate Court may not interfere with findings of fact.— In *Bombay Cotton Manufacturing Co.* v. *Moti Lal,*[1] their Lordships of the Privy Council observed as follows:—

> "On appeal, the whole case, including the facts, are within the jurisdiction of the Appeal Court. But generally speaking, it is undesirable to interfere with the findings of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of appeal."

In *Prasanna Moyee* v. *Baikunthnath,*[2] the Calcutta High Court observed as follows:—

> "Two conflicting view-points have to be reconciled, namely, on the one hand, the undoubted duty of the Court of Appeal to review the recorded evidence and to draw its own inferences and conclusions, and, on the other hand, the unquestionable weight which must be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manner."

See also the following cases.[3] (*See also* Ss. 100 and 103.)

Baksh v. *Abdul Karim,* (1912) 14 Ind Cas 1008 (1008): 146 Pun L R 1912: 81 Pun W R 1912; *Saraswati* v. *Pachanna Setti,* (1866) 3 Mad H C R 258 (259); *Maung Mya* v. *Ma Thin Tin,* 1925 Rang 313 (313): 4 Bur L Jour 113: 94 Ind Cas 611 [Though the issue embodying the plea had been abandoned in the trial Court]; *Salufi* v. *Rajsangji,* (1864-66) 2 Bom H C R 162. But see *Moru* v. *Gopal,* (1877) 2 Bom 120 (131): 2 Ind Jur 278; *Raghunath* v. *Pareshram,* (1883) 9 Cal 635 (637): 13 Cal L Rep 89; *Alimunnissa* v. *Syed Hossein,* (1888) 6 Cal L Rep 267 (269); *Delhi Jagannadha Row Pantulu Garu* v. *Brindavanam Seshayya,* (1907) 17 Mad L Jour 281 (282) [Plea of exemption under S 14 of the Limitation Act cannot be allowed to be raised in appeal].

(15) *Kanahai Lal* v. *Suraj Kanwar,* (1899) 21 All 446 (448): 1889 All W N 164; *Mugno* v. *Hur Chunder,* (1865) 3 Suth W R Act X 146 (147); *Koylash Nath Chand* v. *Mounahiney Dossee,* 1863 Marsh 276.

Note 13.

(1) 1915 P C 1 (2): 29 Ind Cas 229 (230): 19 Cal W N 617: 17 Mad L Tim 408: 28 Mad L Jour 593: 21 Cal L Jour 528: 17 Bom L R 455: 2 Mad L W 521: 39 Bom 386: 1915 Mad W N 788: 42 Ind App 110 P C. See also *Ram Prokash Das* v. *Anand Das,* (1916) 33 Ind Cas 583 (588): 20 Cal W N 802: 14 All L J 621: 1916 P C 256: (1916) 1 Mad W N 406: 31 Mad L Jour 1: 18 Bom L R 490: 3 Mad L W 556: 24 Cal L Jour 116: 43 Cal 707: 20 Mad L Tim 267: 48 Ind App 73 P C; *Nandolal* v. *Panchanan,* (1918) 42 Ind Cas 484 (491): 21 Cal W N 1076: 26 Cal L Jour 187: 45 Cal 60.

(2) 1922 Cal 260 (267): 49 Cal 132: 66 Ind Cas 782: 34 Cal L Jour 384: 25 Cal W N 779.

(3) *Tayammal* v. *Seshachala,* (1863-66) 10 Moo Ind App 429 (436, 437): 2 Sar 139 P C [Appellate Court must weigh the whole evidence and come to an independent conclusion]; *Maung Kyi Oh* v. *Ma Thet Pon,* 1926 P C 29 (30): 94 Ind Cas 916: 1926 Mad W N 489: 3 Oudh W N 735: 4 Rang 513 P C [Judgment of trial Court not based on demeanour of witness but on consideration of probabilities of story—Appellate Court is in as good a position to form its own conclusion]; *Mohunt Radhika Das* v. *Bhugwan Das,* 1874 Pun Re No 7 [The appellate Court in a regular appeal is as much the judge of the facts as the Court of first instance—It can arrive at the opposite conclusion]; *Bagh Singh* v. *Fatta,* 1873 Pun Re No 28; *Hem Chandra Kundu* v. *Jnanendra Chandra Kundu,* 1926 Cal 116 (119): 90 Ind Cas 624 [Appellate Court must give weight to the impression that the witnesses made on the judge in whose presence they gave evidence]; *Nobin Chunder Pooshalee* v. *Bungo Chunder Chatterjee,* (1876) 25 Suth W R 363 (364) [It is an error in law to disbelieve witnesses believed by the original Court in the absence of sufficient grounds for doing so]; *Rai Bahadur Harihar Prasad Singh* v. *Maharaja Kesho Prasad Singh,* 1925 Pat 68 (88): 5 Pat L Tim Sup 1: 93 Ind Cas 454 [Where the opinion of the trial Court depends not on the honesty of the witnesses but upon reasons which the appellate Court cannot accept, it is obviously the duty of the appellate Court to set aside the trial Court's finding of fact]; *Kaniza* v. *Hasan Ahmad Khan,* 1926 Oudh 231 (234): 3 Oudh W N 114: 92 Ind Cas 82: 1 Luck 71 [Trial Court's judgment written by Judge who

O. 41, R. 1, Notes 14—16.

14. Competency of appeal.—Where leave to appeal has to be obtained before preferring an appeal, the memorandum of appeal should be accompanied by a petition for such leave.[1] An objection as to the maintainability of the appeal should be considered by the Court, though it was not raised in the first instance by the respondent's pleader.[2] *See also* the following cases.[3] Where a party has accepted the order of the lower Court as correct and has enjoyed the benefit thereof, he will be estopped from appealing against the same.[4] (*See also* Notes under S. 96.)

15. Consolidation of appeals.—A Court has inherent power to consolidate suits or appeals in proper cases.[1] But this cannot be done so as to affect the provisions of the Court Fees Act or of this Code. Thus several appeals in cases disposed of by one judgment cannot be consolidated so as to enable the appellant to pay Court-fee on the value of the consolidated appeals and file only one *vakalat*.[2] Where one decree only was passed in two appeals preferred by two sets of defendants against the decree of the trial Court, it was held that one second appeal was enough.[3]

16. Stamp on memorandum of appeal.—It has been seen in Note 2 to S. 149, *ante*, that the institution of a suit or other proceeding will not be a *legal* institution if the fee chargeable under law is not paid *at the time* of the institution, but that Court, may under the provisions of S. 149, allow the payment of the stamp fee at any stage and thus validate the institution. A memorandum of appeal which does not bear the proper stamp fee, prescribed therefor is not validly presented,[1] unless the Court allows under S. 149 the fee to be paid subsequently.[1-a]

Under S. 5 of the Court Fees Act, 1870, the decision of the Taxing Officer as to the Court-fee required is final. Where, however, no such decision has been given by the Taxing Officer, the respondent can raise the question at the time of the hearing of the appeal.[2]

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had not heard witnesses—Appellate Court in as good position as trial Court]; *Naung Aung Gyaw* v. *Muthiya*, 1925 Rang 308 (309): 3 Rang 177: 89 Ind Cas 361 [Failure of trial Judge to discuss evidence—Appellate Court can reverse finding]; *Hariram Isardar* v. *Mt Har Devibai*, 1925 Sind 16 (16) [Commission evidence—Trial Court in no better position than appellate Court]; *Monkee Dumber* v. *Mookee Bhullundur*, (1871) 15 Suth W R 423 (424) [Appellate Court should not interfere with the result of local enquiry except upon clear grounds]; *Brindabun Bharotee* v. *Dhununjoy Narain*, (1872) 18 Suth W R 452 (453), (Do.); *Adam Haji Peera Mohamed Ishack* v. *Sakavath Hussain Akbari*, 1923 Mad 103 (104): 1922 Mad W N 434: 43 Mad L Jour 199: 31 Mad L Tim 40: 70 Ind Cas 736 [Demeanour of witnesses is not invariably a safe guide to the truth of their evidence].

Note 14.

(1) *Balli* v. *Nandlal*, (1916) 33 Ind Cas 773 (774) All.

(2) *Behary Lal Pandit* v. *Kedar Nath Mullick*, (1891) 18 Cal 469 (472).

(3) *Krishnadhan Laha* v. *Brojendranath Das*, 1930 Cal 748 (749): 34 Cal W N 642 [Non-joinder of non-contesting parties—Appeal held maintainable]; *Thakur Das* v. *Radhakishen*, (1917) 37 Ind Cas 125 (126): 99 Pun Re 1916.

(4) *Banku Chandra Bose* v. *Marium Begam*, (1917) 37 Ind Cas 804 (805): 21 Cal W N 232.

Note 15.

(1) In re *G Krishnaya Chandrulu*, 1930 Mad 376 (381): 53 Mad 248: 123 Ind Cas 203: 58 Mad L Jour 510: 31 Mad L W 282 F B; *Sheoram* v. *Hiraman*, 1929 Nag 229 (231) 25 Nag L R 183.

(2) In re *Sri Sree Raja Velugotti Sri Govind Krishnayachandrulu Varu Bahadur, Maharaja of Venkatagiri*, 1930 Mad 376 (381): 53 Mad 248: 123 Ind Cas 203: 58 Mad L Jour 510: 31 Mad L W 282.

(3) *Appa* v. *Kachat Bayyan Kutti*, 1932 Mad 689 (691): 35 Mad L W 444: 137 Ind Cas 458.

Note 16.

(1) *Lakhi Narain* v. *Kirtibas Das*, (1913) 19 Ind Cas 971 (972): 18 Cal L Jour 133: *Balkaran* v. *Gobind*, (1890) 12 All 129 (142): 1890 All W N 39 F B.

(1-a) See *Notes to S.* 149:—See also *Mohanlal* v. *Nand Kishore*, (1906) 28 All 270 (272): 1905 All W N 280: 2 All L J 839 F B.

(2) *Kasturi Chetty* v. *Deputy Collector, Bellary*, (1898) 21 Mad 269 (270). But see *Badri Prasad* v. *Kundalal*, (1893) 15 All 117 (118): 1893 All W N 45.

In order to see which part of the decree is the subject of appeal before it, the appellate Court must look at the memorandum of appeal and not the stamp fee affixed thereon.[3] Nor, where an appeal memorandum is insufficiently stamped, can the Court grant a relief proportionate to the stamp affixed.[4] As to the amount of fee leviable in appeals, *see* the Court Fees Act, 1870, and the undermentioned cases.[5]

17. **Refund where memorandum is overstamped.**—The Court has inherent jurisdiction in a fit case to order the refund of excess Court-fee paid on the memorandum of appeal.[1] But the Court can only grant a certificate to the appellant authorising him to receive back such excess. The appellant should thereafter apply to the Collector for refund of the Court-fee.[2] *See also* S. 13 of the Court Fees Act.

18. **Applicability of the Order to other proceedings.**—It has been held by a Full Bench of the High Court of Madras[1] that the provisions of this Order apply also to *Original Side* appeals. In the undermentioned cases[2] it was held that appeals under S. 476-B of the Code of Criminal Procedure should also be treated as civil appeals regulated by the provisions of this Order.

The provisions of this Order apply to proceedings under the N.-W. F. P. Law and Justice Regulation (VII of 1901), S. 89 and the Punjab Pre-emption Act (I of 1913), S. 29. *See also* the Agra Tenancy Act (III of 1926), Sch. 2.

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(3) *Oheda Lal* v. *Badullah*, (1888) 11 All 35 (38): 1888 All W N 284: 13 Ind Jur 190.

(4) *Bulo Ram* v. *Ram Narain*, (1868) 10 Suth W R 242. But where the appellant has valued his appeal at a particular amount, he cannot be awarded a larger amount, see *Mahomed Ali* v. *Secretary of State*, (1903) 30 Cal 501 (502).

(5) *Tarinee Churn* v. *Taranath Gooho*, (1869) 12 Suth W R 449 [Stamp value may be made up by several stamps]; *Rash Behari* v. *Sridhar*, (1902) 6 Cal W N 687; *Brahmayya* v. *Lakshminarasimham*, (1893) 16 Mad 310 (311) [Decree directing ejectment and awarding mesne profits—Court-fees chargeable both on the land and on the mesne profits]; *Kishori Lal* v. *Sharut Chander*, (1882) 8 Cal 593 (596): 10 Cal L Rep 359: 4 Shome L R 253 F B [Suit for possession and mesne profits is to be taken as one entire claim and not two distinct subjects]. Reference under the Court Fees Act, 1870—(1894) 16 All 401 (406): 1894 All W N 124, (Do.); *Sheo Rattan* v. *Mohri*, (1899) 21 All 354 (355): 1899 All W N 96 [Appeal from the order of a District Judge as to the disposal of compensation in a land acquisition case must be stamped as an appeal from an original decree]; Reference under Court Fees Act, S 5, (1899) 22 Mad 162 (163) [Appeal to Governor in Council against decision of the Governor-General's agent at Vizagapatam and referred by the Government to the High Court for disposal, is not chargeable under the Court Fees Act]; Reference under S 26 of Act VII of 1870, (1895) 17 All 238 (240): 1895 All W N 56 [Appeal from order under S 214 of Act VI of 1882 (Indian Companies Act) is properly stamped with a Court-fee of Rs. 2]; *Ahmad Khan* v. *Madho Das*, (1885) 7 All 565 (567): 1885 All W N 99 [Decision of dispute under S. 322-B of the Civil Procedure Code of 1882—Appeal from decision—*Ad valorem* Court-fee payable]; *Muhammad Malik* v. *Nirhai Bibi*, (1885) 7 All 761 (763): 1885 All W N 218 [Suit for profits—Appeal—Court-fee to be calculated on aggregate amount of profits claimed and not separately on the profits claimed for each year]; *Kamaraja* v. *Secretary of State*, (1885) 8 Mad 22 (24) [Rejection of claim by Forest Settlement officer—Appeal to District Court under S. 10 (2) of Madras Forest Act of 1882—Art. 17 (6) and not Art. 11 (*a*) of Sch. 2 applied]; *Kirty Churn* v. *Aunath Nath*, (1882) 8 Cal 757 (758, 759): 11 Cal L Rep 95 [Suit for partition, separation, and Khas possession of that share after separation—Art. 17 (6), Sch. 2, Court Fees Act applies]; *Maiden* v. *Janakiramayya*, (1898) 21 Mad 371 (372) [Mesne profits subsequent to institution of suit left to be determined in execution—No Court-fee on such mesne profits]; *Rama Varma* v. *Kadar*, (1893) 16 Mad 415 (418) [Suit for redemption and for arrears of rent—Arrears not intended to be set off against mortgage debt—Court-fee should be calculated on both]; *Vasudeva* v. *Madhava*, (1893) 16 Mad 326 (327, 328) [Suit to redeem portion of mortgage—Court-fee should be calculated on the proportionate part of the mortgage amount].

Note 17.

(1) *Chandra Hari Singh* v. *Tipan Prasad Singh*, (1918) 46 Ind Cas 271 (272): 3 Pat L Jour 452: 1918 Pat H C C 273. See also *G H Grant*, In the matter of, (1870) 14 Suth W R 47.

(2) See *Lalta Prasad* v. *Shearaj Singh*, (1920) 57 Ind Cas 26 (28): 2 U P L R (All) 180.

Note 18.

(1) *D Venkatesam Chetty* v. *Mothichand Gulabchand*, 1926 Mad 316 (319): 50 Mad L Jour 190: 93 Ind Cas 293: 49 Mad 291: 24 Mad L W 571 F B [Overruling 1925 Mad 725].

(2) *Hamid Ali* v. *Madhu Sudan Das Sarkar*, 1927 Cal 284 (285): 31 Cal W N 281: 100 Ind Cas 351: 54 Cal 355; *Surendra Nath Maity* v. *Susil Kumar Chakravarty*, 1931 Cal 604 (605): 35 Cal W N 775: 1931 Cr Cas 756: 134 Ind Cas 1063: 33 Cr L Jour 88: 59 Cal 68.

Grounds which may be taken in appeal.

R. **2**. [S. 542.] The appellant shall not, *except by* leave of the Court, urge or be heard in support of any ground of objection *not set forth in the memorandum of appeal* ; *but* the *Appellate* Court, in deciding the appeal, shall not be confined to the grounds of *objection* set forth *in the memorandum of appeal or taken by leave of the Court under this rule*:

Provided that the Court shall not rest its decision on any *other* ground *unless the party who may be affected thereby* has had *a* sufficient opportunity *of* contesting the case on that ground.

[1877—S. 542; 1859—S. 334. *Cf.* S. 100, O. 6, R. 7 and O. 8, Rr. 8 and 9.]

Synopsis.

1. **New case in appeal. See Note 12 to R. 1.**
2. **Change of case in appeal. See Note 12 to R. 1.**
3. **Point not set forth in the memorandum of appeal.**
4. **Leave of Court to raise new point.**
5. **Point of limitation.**
6. **Point of jurisdiction.**
7. **"Appellate Court shall not be confined . . . . by leave of the Court."**
8. **Party affected must have had an opportunity of contesting the case.**

Abandonment or waiver—Waiving objection in lower Court—Effect. See Note 12 to R. 1, ante.

Appellate Court—Whether can set up a new case. See Note 7, Pt. (6).

Inconsistent pleas. See Notes 12, Pt. (3) in R. 1.

Objection as to admissibility of a document. See Note 12, F.-N. (6) in R. 1.

Objection as to joinder of parties and causes of action. See Note 12, Pt. (5) in R. 1.

Pleas not allowed in appeal. See Note 12, Pts. (1) to (7) in R. 1.

Plea of law. See Note 4, Pt. (5) and also Note 12, Pt. (13) in R. 1.

Plea of limitation. See Note 5, Pt. (4) and also Note 12, Pt. (14) in R. 1.

1. **New case in appeal.**—*See* Note 12 to R. 1.

2. **Change of case in appeal.**—*See* Note 12 to R. 1.

3. **Point not set forth in the memorandum of appeal.**—The penalty for not raising an objection in the memorandum of appeal is that the appellant will not be entitled as of right to urge such an objection *at the hearing* of the appeal[1], though he can do so with the *permission* of the Court.[2]

Order 41, Rule 2—Note 3.

(1) *Lalta Prasad* v. *Darshan Singh*, 1924 All 149 (149): 74 Ind Cas 839; *Kanshi Ram* v. *Prem Singh*, 1926 Lah 11 (12): 26 Pun L R 240: 89 Ind Cas 879; *Rajambal Ammal* v. *Shanmuga Mudaliar*, 1923 Mad 11 (11): 1922 Mad W N 481: 70 Ind Cas 653; *Somasundaram Chettiar* v. *Kanoo Chettiar*, 1929 Mad 573 (574): 118 Ind Cas 494: 1926 Mad W N 262; *Baliram* v. *Sadaram*, 1926 Nag 147 (148): 89 Ind Cas 1019; *Muhammad Shabbir* v. *Muhammad Jawad*, (1912) 15 Ind Cas 270 (272) Oudh; *Debi Doss* v. *Tulshi Ram*, (1911) 19 Ind Cas 55 (56): 11 All L J 202; *Muhammad Khan* v. *Bechan Khan*, (1915) 30 Ind Cas 374 (375): 2 Oudh L J 371; *Sasadhar Battacharjee* v. *Arun Kumar Bhattacharjee*, (1920) 54 Ind Cas 631 (631) Cal; *Lal Singh* v. *Girdharidas*, (1921) 60 Ind Cas 263 (263): 2 U P L R (B R) 95; *Oliullah* v. *Bachu Lal*, (1888) 15 Cal 706 (707); *Gourmoni* v. *Jugal Chunder*, (1890) 17 Cal 57 (64); *Kishen* v. *Hurish*, (1865) 3 Suth W R 216 (217); *Bhawani Gir* v. *Dalmardan Gir*, 1881 All W N 40 (40); *Kashinath* v. *Roy Dwarkanath*, (1867) 7 Suth W R 61 (62); *Tilak Raj Singh* v. *Chakradhari Singh*, (1893) 15 All 119 (120): 1893 All W N 14; *Bansi Lal* v. *Ramji Lal*, (1898) 20 All 370 (372): 1898 All W N 75; *Buddun* v. *Rampertab*, (1876) 25 Suth W R 511 (513); *Gangaram* v. *Kaka Ram*, (1914) 22 Ind Cas 403 (404): 47 Pun L R 1914: 58 Pun W R 1914; *Sasadhar Bhattacharjee* v. *Arun Kumar*, (1920) 54 Ind Cas 631 (632) Cal; *Cunder Nath* v. *Sirdar Khan*, (1872) 18 Suth W R 218 (221); *Samu Ayyangar* v. *The Secretary of State for India*, (1909) 4 Ind Cas 1123 (1124): 5 Mad L Tim 214; *Ambalavana* v. *Singaravelu*, (1909) 4 Ind Cas 1118 (1118): 5 Mad L Tim 210.

(2) *Parmanand* v. *Thikhu*, (1915) 30 Ind Cas

O. 41, R. 2.
Note 4.

4. Leave of Court to raise new point.—The Court has under this rule, a discretion to permit a new point, not raised in the memorandum of appeal, to be raised and argued at the hearing.[1] The leave may, however, be express or implied.[1-a] But, unless such permission is taken, the Court will not allow such a point to be argued at the hearing.[1-b] The mere fact that the respondent has had notice of the fact that the appellant intends to raise such point at the hearing cannot dispense with the Court's permission under this rule.[2]

The Court will refuse to permit a new point to be argued where, at the time of taking it, the period of limitation for the appeal had expired and where the allowing of such a point to be argued would practically amount the appellant to set up a new appeal.[3] But where the point sought to be raised is *involved* in the points already raised in the memorandum of appeal[4] or is a question of law depending on no new facts except those already on the record[5] or is a point to which the other side cannot legitimately raise an objection on the ground of surprise,[6] the Court may grant the appellant leave to raise it. The Court should, however, grant the permission only on such terms as would indemnify the opposite party for the loss caused to him by reason of the failure of the applicant to raise the point in time.[7]

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817 (817): 121 Pun W R 1915: 57 Pun L R 1916; *Sheodhan* v. *Balkaran*, 1921 All 337 (339): 43 All 198: 59 Ind Cas 116: 18 All L J 1088; *Maung Weik* v. *Shwe Lu*, (1900-1902) 1 L B R 184 (185); *Raghoba* v. *Bhai Rav Singh*, (1895) 8 C P L R 81 (82).

Note 4.

(1) See also *Mt Ram Piari* v. *Sultan Bakhsh*, 1923 Lah 115 (116): 3 Lah 382: 77 Ind Cas 207.

(1-a) *Maung Ba* v. *Maung Tha Yin*, 1931 Rang 314 (315): 135 Ind Cas 328.

(1-b) *Nund Kishore* v. *Kanee Ram*, (1902) 29 Cal 355 (357): 6 Cal W N 395 [Especially a technical point]; *Wuzeer* v. *Noor Ali*, (1869) 12 Suth W R 33 (34); *Girish Chandra* v. *Girish Chandra*, (1919) 52 Ind Cas 501 (501) Cal; *Kastur Bhavani* v. *Appa*, (1880-81) 5 Bom 621 (627); *Fazal Hussain* v. *Malik Jinda*, (1914) 25 Ind Cas 443 (445): 49 Pun Re 1914: 252 Pun L R 1914: 160 Pun W R 1914 [Additional grounds none of which were taken in the lower appellate Court and were sought to be put in at the eleventh hour in second appeal were disallowed]; *Basheshar Nath* v. *Kanhya Lal*, (1914) 22 Ind Cas 250 (253): 34 Pun Re 1913: 45 Pun L R 1914; *Nathu Mal* v. *Mul Chand*, (1912) 17 Ind Cas 232 (233): 183 Pun W R 1912: 197 Pun L R 1912; *Hira Singh* v. *Lahori Mal*, (1912) 17 Ind Cas 247 (249): 174 Pun W R 1912: 217 Pun L R 1912; *Basiruddin* v. *Jogendra*, (1922) 64 Ind Cas 182 (183) Cal; *Dori Lal* v. *Seth Ram Charan Lal*, (1918) 44 Ind Cas 415 (416): 4 Oudh L J 708; *Nageshar Sahai* v. *Mata Prasad*, 1922 Oudh 236 (246): 9 Oudh L J 235: 25 Oudh Cas 189: 69 Ind Cas 730; *Hanskuarbai* v. *Imam Ali*, 1921 Nag 53 (53): 17 Nag L R 126: 59 Ind Cas 717; *Barkat Ram* v. *Anant Ram*, (1915) 31 Ind Cas 632 (633): 185 Pun W R 1915; *Lekenath Day* v. *Hara Chandra*, (1918) 43 Ind Cas 29 (30) Cal; *Zahur-un-nissa* v. *Khuda Yar Khan*, (1881) 3 All 528 (529): 1881 All W N 18; *Bhagwanti* v. *Jagannath*, (1909) 3 Ind Cas 510 (511): 6 All L J 636; *Pahu Lal* v. *Daulat Ram*, (1910) 6 Ind Cas 651 (651): 47 Pun W R 1910; *Narottam Das* v. *Kedar Nath*, 1916 P C 245 (246): 21 Cal W N 665: 6 Mad L W 61: 41 Ind Cas 957 P C; *Idris* v. *Jone Skimer*, 1918 P C 154: 82 Pun Re 1919: 45 Pun W R 1919: 56 Ind Cas 723 (726) P C; *Behari Lal* v. *Amirchand*, 1924 All 918 (919): 5 L R A Civ 396: 79 Ind Cas 1029; *Balkaram Singh* v. *Dulari Bai*, 1927 All 231 (232): 49 All 55: 24 All L J 920: 97 Ind Cas 292.

(2) *Sri Kanta Prasad* v. *Jag Sah*, 1925 Pat 57 (59): 3 Pat 818: 84 Ind Cas 293: 6 Pat L Tim 327.

(3) *Jiwan Shah* v. *Fateh Bibi*, 1921 Lah 228 (229): 3 Lah L Jour 165: 67 Ind Cas 44; *Chhuttan* v. *Hazari Lal*, (1915) 30 Ind Cas 22 (23): 129 Pun W R 1915: 7 Pun Re 1916: 46 Pun L R 1916.

(4) *Jamna Prasad* v. *Balbhaddar*, 1928 Oudh 147 (148): 25 Oudh Cas 388: 9 Oudh L J 601: 74 Ind Cas 353.

(5) *Chhadami Lal* v. *Syama Charan*, (1914) 22 Ind Cas 12 (13) All [Plea of "*res judicata*"]; *Muhammad Ismail* v. *Chattar Singh*, (1882) 4 All 69 (70): 1881 All W N 116 F B, (Do.); *Krishnan Dyal Gir* v. *Mahomed Amirul Hussain*, (1915) 26 Ind Cas 673 (674): 19 Cal W N 942, (Do.). See also *Mahghu Kuar* v. *Faiydar Kuar*, 1891 All W N 105 (105) [Plea of invalidity of remand order]; *Mullu Khan* v. *Than Singh*, (1891) 11 All W N 187 (187), (Do.).

(6) *Ma Daw Thu* v. *Ma Dwa*, (1910) 8 Ind Cas 990 (991): 3 Bur L Tim 146; *Ram Kishen Upadhia* v. *Dipa Upadhia*, (1890) 13 All 580 (581): 1891 All W N 166; *Manik* v. *Roshan Lal Shorey*, 1931 Lah 390 (391): 32 Pun L R 235: 130 Ind Cas 644 [Basic question on the face of the pleadings clear].

(7) *Maung Pe* v. *Ma Lon*, (1911) 11 Ind Cas 497 (498): 15 Cal W N 766: 8 All L J 739: 13 Bom L R 465: 14 Cal L J 15: (1911) 2 Mad W N 397: 4 Bur L Tim 153: 38 Cal 629: 6 L B R 13: 10 Mad L Tim 479 P C.

O. 41, R. 2.
Notes
5—7.

5. Point of limitation.—Under S. 3 of the Limitation Act a Court is bound to reject a suit or appeal if it is barred by limitation even though the bar of limitation may not have been raised in the pleadings.[1] But this section does not apply where the plea is not that the *appeal before that Court* is barred by limitation but that the suit or appeal in the *lower Court* was barred by limitation.[2] Hence, unless a plea that the suit or appeal in the lower Court was barred by limitation is taken in the memorandum of appeal preferred to the higher Court under R. 2, it cannot be urged at the hearing of the appeal without the leave of the appellate Court.[3] As a general rule, the appellate Court will permit a point of limitation though not raised in the memorandum of appeal, to be raised at the hearing of the appeal, where it is *apparent on the face of the proceedings and does not involve any new question of fact*.[4] But it will not do so where such a plea involves an investigation of further facts.[5]

6. Point of jurisdiction.—A point of jurisdiction not involving an investigation into other facts than those on the record will be allowed to be raised at the hearing of an appeal, though it was not raised in the memorandum of appeal. Thus a plea as to the jurisdiction of the Court to make a reference to arbitration[1] or a plea as to the competency of the Court to grant the relief claimed[2] or a plea of *res judicata*[3] or a plea that the plaint does not disclose a cause of action against the defendant[4] can be permitted to be argued at the hearing of the appeal.

7. "Appellate Court shall not be confined .... of the Court."—An appellant is confined to the grounds set forth in the memorandum of appeal or taken at the hearing with the permission of the Court. He cannot advance at

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Note 5.

[1] *Ghulam Khan* v. *Muhammad Hassan*, (1902) 29 Cal 167 (185): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 25 Pun Re 1902 P C.

[2] *Dattu* v. *Kasai*, (1884) 8 Bom 535 (537).

[3] *Kyin Baw* v. *Maung Lon*, (1903-1904) 2 L B R 237 (238); *Venkata* v. *Bhasyakarlu*, (1902) 25 Mad 367 (378): 29 Ind App 76: 6 Cal W N 641: 4 Bom L R 548: 8 Sar 258 P C; *Ahmad Ali* v. *Waris Husain*, (1893) 15 All 123 (128): 1893 All W N 47.

[4] *Bechi* v. *Ashanullah*, (1890) 12 All 461 (464): 1890 All W N 149 F B; *Abdullah* v. *Asraf Ali*, (1908) 7 Cal L Jour 152 (167); *Deo Narain* v. *Webb*, (1901) 28 Cal 86 (89): 5 Cal W N 160; *Balram* v. *Mangta Das*, (1907) 34 Cal 941 (945, 946): 11 Cal W N 959: 6 Cal L Jour 237 F B; *Bhusen* v. *Narendra*, (1920) 60 Ind Cas 280 (282): 32 Cal L Jour 236; *Ganesh* v. *Nimbi*, (1912) 17 Ind Cas 638 (639): 8 Nag L R 174; *Musst Batisa Kuer* v. *Raja Ram Pandey*, 1926 Pat 192 (194): 1925 Pat H C C 343: 92 Ind Cas 177: 7 Pat L Tim 393: 5 Pat 441; *Dhanji* v. *Secretary of State*, 1921 Bom 381 (383): 45 Bom 920: 23 Bom L R 279: 61 Ind Cas 347. But see *Shah Muhammad* v. *Piara Mal*, (1911) 13 Ind Cas 792 (794): 84 Pun Re 1911: 255 Pun W R 1911 [But appellate Court has option of refusing to listen to plea of limitation even though it can be decided without any further inquiry].

[5] *Venkata* v. *Bhasyakarlu*, (1902) 25 Mad 367 (378): 29 Ind App 76: 6 Cal W N 641: 4 Bom L R 548: 8 Sar 258 P C; *Kedarnath* v. *Mathooranath*, (1868) 1 Beng L R A C 17: 10 Suth W R 59; *Deo Narain* v. *Webb*, (1901) 28 Cal 86 (89): 5 Cal W N 160; *Bhusan Chandra Pal* v. *Narendra Nath Koer*, (1921) 60 Ind Cas 280 (282): 32 Cal L Jour 236; *Perumao Goundan* v. *Rama Goundan*, (1915) 28 Ind Cas 378 (379): 28 Mad L Jour 115; *Attar Singh* v. *Allah Din*, (1913) 18 Ind Cas 445 (447): 126 Pun L R 1913: 93 Pun W R 1913; *Shah Muhammad* v. *Piara Mal*, (1911) 13 Ind Cas 792 (794): 84 Pun Re 1911: 255 Pun W R 1911; *Lajpat Rai* v. *Sohna*, 1929 Lah 432 (432): 11 Lah L Jour 91: 30 Pun L R 296: 115 Ind Cas 71; *Wazir Chand* v. *Nathu Ram*, 1924 Lah 468 (469): 6 Lah L Jour 151: 80 Ind Cas 321; *Secretary of State* v. *Ananda Mohan Roy*, 1921 Cal 661 (672): 34 Cal L Jour 205: 66 Ind Cas 287.

Note 6.

[1] *Girija Nath* v. *Kanai Lal*, (1918) 43 Ind Cas 169 (172): 27 Cal L Jour 339.

[2] *Ram Kissen* v. *Pooran Mal*, (1920) 56 Ind Cas 571 (574): 31 Cal L Jour 259: 47 Cal 733.

[3] *Brijbasirai* v. *Shiva Tahlu*, (1891) 11 All W N 10 (11). *See also* Foot-note (5), Note 4, above.

[4] *Secretary of State* v. *Sukhdev*, (1899) 21 All 341 (345): 1899 All W N 151 F B; *Lachman Prasad* v. *Bahadur Singh*, (1878-80) 2 All 884 (887). But see *Soodukhina* v. *Raj Mohan*, (1869) 11 Suth W R 350 (351) [Such a plea does not raise a question of jurisdiction].

O. 41, R.2, Note 7.

the hearing a point not so raised or taken. But the appellate Court is not confined in deciding the appeal to the points so raised or taken. It is entitled to base its decision on grounds neither set forth in the memorandum of appeal nor taken with the leave of the Court.[1] Thus it can *suo motu* raise a point of limitation[2] or of jurisdiction[3] apparent on the face of the record and decide the appeal on that point. Where alternative grounds of appeal are raised, it can go into questions which are admitted for the purpose of an alternative argument and give a finding against the appellant.[4] But a party cannot claim, as of right, that the Court *must* exercise power given under this rule.[5]

The power given to the appellate Court under this rule does not extend to the making out a new case for either party and to grant them relief on that basis[6] or to go behind a finding of fact which is accepted by the appellant[7] or to interfere with a part of the decree which is not appealed from.[8] Thus in an appeal by the defendants where there is no cross-objection by the plaintiff the appellate Court cannot, while dismissing the appeal, enlarge the relief granted to the plaintiff by the lower Court.[9] The Court will not also be justified in taking up a new question under this rule unless there can be no reasonable doubt on the record that the evidence on the new point had been completely given on both sides or the point is a pure question of law and it is expedient in the interests of justice to consider and decide it.[10] An appellant can give

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Note 7.

[1] *Thakuri* v. *Kundan*, (1895) 17 All 280 (281): 1895 All W N 69. See *Gauri Shankar* v. *Abbas Beg*, (1918) 46 Ind Cas 12 (12, 13): 5 Oudh L J 165.

[2] *Mozaffer* v. *Girish*, (1868) 1 Beng L R A C 25: 10 Suth W R 71.

[3] *Jwala Prasad* v. *Salig Ram*, (1891) 13 All 575 (576): 1891 All W N 158; *Poran Sookh* v. *Parbutty*, (1877-78) 3 Cal 612 (615, 616): 1 Cal L Rep 404: 2 Ind Jur 861 [Illegality of decree]. But see *Rukmani* v. *Foodun Koomaree*, (1875) 23 Suth W R 408 (409) [Objection to jurisdiction not raised in first Court—Suit tried on merits—Appellate Court cannot of its own motion raise issue as to jurisdiction but appeal must be heard on merits].

[4] *Ram Das* v. *Mt Panna Devi*, 1921 Lah 201 (202): 5 Lah L Jour 117: 64 Ind Cas 1039.

[5] *Bansidhar* v. *Sita Ram*, (1891) 13 All 381 (382, 383): 1891 All W N 147.

[6] *Irangowda* v. *Seshappa*, (1893) 17 Bom 772 (773, 774); *Musst Thakri* v. *Gurdit Singh Khewan Singh*, (1913) 19 Ind Cas 253 (253): 57 Pun W R 1913: 120 Pun L R 1913 [Suit for possession against Hindu widow by reversioner on ground of unchastity—Suit cannot be decreed on basis that the widow had in effect *re-married* the paramour]; *Shivabasava* v. *Sangappa*, (1905) 29 Bom 1 (12): 8 Cal W N 865: 1 All L J 637: 6 Bom L R 770 P C; *Official Trustee* v. *Krishnachunder*, (1886) 12 Cal 239 (245): 12 Ind App 166: 4 Sar 657: 9 Ind Jur 399 P C; *Nowbut Singh* v. *Mst Lad Kooer*, (1878) 5 N W P H C 102; *Waradhbhai* v. *Bhaiji*, 1891 Bom P J 191; *Harendra Kumar Bose* v. *Khemada Kinkar Ray*, 1927 Cal 86 (87): 44 Cal L Jour 282: 98 Ind Cas 835; *Junendra Mohan Sen* v. *Hari Ram Rabha*, (1917) 40 Ind Cas 467 (468) Cal; *Sujjad Ahmad Chowdhury* v. *Ganga Charan Ghose*, (1905) 9 Cal W N 460 (463): 1 Cal L Jour 116; *Brojo Sunder Mitter* v. *Fatick Chunder Roy*, (1872) 17 Suth W R 407 (408); *Latoo Mundal* v. *Bhoboon Mohan*, (1872) 17 Suth W R 361 (362); *Luckhee Dossee* v. *Mahomed Afzul*, (1865) 2 Suth W R 2 (3); *Kashinath* v. *Dwarkanath*, (1867) 7 Suth W R 61 (62); *Sreenath* v. *Luckhee Narain*, (1875) 24 Suth W R 268 (268); *Fazal Ilahi* v. *Muhamad Jan*, (1913) 18 Ind Cas 795 (795): 79 Pun L R 1913: 76 Pun W R 1913; *Asanand* v. *Mahmad*, 1927 Lah 96 (96): 7 Lah L Jour 542: 26 Pun L R 840: 92 Ind Cas 241; *Ram Rakha Mal* v. *Devi Das*, 1905 Pun Re No 89: 17 Pun L R 1906: 128 Pun W R 1905; *Narano Mahapatro* v. *Sri Ramachandra Mandaraja Deo Garu*, 1925 Mad 857 (857): 80 Ind Cas 724; *Illikka Pakrammar* v. *Kutti Kunhamad*, (1894) 4 Mad L Jour 14 (16): 17 Mad 69; *Bashestar Nath* v. *Devi Pershad*, (1913) 19 Ind Cas 411 (416): 20 Pun Re 1913: 101 Pun W R 1913: 185 Pun L R 1913; *Abdul Qadir* v. *Imam Din*, 1927 Lah 231 (233): 9 Lah L Jour 165: 28 Pun L R 138: 104 Ind Cas 418; *Nathu Piragi* v. *Umad Mal*, (1909) 1 Ind Cas 456: 33 Bom 85: 10 Bom L R 768.

[7] *Wadhawa Singh* v. *Sunder Singh*, 1921 Lah 184: 59 Ind Cas 689 (690): 39 Pun W R 1921: 44 Pun L R 1921; *Kalee Das* v. *Khiroda*, (1871) 16 Suth W R 300 (301).

[8] *Dwarkanath* v. *Mohima Charan*, (1911) 9 Ind Cas 121 (122) Cal.

[9] *Apee* v. *Heera Nand*, (1870) 2 N W P 44.

[10] *Vemi Reddi* v. *Nallappa Reddi*, (1920) 57 Ind Cas 800 (803): 11 Mad L W 611; *Allahdin* v. *Fatehdin*, (1918) 45 Ind Cas 101 (101): 81 Pun Re 1918: 54 Pun W R 1918: 27 Pun L R 1918 [Point of law can be raised by appellate Court *suo moto*].

up any of the grounds of appeal at the hearing[11] and the appellate Court is bound to give a decision only on those pleas which are urged and argued.[12]

8. **Party affected must have had an opportunity of contesting the case.** —Although an appellate Court can under R. 2 decide the appeal on a point not raised in the memorandum of appeal or raised at the hearing of the appeal with the permission of the Court, it cannot do so unless it gives an opportunity to the party affected thereby, to contest the case on that point.[1]

Rejection or amendment of memorandum.

R. **3.** [S. 543.] (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

[1877—S. 543; 1859—S. 336. *Cf.* O. 7, Rr. 10 to 13.]

Local Amendments.

ALLAHABAD.

Substitute the following for sub-R. (1) of R. 3:—

"3. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, or accompanied by the copies mentioned in R. 1 (1), it may be rejected, or where the memorandum of appeal is not drawn up in the manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there."

BOMBAY.

After R. 3, the following rule shall be inserted, namely:—

"3-A. Where an appellant applies for delay to be excused, notice to show cause shall at once be issued to the respondent and the matter shall be finally decided before notice is issued to the Court from whose decree the appeal is preferred under R. 13."

OUDH.

For the existing R. 3 (1), *substitute* the following:—

"3. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, or accompanied by the copies mentioned in R. 1, sub-R. (1),

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(11) *Hirda* v. *Muhammad Abdul Hassan Khan,* (1915) 30 Ind Cas 207 (208): 2 Oudh L J 335.

(12) *Raja* v. *Salabat*, 1921 Lah 229 (231): 3 Lah L Jour 26: 66 Ind Cas 935. See however *Dada Valad* v. *Bavasha Valad,* (1869) 6 Bom H C (A C) 9 [Appellate Court is not justified in holding that a point has been abandoned merely because the vakil has not argued it].

Note 8.

(1) *Shripuja* v. *Kanhayalal,* (1919) 53 Ind Cas 947 (949): 15 Nag L R 192 [Full opportunity given to the parties to argue the point—Appellate Court can base its decision on the point].

O. 41, R. 3, Notes 1—2.

it may be rejected, or where the memorandum of appeal is not drawn up in the manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.''

1. "May be rejected."
2. "Or be returned to the appellant for the purpose of being amended."
3 Defect of parties.
4. Scandalous matters.
5. Reasons for rejection.
6. Appeal.
7. Second appeal.

Appellate Court has same powers as trial Court. See Note 1, Pt. (2) and S. 107.

1. ''May be rejected''.—The power to reject a memorandum of appeal under this rule, is limited to cases where it is defective in point of form or in respect of the grounds which it must contain. It cannot be interpreted as enabling the Court to reject a memorandum of appeal on the ground that it is insufficiently stamped[1] or on the ground that it is barred by limitation.[1-a] But independently of the provisions of this rule, the Court can, under O. 7, R. 11 read with S. 107, reject an appeal if it is not sufficiently stamped provided that an opportunity is given to the appellant to make good the deficiency and he fails to do so within the time fixed.[2] *See* S. (2), Cl. (2), Note 13; O. 7, R. 11, Notes 6 and 11 and O. 7, R. 13, *ante*.

The rule does not impose any *duty* on the appellate Court to examine every memorandum of appeal immediately on presentation, and add proper parties if the appellant neglects to do so.[3]

The Court can exercise its power of rejecting a memorandum of appeal under this rule *at any stage*[4] though, as a general rule, the proper time to do so would be the time of its presentation and not after it has been admitted.[5]

2. ''Or be returned to the appellant for the purpose of being amended''.—Where the memorandum of appeal consisted of two documents, one, in the vernacular, containing the names of parties, and signed by the appellant, and the other in English containing the grounds of appeal but not signed by the appellant, it was held that the defect, if any, could be remedied by an amendment under this rule.[1] A memorandum of appeal which merely states that the proceedings of the lower Court are irregular and contrary to law is too vague and general and requires amendment before the appeal can be heard.[2] In this rule there is no limitation as to the time or stage when the

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Order 41, Rule 3—Note 1.

(1) *Achut Ramchandra* v. *Nagappa*, (1914) 21 Ind Cas 337 (337): 16 Bom L R 902: 38 Bom 41; *Jai Singh Gir* v. *Sita Ram Singh*, 1923 All 349: 74 Ind Cas 757: 21 All L J 338: 4 L R (All) Civ 188.

(1-a) *Farzand Ali* v. *Abdul Hamid*, (1921) 60 Ind Cas 493 (495) Pat.

(2) *Anund* v. *Doorga*, 1864 Suth W R Mis 4.

(3) *Fakir Chand* v. *Municipal Committee of Hazro*, (1913) 18 Ind Cas 37 (39): 59 Pun Re 1913: 88 Pun W R 1913: 55 Pun L R 1913.

(4) *Damodar Das* v. *Gopal Chand*, (1885) 7 All 79 (85): 1884 All W N 303; *Jaffer Hossein* v. *Muhammad Amir*, (1869) 4 Beng L R App 103: 13 Suth W R 351.

(5) *Bharut* v. *Issur*, (1867) 8 Suth W R 141; *Gopee Bullub* v. *Goluck*, 1864 Suth W R 135.

Note 2.

(1) *Karman* v. *Bishna*, (1920) 55 Ind Cas 24: 2 U P L R (Lah) 49.

(2) *Goree Monee* v. *Juggut Indro*, (1866) 11 Moo Ind App 1 (2): 2 Sar 207 P C.

O. 41, R.3, Notes 2—7.

memorandum of appeal may be returned for amendment.[3] But whenever a memorandum of appeal is returned for amendment the Court should fix a time for its representation.[4]

A memorandum of appeal from the preliminary decree can be amended so as to constitute an appeal from the final decree also.[5]

3. **Defect of parties.**—Where the respondent is wrongly named owing to a clerical error in the decree, the mistake is not a fatal one but can be rectified.[1] A single appeal by different persons having different defences and reasons for appealing is irregular.[2] As to whether an appeal filed against a dead person can be rectified by adding the legal representatives, *see* S. 153, Note 5 and O. 1, R. 10 and also the case cited below.[3]

4. **Scandalous matters.**—Where a memorandum of appeal contains irrelevant and scandalous allegations which are separable from the rest, a Court of appeal should not reject it, but should either expunge the objectionable part or return the memorandum of appeal for amendment, and refuse to receive it back until such part is struck out.[1] The Court will return a memorandum of appeal making allegations of partiality against the Judge from whose decree the appeal is sought to be filed, and order the objectionable matter to be expunged therefrom.[2] *See also* Notes 2 and 6 to O. 6, R. 16, *ante.*

5. **Reasons for rejection.**—A Court rejecting a memorandum of appeal under this rule should record its reasons for such rejection.[1]

6. **Appeal.**—An appeal will lie from an order rejecting a memorandum of appeal if it amounts to a *decree.* As to the question whether it amounts to a decree, *see* Note 13 to S. 2, sub-S. (2), *ante,* and the case cited below.[1]

A rejection of a memorandum of appeal on the ground of limitation amounts really to a dismissal of the appeal under R. 11, *infra,* and is, therefore, appealable.[2]

7. **Second appeal.**—An order returning a memorandum of appeal for presentation to the proper Court is appealable *as an order,* and hence under

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(3) *Damodar* v. *Gopalchand,* (1884) 7 All 79 (85): 1884 All W N 303.

(4) *Jagan Nath* v. *Lalman,* (1876) 1 All 260 (261). See also *Sheo Partab* v. *Sheo Golam,* (1880) 2 All 875 (876) [Memo of appeal returned for making up deficiency of Court-fee for—Court must fix a time for the representation of the appeal].

(5) *Madu Sudan Kundu* v. *Ohhalimaddin Ahammad,* 1928 Cal 167 (168): 106 Ind Cas 128.

Note 3.

(1) *Golapdi Meah* v. *Poorna Chandra Datta,* (1917) 41 Ind Cas 37 (38): 21 Cal W N 774: 27 Cal L Jour 129.

(2) *Hodges* v. *Delhi and London Bank,* (1901) 5 Cal W N 1: 28 All 137: 27 Ind App 168: 2 Bom L R 971: 7 Sar 767: 10 Mad L Jour 279 P C.

(3) *Mi Ein Zi* v. *Mi Ni,* (1918) 21 Ind Cas 306 (307): 1 U B R 175.

Note 4.

(1) *Zamindar of Tuni* v. *Bennayya,* (1898) 22 Mad 155 (158, 161): 8 Mad L Jour 304; In re *Olive Durvant,* (1891) 15 Bom 488 (489).

(2) *Zamindar of Tuni* v. *Bennayya,* (1898) 22 Mad 155 (159): 8 Mad L Jour 304.

Note 5.

(1) *Rudra Prasad* v. *Baij Nath,* (1893) 15 All 367 (371): 1893 All W N 115; *Raghunath* v. *Nilu,* (1885) 9 Bom 452 (454); *Jugseg Sahay* v *Kaseenath,* 1 Ind Jur O S 121.

Note 6.

(1) *Swamy Dayal* v. *Asghari Khanam,* (1900) 3 Oudh Cas 234.

(2) *Farzand Ali* v. *Shiekh Abdul Hamid,* (1921) 60 Ind Cas 493 (495) Pat.

O. 41, R. 3, Note 7. S. 102, sub-S. 2 no second appeal lies therefrom.[1] In the undermentioned case the High Court in second appeal refused to convert an order rejecting a memorandum of appeal into one returning it for amendment.[2] The High Court in second appeal can interfere with the discretion of a lower appellate Court in admitting or refusing to admit an appeal after the expiry of limitation, where the lower Court has exercised its discretion arbitrarily and not according to legal principles.[3] *See also* Note 16 to S. 100, *ante*.

O. 41, R. 4, Note 1.

One of several plaintiffs or defendants may obtain reversal of whole decree *where* it proceeds on ground common to all.

R. 4. [S. 544.] Where there are more plaintiffs or more defendants than one in a suit, and the decree[2] appealed *from* proceeds on any ground common[3] to all the plaintiffs[4] or to all the defendants,[5] any one of the plaintiffs or of the defendants may appeal *from* the whole decree, and thereupon the Appellate Court may reverse or *vary* the decree in favour of all the plaintiffs or defendants,[6] as the case may be.

[1877—S. 544; 1859—S. 337.]

1. Scope and object of the rule.
2. Decree.
3. "Common ground."
4. Ground common to all the plaintiffs.
5. Ground common to all the defendants.
6. May reverse the decree in favour of all the plaintiffs or defendants.
7. Failure to file cross objections. See Notes to Rr. 22 and 33, infra.
8. Death of one of several appellants in a case where the decree appealed from proceeds on a ground common to all of them.
9. Application for execution by non-appealing parties and the limitation therefor.
10. Court-fee.
11. Review.
12. Revision.

Abatement. See Note 8.
Appeal by some—Variation in favour of all. See Note 6.
Decree proceeding on common ground. See Note 3.
Ex parte decree. See Note 2.
Rules 4 and 33 distinction between. See Note 1.

1. Scope and object of the rule.—The general rule is that, on an appeal by one of several plaintiffs or defendants, the appellate Court can reverse or vary the decree of the trial Court only in favour of *the party appealing*. This rule and R. 33 provide exceptions to the general rule,[1] and give the Court ample power to make the appropriate order needed in the interests of justice.[1-a] While R. 33 of this order provides that the appellate

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Note 7.

(1) *Kunhi Kutti* v. *Achotti*, (1891) 14 Mad 462 (464).

(2) *Bussunt* v. *Zalem*, 1864 Suth W R 386.

(3) *Parvati* v. *Ganpati*, (1898) 23 Bom 513 (517); *Chunder Doss* v. *Boshoon Lal*, (1881) 8 Cal 251 (253): 11 Cal L Rep 177: 6 Ind Jur 358; *Surbhai* v. *Raghunathji*, (1873) 10 Bom H C R 397.

Order 41, Rule 4—Note 1.

(1) *Maha Mangal Rai* v. *Kishun Kandu*, 1927 All 311 (313): 100 Ind Cas 346.

(1-a) *Debendra Narain Singh* v. *Narendra Narain Singh*, (1920) 54 Ind Cas 636 (641): 30 Cal L Jour 417: 24 Cal W N 110.

Court has power to make the proper decree even in cases where the appeal is as to a *part only* of the decree,[2] this rule provides that where a decree proceeds upon a ground *common* to all the plaintiffs or defendants, any one of the plaintiffs or the defendants may appeal from the *whole* decree, and thereupon the appellate Court can reverse or vary the decree in favour of all the plaintiffs or the defendants, as the case may be.[3] In such a case the appeal by one is virtually treated as an appeal on behalf of all, though they may not be parties to the appeal.[4] The rule therefore will not apply where the appeal is directed only against that portion of the decree which affects the appellant.[4-a] or where the appealing plaintiff or defendant cannot, under the circumstances of the particular case, be considered as appealing *on behalf of* the non-appealing plaintiffs or defendants, *e.g.*, where one of the defendants appeals *on his* own behalf and impleads the non-appealing defendants as respondents.[4-b] A decree passed by the appellate Court does not, as a matter of course, enure to persons who have not joined in the appeal merely because the lower Court's decree has proceeded on a common ground. The rule will apply only where the Court consciously decides to apply it.[4-c] The policy of the rule is, *firstly*, to give the appellate Court full power to do justice to all parties, whether before it or not, provided the whole case is gone into at the instance of the parties representing all the necessary contentions in the case,[5] and, secondly, to prevent contradictory decisions in the matter in the same suit.[6]

The rule does not become inapplicable merely because the non-appealing defendant has, in the meanwhile, obeyed the lower Court's decree[7] or because he has separately appealed from the same decree and has failed in his appeal.[8] But the rule has no application where there are *several suits*, the decree in each of which, proceeds on a ground common to the defendants in all the

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(2) *Debendra Narain Singh* v. *Narendra Narain Singh*, (1920) 54 Ind Cas 636 (641): 30 Cal L Jour 417: 24 Cal W N 110.

(3) See *Ambica Charan* v. *Sasi Tara Debi*, (1915) 30 Ind Cas 868 (869): 22 Cal L Jour 61.

(4) *Abdul Rahiman* v. *Maidin Saiba*, (1896) 22 Bom 500 (508).

(4-a) *Venkata Narasimha Appa* v. *Mal Raju Lakshmi Venkayamma*, (1910) 5 Ind Cas 102: 7 Mad L Tim 296; *Nakur Chunder* v. *Judoo Nath*, (1875) 24 Suth W R 389; *Ram Chunder* v. *Omara Churn*, (1872) 18 Suth W R 26 (27); *Mangli* v. *Pohu*, 1926 Lah 303 (303): 8 Lah L Jour 132: 27 Pun L R 249: 94 Ind Cas 557; *Venkatakrishnayya* v. *China Veera Reddi*, 1928 Mad 1144 (1146): 116 Ind Cas 824; *Gyan Singh* v. *Ata Husain*, 1921 All 56 (57, 58): 43 All 320: 19 All L J 83: 60 Ind Cas 817; *Ambica Charan* v. *Sasitara*, (1915) 30 Ind Cas 868 (869): 22 Cal L Jour 61; *Jogendra Nath Roy Chaudhury* v. *Rajendra Nath Rai Chaudhuri*, (1921) 63 Ind Cas 95 (97) Cal [Appellant valuing the appeal for a sum representing the amount decreed against him alone—Such an appeal is not one against the entire decree at all]; *Ramachandra* v. *Narayana*, (1917) 42 Ind Cas 972 (974): 1917 Mad W N 808: 22 Mad L Tim 460: 7 Mad L W 10; *Debi Sahai* v. *Tarachand*, (1918) 44 Ind Cas 135 (137): 44 Pun W R 1918: 22 Pun L R 1918; *Chedalal* v. *Badullah*, (1889) 11 All 35 (39, 40): 1888 All W N 284: 13 Ind Jur 190 [The fact that Court-fee is paid as on an appeal against the entire decree is immaterial]; *Hira Singh* v. *Mohar Singh*, (1911) 12 Ind Cas 605 (606): 2 Pun L R 1912: 228 Pun W R 1911 [It was held in the case that the non-appealing parties were satisfied with the decree against them]; *Hari* v. *Daulata*, 1897 Bom P J 419 (421).

(4-b) *Gokalchand* v. *Hukkam Chand Nathumal*, (1916) 34 Ind Cas 714 (715, 718): 109 Pun W R 1916: 154 Pun L R 1916: 70, 71 Pun Re 1917: *Hira Singh* v. *Mohar Singh*, (1912) 12 Ind Cas 605 (606): 2 Pun L R 1912: 228 Pun W R 1911 [In this case it was held that the other defendants were satisfied with the lower Court's decree].

(4-c) *Vasu* v. *Thekkeddath Veetil*, 1926 Mad 991 (994): 51 Mad L Jour 282: 1926 Mad W N 763: 97 Ind Cas 551.

(5) *Artho Rama* v. *Artho Padhi*, (1913) 20 Ind Cas 952 (954): 14 Mad L Tim 177: 1913 Mad W N 687: 25 Mad L Jour 248.

(6) *Ram Tahal Singh* v. *Sukheswar Reyain*, (1916) 35 Ind Cas 547 (548): 1 Pat L Jour 143; *Dhuttaloor Subbayya* v. *Padigantam Subrayya*, (1907) 30 Mad 470 (472): 17 Mad L Jour 119: 2 Mad L Tim 104 F B.

(7) *Madhavan* v. *Valia Nambidi*, (1908) 18 Mad L Jour 39 (41).

(8) *Ishardat* v. *Musai*, (1915) 31 Ind Cas 886 (888) All.

O. 41, R.4, Notes 1—3.

suits,[9] unless such suits are consolidated.[10] Nor will the rule apply where the plaintiff who appeals has no *locus standi* to appeal.[11] Where, for a suit under S. 92 of the Code, the consent of the Advocate-General has been given to three persons, they all constitute in the eye of the law, *one* plaintiff and therefore one of them alone cannot appeal so as to make this rule applicable.[12]

Where a decree is passed against two defendants on a ground common to both and one of them appeals against the decree while the other files cross-objections to the decree the appellate Court can transpose the latter defendant as an appellant and decide the appeal in his favour.[13]

Where there are several respondents before the lower appellate Court any one of them may maintain the second appeal on behalf of all under this rule but he cannot represent a person who was not a respondent in the lower appellate Court.[14] Nor can a person not a party to the first appeal prefer a second appeal under this rule.[14-a]

The rule applies also to a cross-appeal by respondents.[15]

2. **"Decree".**—A decree may be reversed under this rule in favour of all the defendants even if some of them allowed the decree to be passed *ex parte* against them, provided the other conditions laid down in the rule are satisfied.[1] But where a decree is passed against some of the defendants on *confession* of judgment, the decree cannot be reversed in their favour under this rule.[2]

3. **"Common ground."**--It is essential for the application of this rule that the decree appealed from should have proceeded on a ground *common* to all the plaintiffs or defendants. Otherwise the appellate Court has no jurisdiction to reverse or vary the entire decree except on the appeal of all the plaintiffs or defendants.[1] Further, the rule does not apply unless

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(9) *Appu Rau* v. *Ratnam*, (1890) 13 Mad 249 (252); *Gobind Ram* v. *Musst Pali*, (1919) 53 Ind Cas 883 (884): 116 Pun Re 1919; *Gayan Singh* v. *Ata Hussain*, 1921 All 56 (58): 43 All 320: 19 All L J 83: 60 Ind Cas 817 [Combination of several decrees against several defendants—Rule does not apply]. But see *Shaikh Nagar* v. *Shuritoollah*, (1873) 20 Suth W R 77 (77).

(10) *Amarsangji Indrasangji* v. *Desai Umed*, 1925 Bom 290 (291): 27 Bom L R 91: 86 Ind Cas 31 [Several *appeals*—Rule does not apply unless the appeals are consolidated]; *Bipin Chandra Chatterji* v. *Dawan Singh*, 1925 Oudh 732 (735): 2 Oudh W N 894: 91 Ind Cas 121, (Do.); *Appa Rau* v. *Ratnam*, (1890) 13 Mad 249 (252), (Do.).

(11) *Chugata Khan* v. *Wasil Khan*, (1910) 6 Ind Cas 496 (497): 21 Pun L R 1910: 132 Pun W R 1910.

(12) *Zafar Ali* v. *Jai Lal*, 1927 Lah 382 (383): 100 Ind Cas 838.

(13) *East Indian Railway Co* v. *Lala Janki Prasad*, 1924 All 605 (609): 5 L R All (Civ) 586: 80 Ind Cas 737.

(14) *Deo Gopal Savant* v. *Vasudev Vithal Savant*, (1887) 12 Bom 371 (375): 13 Ind Jur 27.

(14-a) *Raghulal* v. *Babu Arjun Singh*, 1931 All 766 (767): 1931 All L J 271: 132 Ind Cas 205 [Person, not party to first appeal, cannot prefer second appeal]; *Jugunnath Chatterjee* v. *Gordon Stuart & Co*, (1866) 6 Suth W R 36 (37).

(15) *Debendra Narayan Singh* v. *Narendra Narayan Singh*, (1920) 54 Ind Cas 636 (641): 30 Cal L Jour 417: 24 Cal W N 110.

Note 2.

(1) *Ram Tahal Singh* v. *Sukheswar Reyain*, (1916) 35 Ind Cas 547 (548): 1 Pat L Jour 143; *Sreenat Chowdhry* v. *John James Grey*, (1870) 13 Suth W R 114 (116); *Lukhee Kant Sein* v. *Ramdeyal Dos*, 2 Hay 288: Marsh 281; *Ram Lochun* v. *Nittya*, (1869) 12 Suth W R 211 (211, 212). But see per Seshagiri Ayyar, J in *Periakrishnaswami Naik* v. *Aiyappa Naick*, (1914) 24 Ind Cas 924 (926): 1 Mad L W 376.

(2) *Malik Fateh Muhammad* v. *Fateh Muhammad Khan*, (1913) 18 Ind Cas 758 (760): 80 Pun L R 1913: 109 Pun W R 1913. But see *Khajah Salauddin* v. *Mt Afzal Begam*, 1925 Cal 23 (26): 28 Cal W N 963: 39 Cal L Jour 590: 84 Ind Cas 68 [A judgment-debtor who did not appeal but who filed an application in the lower Court consenting to the decree being executed as against him *on which no order was passed* can be given the benefit of the appeal preferred by other judgment-debtors].

Note 3.

(1) *Munawar Ali* v. *Jagmilan Ram*, 1927 All 177 (178): 99 Ind Cas 280; *Viswanath* v.

the *lower Court's* decree proceeds on a common ground and not where the appellate Court wishes to proceed on a common ground and reverse or vary the lower Court's decree in favour of all the parties.[1] It is not necessary that all the grounds upon which the lower Court proceeds should be common to all the parties. It is enough if it proceeds on *any* ground common to all the plaintiffs or defendants.[2] It is not also necessary that all the defendants should claim an *interest* in the property affected by the decree.[3] The rule will apply when the defendants put forward a common defence as against the plaintiff, although they dispute each other's rights.[4]

In applying this rule, the Court is entitled to consider the ground or finding upon which the judgment or decision is based, and not merely the operative portion of the decree.[5]

4. **Ground common to all the plaintiffs.**—Where there are several plaintiffs and the suit is dismissed on a ground common to all of them the appellate Court may reverse the decree in favour of all the plaintiffs although only some of them have appealed.[1] *A* and *B* the alleged reversioners of one *F* sue *X* for possession. The suit is dismissed as *time-barred.* *A* alone appeals and the appellate Court comes to the conclusion that the suit is not time-barred. The appellate Court can reverse the decree in favour of *B* also although he had not joined in the appeal, inasmuch as the lower Court's decree proceeded on a ground common to both *A* and *B*, namely that the suit was time-barred.[2]

Though an application for commutation of rent under the Bengal Tenancy Act must be made by all the landlords, an appeal by some only of the landlords in such proceedings is maintainable.[3]

Vasudev, (1896) 25 Bom 699 (702): 3 Bom L R 400; *Eka* v. *Eka*, 1893 Bom P J 321 (322); *Rugghoonath Newgy* v. *Sudhamoyee Debi*, 1 Hay 183: Marsh 106; *Sreemathy Doyamoyee Dasi* v. *Eshur Chunder Mutty Lal*, (1864) 1 Suth W R 203 (204); *Woomesh Chunder* v. *Matunginea*, (1865) 2 Suth W R 170 (171); *Sreemutty Khermukuree Dossee* v. *Nilambur Mundul*, (1865) 2 Suth W R 227 (228, 230); *Abdul Ali* v. *Banoo*, (1865) 2 Suth W R 287 (288); *Ram Mohinee Debia* v. *Jabed Sircar*, (1866) 6 Suth W R 82 (83) (Act X); *Gudadhar Banerjee* v. *Musst Mun Mohinee Dossee*, (1867) 7 Suth W R 366 (366); *Boydo Nath* v. *Ojan Bibi*, (1869) 11 Suth W R 238 (240); *Koolada Pershad* v. *Gora Chand*, (1872) 17 Suth W R 353 (353, 354); *Ramchunderpal* v. *Omora Churn Deb*, (1872) 18 S W R 26 (27); *Lalla Ram* v. *Lokebase*, (1872) 18 Suth W R 39 (40); *Chunder Monee* v. *Modhoo*, (1875) 23 Suth W R 166 (167); *Nanda* v. *Jai Chand*, (1917) 40 Ind Cas 184 (185): 35 Pun W R 1917; *Jogesh Chandra* v. *Sarada Kumar*, (1919) 49 Ind Cas 834 (835): 23 Cal W N 223; *Amir Chand* v. *Kahan Das*, 1928 Lah 279 (280): 106 Ind Cas 875; *Mitha Mal* v. *Faiz Mahomed*, 1889 Pun Re No 113; *Raja Seth Gokuldas* v. *The Jodhpur Bikanir Railway Co*, (1902) 15 C P L R 116 (119); *A C T R M Chetty* v. *Po U*, (1921) 63 Ind Cas 973 (974) Rang; *Bhagelu Singh* v. *Murti Kuar*, 1932 All 326 (327): 135 Ind Cas 247; *Jang Bir* v. *Jamna*, 1932 Lah 37 (38): 12 Lah 534: 32 Pun L R 778: 135 Ind Cas 593.

(1) *Protab Chunder* v. *Kurbanissa*, (1870) 14 Suth W R 130 (131, 132); *Chajju* v. *Umrao Singh*, (1900) 22 All 386 (392): 1900 All W N 120; *Puran Mal* v. *Krant Singh*, (1898) 20 All 8 (9): 1897 All W N 154.

(2) *Ram Kamal Shaha* v. *Ahmad Ali*, (1903) 30 Cal 429 (432); *Ambica Prasad Singh* v. *Pardip Singh*, (1915) 23 Ind Cas 446 (447): 19 Cal W N 233: 42 Cal 451; *Annamalai Chettiar* v. *Pichu Ayyar*, (1905) 28 Mad 122 (124): 15 Mad L Jour 28. But see *Bure Khan* v. *Sant Ram*, 1895 Pun Re No 8.

(3) *Dhuttaloor Subbayya* v. *P Subrayya*, (1907) 30 Mad 470 (472): 17 Mad L Jour 119: 2 Mad L Tim 104 [Disapproving 17 Mad 265] F B.

(4) *Bankey Behari Singh* v. *Parmeshwar Singh*, 1927 Pat 103 (104): 98 Ind Cas 846: 8 Pat L Tim 816.

(5) *Kali Pada Sadhu* v. *Mati Lal Fouzdar*, (1909) 4 Ind Cas 166 (167): 9 Cal L Jour 461.

Note 4.

(1) *Sunder Singh* v. *Krishna Mills Co, Ltd*, (1914) 23 Ind Cas 91 (92): 11 Pun L R 1914: 22 Pun W R 1914: 63 Pun Re 1914; *Ballachariar* v. *Thiruvenkatachariar*, (1912) 15 Ind Cas 409 (412) Mad; *Madhorao Sapre* v. *Laxmibai*, 1927 Nag 406 (407): 99 Ind Cas 1041; *Bane Bahadur Singh* v. *Sukhraj Kuar*, 1924 Oudh 385 (389): 11 Oudh L J 297: 81 Ind Cas 484: *Parmeshri Kunwar* v. *Dhuman Kunwar*, 1929 All 393 (394): 119 Ind Cas 434; *Maung Byaung* v. *Mg Shwe Baw*, 1924 Rang 376 (376): 2 Rang 486: 3 Bur L Jour 171: 84 Ind Cas 170.

(2) *Kundan* v. *Mam Raj*, 1922 Lah 57 (58): 4 Lah L Jour 178: 31 Pun W R 1922: 77 Ind Cas 274.

(3) *Bhojraj Mahto*, In re, (1917) 41 Ind Cas 787 (788): 1 Pat L W 578.

O. 41, R. 4, Notes 5—6.

5. **Ground common to all the defendants.**—Under this rule, where a decree is passed against several defendants and the decree proceeds on any ground common to all the defendants, it is open to any of them to appeal from the whole decree and on such appeal the appellate Court can reverse or vary the decree in favour of *all* the defendants.[1] *A* mortgaged certain properties to *X*, and sold the same to *B* on 5—3—1925. On 10—3—1925, *A* paid *X* the whole of the interest due upto that date and it was arranged that the principal should be paid by 16—10—1925, failing which further interest would accrue from 10—3—1925 till payment. On 16—3—1925, *B* tendered to *X* a certain sum as the principal amount due on the mortgage. On *X* refusing to receive the same *B* deposited the amount in Court under S. 84 of the Transfer of Property Act, 1882 on 22—10—1925. *X* thereafter filed a suit against *A* and *B* for the interest accrued due from 10—3—1925 to 22—10—1925 on the ground that no valid tender was made on 16—3—1925. *A* and *B* contested the suit on the ground that the tender was a valid one. The trial Court passed a decree against both *A* and *B* overruling their plea. *B* alone appealed against the decree. It was held that the ground on which the decree of the lower Court proceeded, *viz.*, that there was no valid tender being common to both *A* and *B* the appellate Court could under this rule reverse the decree against *A* also though he had not joined in the appeal.[2]

6. **May reverse the decree in favour of all the plaintiffs or defendants.**—The word "may" in the rule shows that the exercise of the

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Note 5.

[1] *Ahmad Haji* v. *Mayan*, 1930 Mad 65 (67): 57 Mad L Jour 789: 30 Mad L W 1045: 124 Ind Cas 801; *Kishore Chandra Banerjee* v. *Ram Charan*, (1910) 5 Ind Cas 888 (889) Cal; *Chirag Ali* v. *Salik Ram*, 1882 All W N 36 (37); *Peary Mohan Mukopadhya* v. *Sreeram Chandra Bose*, (1902) 6 Cal W N 794 (796) [Suit for contribution against three persons—Suit decreed—One defendant alone appealing—Appellate Court finding that the plaintiff was not entitled to any contribution may dismiss the suit as against all the defendants]; *Tulsi* v. *Nabi Bux*, (1916) 32 Ind Cas 193 (194) Cal [Sale set aside against all purchasers—Reversal of order in appeal by one enured for benefit of all]; *Hari Kissen Dos* v. *Lal Soonder*, 1 Ind Jur O S 82; *Lal Sunder Dos* v. *Hary Kissen Dos*, Marsh 113: 1 Hay 339; *Joy Kisto* v. *Nityanand*, (1877-78) 3 Cal 738 (741): 2 Cal L Rep 440: 3 Ind Jur 117 F B; *Srimana Vikraman* v. *Rayan*, (1891) 16 Mad 293 (294) [Both defendants appealing—One withdrawing—Other could continue the appeal]; *Banka Mal* v. *Chuah Malik*, 1883 Pun Re No 71; *Bhupa* v. *Chetu*, 1881 Pun Re No 26; *Ganda Singh* v. *Kishen Singh*, 1879 Pun Re No 6; *Kalyana Sundaram* v. *Subba*, (1904) 14 Mad L Jour 139 (140); *Yerrabalu Viraraghava* v. *Abdul Khadir Sahib*, (1868-69) 4 Mad H C R 26 (27, 28); *Kanhye Roy* v. *Hyder*, (1876) 25 Suth W R 29 (30); *Ramkrishna* v. *Jairam*, (1890) 3 C P L R 130 (130); *Ram Sunder Das* v. *Shajidur Rahman*, (1921) 60 Ind Cas 460 (460) Cal; *Syam Kishore De* v. *Umesh Chandra Bhattacharya*, (1920) 55 Ind Cas 154 (156): 31 Cal L Jour 75: 24 Cal W N 463; *Sheikh Mahomed Safoollah* v. *Shaikh Anwar Ali*, (1874) 21 Suth W R 112 (113); *Sreestee Dhur Chuckerbutty* v. *Sreenath Biswas*, (1872) 18 Suth W R 331 (332); *Luchmeeput Singh* v. *Khoobunnissa*, (1894) 14 Suth W R 280 (281); *Doorga Churn Sett* v. *Shamanand Gossami*, (1869) 12 Suth W R 376 (377); *Sreemanfuree* v. *Poorusattam*, (1868) 9 Suth W R 499 (500); *Kritartho* v. *Khetternath*, (1868) 9 Suth W R 472 (473); *Sufur Ali* v. *Busseeroolla*, (1884) 6 Suth W R 323 (324); *Katyanee Chowdhrain* v. *Madhub Narain Roy Chowdhury*, (1865) 4 Suth W R 68 (69); *Durga Kunwar* v. *Balwant Singh*, (1901) 23 All 478 (481): 1901 All W N 175; *N Gangulu Naidu* v. *Chengama Naidu*, 1925 Mad 237 (238): 47 Mad L Jour 871: 85 Ind Cas 397; *Beni* v. *Purna*, (1911) 11 Ind Cas 897 (898): 14 Cal L Jour 134; *Dasarathi Patel* v. *Bhojo Mohan Gaontia*, (1914) 22 Ind Cas 90 (92): 18 Cal L Jour 621; *Sokkappa Reddi* v. *Singana Reddi*, (1914) 23 Ind Cas 620 (621): 1 Mad L W 169; *Motookdhari* v. *Jagdip Narain*, (1915) 28 Ind Cas 343 (344): 21 Cal L Jour 261: 19 Cal W N 1319; *Somasunderam* v. *Vaithilinga*, (1917) 41 Ind Cas 546 (551, 552): 6 Mad L W 253: 40 Mad 846; *Ram Tahal* v. *Sukeshwar*, (1916) 35 Ind Cas 547 (548): 1 Pat L Jour 143; *Peria Krishnasami Naik* v. *Aiyappa Naik*, (1914) 24 Ind Cas 924 (925, 926): 1 Mad L W 376 [Decree for possession against two defendants—One alone appealing—Appellate Court finding that the plaintiff had no title to the property—Whether R 4 applied or not; under R 33 entire decree might be set aside]; *Subbarayalu Naidu* v. *Pappammal*, (1915) 29 Ind Cas 579 (579) Mad; *Chunder Kulla Dossee* v. *Jotendro Mohun Tagore*, (1866) 6 Suth W R 104 (104, 105) [Cross objections by one defendant—Common ground with other defendant—Decree varied as to latter also]; *Srimati Jadumani Dasi* v. *Srimati Fudu Bibi*, (1871) 7 Beng L R App 28; *Mt Kundan Bibi* v. *Magan Lal*, (1932) 139 Ind Cas 718 (721): 1932 All 710; *Rakhal Chandra Chatterjee* v. *Raji Santhal*, (1927) 98 Ind Cas 837 (838); 23 Cal W N 372; *Dasarath* v. *Brojo Mohun*, (1913) 18 Cal L Jour 621 (623, 624): 22 Ind Cas 90.

[2] *Venkatarama Ayyar* v. *Gopalakrishna Pillai*, 1929 Mad 230 (233): 29 Mad L W 220: 56 Mad L Jour 255: 52 Mad 822: 116 Ind Cas 844.

O. 41, . 4, Note 6.

power under this rule is discretionary, and that the Court is not *bound* to exercise it.[1]

There is a conflict of opinion as to whether this rule applies to cases where one of the plaintiffs or defendants appeals without impleading the other plaintiffs or defendants as parties to the appeal. The High Court of Calcutta has held that it does[2] while the Lahore High Court holds that it does not.[3] Opinion in the High Court of Allahabad is conflicting, some cases holding that it does[4] and some, that it does not.[5] It is submitted that the Calcutta view is correct.

The Court may, under this rule reverse or vary the decree in *favour* of all the plaintiffs or defendants as the case may be. It does not enable a decree to be passed *against* a person. Such a decree may be passed under R. 33, *infra* if the person against whom the decree is varied or reversed has been impleaded as a party to the appeal.[6] The reason is that it is a fundamental rule of law that no order can be passed against a person without his being given an opportunity of showing cause against it. It has however been held by the High Court of Bombay in the undermentioned case[7] that where *A* and *B* obtain a decree against *C* for a part of the claim made in the suit, and in an appeal by *B* for the portion of the claim disallowed *C* filed cross objections against the portion decreed, and the appellate Court dismissed the claim in *toto*, *A* was bound by the decision, notwithstanding he was not a party to the appeal, inasmuch as *B's* appeal was on behalf of *A* also.

Where a suit is partly decreed and partly dismissed and in an appeal by the plaintiff against the part dismissed, no cross objections are filed against the part decreed, the appellate Court cannot interfere with such portion. This rule has no application to such a case.[8] Where a decree is passed against *A* and *B*, and *B* alone appeals from the decree, the appellate Court cannot while setting aside the decree against *B* pass a new decree against *A*.[9]

Where the appellate Court exonerates a particular defendant from the lower Court's decree and that defendant's interest is *separable* from that of the others, the appellate decree does not enure to the benefit of the latter.[10]

Note 6.

(1) *Kaka* v. *Kartara*, 1932 Lah 71 (71): 32 Pun L R 787: 133 Ind Cas 556; *Mt Kundan Bibi* v. *Magan Lal*, 1932 All 710 (711): 139 Ind Cas 718; *Bure Khan* v. *Sant Ram*, 1895 Pun Re No 8; *Karaim Kuppuswami Naidu* v. *Desayi Namberumal*, (1912) 16 Ind Cas 693 (694) Mad; *Jai Narain Singh* v. *Mandhai Singh*, 1926 All 64 (64): 6 L R A (Civ) 495: 88 Ind Cas 535; *Kariam* v. *Desai*, (1912) 16 Ind Cas 693 (694) Mad; *Narain Dikshit* v. *Benaik Bhat*, (1914) 24 Ind Cas 439 (441): 12 All L J 883: 36 All 510.

(2) *Haridas* v. *Kailash*, (1918) 44 Ind Cas 480 (482) Cal.

(3) *Saru Khan* v. *Jan Muhammad*, 1928 Lah 43 (43): 106 Ind Cas 313; *Hussain Shah* v. *Rasul*, (1928) 110 Ind Cas 250: 1928 Notes 80 (*e*) Lah.

(4) *Madan Lal* v. *Gajendrapal Singh*, 1929 All 243 (244): 1929 All L J 344: 116 Ind Cas 436: 51 All 575; *Maha Mangal Rai* v. *Kishun Kandu*, 1927 All 311 (313): 100 Ind Cas 346.

(5) *Balkaran Lal* v. *Malik Namdar*, 1924 All 873 (874): 5 L R All (Civ) 279: 78 Ind Cas 637.

(6) *Madan Lal* v. *Gajendrapal Singh*, 1929 All 243 (244): 1929 All L J 344: 116 Ind Cas 436: 51 All 575; *Devgopal* v. *Vasudev*, (1888) 12 Bom 371 (375): 13 Ind Jur 27; *Desarath Patel* v. *Brojo Mohan Gaontia*, (1914) 22 Ind Cas 90 (92): 18 Cal L Jour 621; *Asibunnessa* v. *Wali Ahamed*, (1905) 1 Cal L Jour 144 (147). See *Jitendranath Chatterjee* v. *Jhaku Mandar*, 1922 Pat 4 (4): 3 Pat L Tim 456: 66 Ind Cas 780 [In this case the appeal itself was held unmaintainable in the absence of the other parties].

(7) *Babaji Bhondshet* v. *Collector of Salt Revenue*, (1887) 11 Bom 596 (598).

(8) *Chedalal* v. *Badulla*, (1889) 11 All 35 (39, 40): 1888 All W N 284: 13 Ind Jur 190.

(9) *Durga Charan* v. *Lakhi Narain*, (1918) 47 Ind Cas 917 (919) Cal.

(10) *Magendra Koer* v. *Sat Narain Lal*, (1918) 44 Ind Cas 762 (763): 3 Pat L Jour 166.

O. 41, R. 4, Notes 7—9.

7. **Failure to file cross objections.**—*See* Notes to R. 22 and R. 33, *infra*.

8. **Death of one of several appellants in a case where the decree appealed from proceeds on a ground common to all of them.**—*See* O. 22, Rr. 2, 3, 4 and 11, *ante*. The provisions of O. 22 apply also to appeals. (*Vide* O. 22, R. 11.) Hence, on the death of one of several appellants, if the right of appeal survives to the surviving appellants alone, the appeal may be proceeded with by the latter.[1] Where the right of appeal does not survive to the surviving appellant alone, the appeal will abate so far as the deceased appellant is concerned, if his legal representatives are not brought on the record within the prescribed period of limitation.

If the case is of such a nature that it cannot be disposed of in the absence of the legal representatives of the deceased the whole appeal will abate. But if the lower Court's decree proceeds on a ground *common to* the deceased as well as to the survivors, then, the latter can under this rule, appeal from the whole decree and the absence of the legal representatives of the deceased is no bar to the disposal of the appeal. Hence, in such a case, if the legal representatives are not substituted within the period of limitation the appeal abates only so far as the deceased is concerned and not as a whole,[2] and if the appeal succeeds the appellate decree or order enures to the benefit of all the appellants including the deceased.[3]

Where one of several *respondents* dies and his legal representatives are not brought on the record within the period of limitation and the right of appeal does not survive against the surviving respondents alone, the appeal will abate against him. *See* O. 22, R. 4, but if the presence of the legal representatives of the deceased is essential for the determination of the appeal, the entire appeal will abate, and must fail by reason of defect of parties. This rule does not apply to such a case so as to prevent the abatement of the appeal as the rule applies only to *appellants* and not respondents to an appeal.[4]

The death of an *unnecessary* party does not affect the validity of a decree passed in the absence of his legal representatives.[5]

9. **Application for execution by non-appealing parties and the limitation therefor.**—When a decree is appealed from, limitation for an application for its execution runs from the date of the appellate decree [*see* Limitation Act, Art. 182, Cl. (2)]. Where there are several plaintiffs

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Note 8.

[1] *Johaga* v. *Bir Chand*, 1928 Lah 737 (737): 29 Pun L R 410: 112 Ind Cas 455.

[2] *Artho Ram* v. *Artha Padi*, (1913) 20 Ind Cas 952 (954): 14 Mad L Tim 177: 1913 Mad W N 687: 25 Mad L Jour 248; *Upendra Nath Ghosh* v. *Bhusan Sahana*, 1926 Cal 462 (463): 88 Ind Cas 970; *Bhagwan Sahai* v. *Nanga*, (1930) 125 Ind Cas 180: 1929 Notes 26 (*d*) Lah.

[3] *Guntuku Appanna* v. *Gayarappadu*, 1925 Mad 910 (911): 48 Mad L Jour 601: 22 Mad L W 142: 87 Ind Cas 748; *Subbaraya Mudaliar* v. *Kandasami Mudali*, 1923 Mad 58 (58): 16 Mad L W 330: 1922 Mad W N 674: 32 Mad L Tim 121: 70 Ind Cas 168; *Nawab* v. *Muhammad Hayat*, (1916) 33 Ind Cas 1006 (1007): 29 Pun W R 1916.

[4] *Manindra Chandra Nandi* v. *Bhagabati Devi Chaudurani*, 1926 Cal 335 (336): 30 Cal W N 45: 90 Ind Cas 986; *Halim* v. *Sadiq Husain*, (1928) 112 Ind Cas 605: 1928 Notes 78 (*c*); *Asibunnessa* v. *Wali*, (1905) 1 Cal L Jour 144 (147); *Bejoy Gopal* v. *Umesh Chandra*, (1902) 6 Cal W N 196 (197). See however *Krishna Bandhu Pal* v. *Brajendra Kumar Shaha*, 1932 Cal 134 (135): 58 Cal 1341: 135 Ind Cas 797 [Suit under S. 104-H, Bengal Tenancy Act—Separable cause of action].

[5] *Vasu* v. *Kannamma*, 1926 Mad 991 (994): 51 Mad L Jour 282: 1926 Mad W N 763: 97 Ind Cas 551.

or defendants and the appellate Court reverses or modifies the lower Court's decree on the appeal of some of the plaintiffs or defendants under this rule, time for execution runs from the *appellate decree* even as regards the non-appealing parties.[1] But where this rule does not apply to the case, the appeal does not postpone the starting of limitation for an application for execution by the non-appealing parties.[2]

10. **Court-fee.**—Where one of several appellants takes a ground of appeal which goes to the root of the respondent's case so that if the ground succeeds, the entire decree will be reversed and not merely that portion of it which concerns the particular appellant, the appellant must pay the Court-fee sufficient to cover the whole relief obtainable on such a ground.[1] The entire decree can be reversed in an appeal by some of the defendants under this rule though one of them, appealing as to costs alone, engrosses his appeal only a stamp to cover the amount of costs.[2]

11. **Review.**—This rule does not apply to applications for review.[1]

12. **Revision.**—Where in a case coming under this rule the appellate Court refuses to reverse a decree in favour of non-appealing parties, while reversing it in favour of the appellants, on the ground that it has no power to do so, its decree can be set aside in revision as it amounts to a failure to exercise jurisdiction.[1]

The power of the High Court in revision under S. 25 of the Provincial Small Causes Courts Act is not less wide than under this rule.[2]

STAY OF PROCEEDINGS AND OF EXECUTION.

O. 41, R.5.

Stay *by Appellate Court.*

R. 5. [S. 545.] (1) *An appeal shall not operate as a stay of proceedings*[4] *under a decree or order appealed from except so far as the Appellate Court may order, nor* shall execution of a decree be stayed by reason only of an appeal having been preferred *from* the decree; but the Appellate Court may for sufficient cause[6] order stay of execution[5] *of such decree.*

Note 9.

(1) *Mulchand* v. *Ram Ratan*, (1898) 20 All 493 (496, 497): 1898 All W N 121 [Application for execution *by* non-appealing party]; *Kishen Sahai* v. *Collector of Allahabad*, (1882) 4 All 137 (140): 1881 All W N 152 [Application for execution *against* non-appealing party]; *Shivaram* v. *Sakharam*, (1909) 1 Ind Cas 459 (460): 33 Bom 39: 10 Bom L R 939; *Luchmeeput Singh* v. *Khoobunnissa*, (1870) 14 Suth W R 280 (281) [Application for execution *by* non-appealing party].

(2) *Mashiatunnissa* v. *Rani*, (1891) 13 All 1 (12): 1890 All W N 207 F B; *Hur Prosad Roy* v. *Enayat Hossain*, (1878) 2 Cal L Rep 471 (473). But see *Abdul Rahiman* v. *Midin Saiba*, (1898) 22 Bom 500 (505) ["Appeal" in Art. 179 (now 182) does not necessarily mean an appeal which imperils the entire decree].

Note 10.

(1) *Bujhawan Rai* v. *Mukund Lal*, (1893) 15 All 112 (115): 1892 All W N 248.

(2) *Badul Singh* v. *Chatturdharee Singh*, (1868) 9 Suth W R 558 (561).

Note 11.

(1) *Gulla* v. *Mota*, (1904) Pun Re No 47: 86 Pun L R 1904.

Note 12.

(1) *Seshadri* v. *Krishnan*, (1885) 8 Mad 192 (195).

(2) *Hemraj* v. *Panna Lal*, 1921 Nag 105 (106): 17 Nag L R 20: 61 Ind Cas 563.

Stay by Court which passed the decree.

(2) *Where* an application *is* made for stay of execution of an appealable decree before the *expiration* of the time allowed for appealing therefrom, the Court which passed the decree may *on* sufficient cause[6] *being shown* order the execution to be stayed.

(3) No order *for stay of execution* shall be made under *sub-rule* (1) *or sub-rule* (2) unless the Court making it is satisfied—

(*a*) that substantial loss[7] may result to the party applying for stay of execution unless the order is made;

(*b*) that the application has been made without unreasonable delay[8]; and

(*c*) that security[11] has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) *Notwithstanding anything contained in sub-rule* (3), *the Court may make an* ex parte *order for stay of execution pending the hearing of the application.*

[1877—S. 545; 1859—S. 338.]

Synopsis.

1. **Legislative changes.**
2. **Scope and object of the rule.**
3. **Rule does not apply where decree has been executed.**
4. **Stay of proceedings.**
5. **Stay of execution when may be granted.**
6. **"Sufficient cause."**
7. **"Substantial loss."**
8. **Application must have been made without unreasonable delay.**
9. **Affidavit in support of the application.**
10. **Notice to decree-holder.**
11. **Security for performance of decree.**
12. **Liability of surety.**
13. **Right of surety to appeal—See S. 145, Note 12.**
14. **When respondent is insolvent.**
15. **Insolvency of appellant and deposit.**
16. **Effect of stay order.**
17. **Effect of uncommunicated order staying execution.**
18. **Costs of application.**
19. **Appeal.**
20. **Letters Patent Appeal.**
21. **Revision.**
22. **Review.**

Enforcement of security bond. See Note 11 and S. 145.

Inherent power to stay. See Note 2, Pt. (9) and Note 5, Pt. (9).

Power of trial Court to grant stay. See Note 2, Pt. (1) and Note 5, Pt. (1) to (3-c).

Presentation of appeal—If operates as stay. See Note 4, Pt. (1).

1. Legislative changes.—

1. The words "an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order" in sub-R. (1) are new, and have been added to make it clear that

proceedings under a decree as well as execution of the decree can be stayed by the appellate Court. *See* Note 4.

2. Sub-R. (4) is new. It expressly authorises the Court to pass an *ex parte* Order of stay pending the hearing of the main application for stay.

2. Scope and object of the rule.—This rule provides for—

(1) A stay of *proceedings* under a decree or order appealed from and

(2) A stay of *execution* of such decree or order.

After an appeal has been filed the *appellate Court* may order the stay of *proceedings* under the decree or of *execution* of such decree.[1] *Before* an appeal is filed from an appealable decree, the Court *which passed the decree* may order the *execution* to be stayed but not of other *proceedings* under the decree. Nor, in such a case, has the *appellate Court* any jurisdiction to order the stay of execution of the decree.[2]

The object of the rule is to see that the ultimately successful party gets not merely a barren success but is able to reap the fruits of his success.[3] At the same time, the *decree-holder's* right to reap the fruits of his decree should not be lightly interfered with.[4] This rule combines these two principles and, while it provides for the execution of a decree being stayed pending on appeal, it restricts the circumstances under which such stay may be granted.

The rule applies to all decrees including decrees relating to moveable as well as immoveable property[5] and to decrees for the restitution of conjugal rights.[6] But it does not enable the High Court to stay proceedings in a Court not subordinate to it.[7]

This rule is not exhaustive of all the circumstances in which a stay of execution can be granted under the Code. Thus—

(1) Under O. 20, R. 11 the Court which passed the decree can postpone the payment of the amount decreed.[8]

(2) Under O. 21, R. 26 the Court *to which a decree has been transferred* for execution can stay execution under the circumstances mentioned therein.

(3) Under O. 21, R. 29, where a suit by the judgment-debtor against the decree-holder is pending, execution of the decree may be stayed.

Order 41, Rule 5—Note 2.

(1) *Laliteswar Singh* v. *Bhabeswar Singh*, (1909) 1 Ind Cas 812 (812): 9 Cal L Jour 561: 13 Cal W N 690: 6 Mad L Tim 11.

(2) *Parshottam* v. *Hargu Lal*, 1921 All 214 (214): 43 All 513: 19 All L J 462: 63 Ind Cas 837: *Parshotam Saran* v. *Hagrulal*, 1921 All 342 (344): 43 All 198: 60 Ind Cas 131: 18 All L J 1121; *Barlow* v. *Abdool Haye*, (1872) 17 Suth W R 341 (342); In re *Bhugwan Chunder*, (1866) 6 Suth W R Mis 15 (15); *Savapathi* v. *Maung Sein*, (1909) 4 Ind Cas 309 (309): 5 L B R 124.

(3) *Brij Coomaree* v. *Ramrick*, (1902) 5 Cal W N 781 (797).

(4) *Srinibas Prosad Singh* v. *Kesho Prosad Singh*, (1911) 9 Ind Cas 862 (865): 13 Cal L Jour 365: 15 Cal W N 475: 38 Cal 754.

(5) In the matter of *Ismaid Kooer*, (1868) 9 Suth W R 448 (448): Beng L R Sup Vol 1007.

(6) *Jassa Ram* v. *Tharya Ram*, (1894) Pun Re No 2.

(7) *Malloob Hasan* v. *Kalawati*, 1931 All 57 (58): 11 L R (All) (Rev) 305: 1930 All L J 1469: 132 Ind Cas 42: 53 All 180.

(8) *Bala Krishna Chettiar* v. *Krishnamurthy Aiyar*, 1927 Mad 416 (419): 52 Mad L Jour 182: 38 Mad L Tim 143: 1927 Mad W N 202: 100 Ind Cas 841.

O. 41, R. 5, Notes 2—4.

(4) Under R. 6, sub-R. (2), *infra*, the *sale* of immoveable property in execution of the decree appealed from may be stayed.

(5) Under O. 45, R. 13 the execution of a decree against which an appeal is preferred to the Privy Council can be stayed.

(6) In cases not covered by any of the said provisions a sale can be stayed under the Court's inherent powers.[9] *See also* Note 2 to S. 151 under the heading "Stay of execution and other proceedings".

3. Rule does not apply where decree has been executed.—The rule does not apply where a decree has already been executed.[1] But, where a respondent prevented an order for stay of execution being passed by representing to the Court that there was no application for execution, and immediately afterwards applied for execution in the lower Court and obtained a delivery of possession, it was held that the respondent was guilty of overreaching the Court, and that the delivery of possession could not be allowed to stand.[2]

4. Stay of proceedings.—The mere filing of an appeal does not suspend the operation of a decree, and is no bar to proceedings being taken under the decree, except so far as the appellate Court orders otherwise.[1] Under the old Code there was no express provision for staying *proceedings* under the lower Court's decree, other than execution proceedings.[2] It was, however, held that the appellate Court could, under its inherent power, stay such proceedings.[3] The present rule now expressly authorises the appellate Court not only to stay the execution of the decree, but to stay *proceedings* under the decree as well.[4] Thus in an appeal from an order directing the issue of a

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(9) *Janki Das* v. *Sheo Prasad*, 1932 All 238 (238): 1932 All L J 43: 136 Ind Cas 75: 54 All 844; *Bhagwan Kaur* v. *Harnam Kaur*, (1910) 7 Ind Cas 1017 (1017): 82 Pun Re 1910: 149 Pun L R 1910: 122 Pun W R 1910; *Lal Nilman Nath Sahi* v. *Rai Bahadur Baldeo Das*, (1919) 52 Ind Cas 185 (186): 1919 Pat H C C 145: 4 Pat L Jour 371.

Note 3.

(1) *Satya Shankar* v. *Maharaj Narain*, (1912) 17 Ind Cas 728 (729): 11 All L J 88: 35 All 119; *Gulam Mustafa Khan* v. *Gulam Nabhi*, (1920) 58 Ind Cas 442 (444) Lah; *Hira Lal* v. *Chuni Sah*, 1924 Pat 715 (716): 5 Pat L Tim 556: 2 Pat L R 263: 79 Ind Cas 1; *Hukumchand* v. *Kamalanand*, (1906) 33 Cal 927 (929): 3 Cal L Jour 67; *Dharam Singh* v. *Kishen Singh*, (1888) 12 Cal L Rep 532 (533). See also *Rameswari Chaudhurani* v. *K B Dutt*, (1916) 33 Ind Cas 685 (686): 23 Cal L Jour 310 [Receiver granted leave to transfer estate—Appeal filed after Receiver had carried out the order is infructuous].

(2) *Narayan Sahu* v. *Thakurji Ramji*, 1928 Pat 49 (50): 8 Pat L Tim 712: 106 Ind Cas 194.

Note 4.

(1) *Hukumchand Boid* v. *Prithi Chand Lal Choudhury*, 1918 P C 151 (158): 46 Cal 670: 46 Ind App 52: 17 All L J 514: 21 Bom L R 632: 30 Cal L Jour 71: 23 Cal W N 721: 36 Mad L Jour 557: 26 Mad L Tim 181: 40 Mad L W 416: 1919 Mad W N 258: 50 Ind Cas 444 P C; *Mehr Chand* v. *Ram Lal*, 1924 Lah 360 (360): 73 Ind Cas 766 [Mere fact that appeal is pending is no reason to refuse to issue warrant for arrest]; *Sat Prakash* v. *Bahal Rai*, 1931 All 386 (388): 1931 All L J 508: 53 All 288 F B [Proceedings relating to the passing of a final decree in a mortgage suit are proceedings under a decree]; *Fathulla* v. *Munyappa*, (1883) 6 Mad 98 (99): 7 Ind Jur 78; *Maung Yan Gin* v. *Katheresan Chetty*, 1921 Upp Bur 5 (7): 4 U B R 83: 63 Ind Cas 799; *Rajbans Sahay* v. *Askaran Baid*, 1930 Pat 227 (229): 125 Ind Cas 113; See *Sarat Chandra* v. *Damodar Manna*, (1908) 12 Cal W N 885 (886, 887) [*Ex parte* decree—Appeal from pending—Lower Court can deal with application to set aside an *ex parte* decree].

(2) *Basunto Kumar Sircar* v. *Bhut Nath Sircar*, (1897) 1 Cal W N 264 (264). See also *Panchanan Singh Roy* v. *Dwarka Nath Roy*, (1906) 3 Cal L Jour 29 (31, 34).

(3) *Balkishen Sahu* v. *Khugnu*, (1904) 31 Cal. 722 (724): 8 Cal W N 572 F B; *Hukum Chand* v. *Kamalanand*, (1906) 33 Cal 927 (932): 3 Cal L Jour 67; *Panchanan* v. *Dwarka Nath*, (1906) 3 Cal L Jour 29 (34).

(4) *Karam Elahi* v. *Amir-un-Nisa*, 1930 Lah 108 (108): 119 Ind Cas 489: 31 Pun L R 268. But see *Nena Ojha* v. *Sarbhoo Dutt Ojha*, (1921)

O. 41, R.5, Notes 4—5.

probate of a will, the appellate Court can pass an order staying the issue of probate.[5] In an appeal against an order appointing a receiver, the appellate Court can pass an order directing the receiver not to act till further orders.[6] In an appeal from a preliminary decree in a partition suit[7] or in a mortgage suit[8] further proceedings can be stayed under this rule. Similarly, in an appeal from a preliminary decree in a suit for accounts, an order can be made staying enquiry into the accounts, pending the appeal,[9] though as a general rule, no such stay will be allowed, unless irreparable injury is likely to result to the appellant, by not passing such an order.[10]

The High Court can under this rule read with S. 47, sub-S. (2) of the Provincial Insolvency Act suspend a sentence of imprisonment passed under that Act, pending the disposal of the appeal from such sentence.[11]

A proceeding for restitution on a decree being varied or reversed, is not "a proceeding under the decree" within the meaning of this rule and cannot be stayed.[12] But an application for possession is a proceeding under the order confirming a sale, and the appellate Court can, under this rule, order the same to be stayed pending appeal by the judgment-debtor against the order confirming the sale.[13]

The Court can make the payment of interest, a condition for staying execution of the decree.[14]

5. **Stay of execution when may be granted.**—As has been seen in Note 2 above, an appellate Court has no power before an appeal is filed before it, to order the stay of execution of the decree of the lower Court. It is the Court which passed the decree that can, in such a case, stay the execution of the decree.[1] An application for stay of execution of a decree passed on the Original Side of the High Court, in view of an intended appeal, must, ordinarily be made to the Judge who tried the case.[2] It is, however, essential for the applicability of the sub-R. (2) that the decree, the execution of which is sought to be stayed, should be an *appealable* one, and that the application

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59 Ind Cas 883 (884): 2 Pat L Tim 70 [The view taken in the following case, that even under the present rule, the appellate Court can only stay "execution" and not "proceedings" under a decree and its power to stay "proceedings under a decree" is *inherent* is inconsistent with the express language of that rule].

(5) *Brij Coomaree* v. *Ramrick*, (1902) 5 Cal W N 781 (796).

(6) *Mulchand Prosad Singh* v. *Tarni Prasad Singh*, (1920) 54 Ind Cas 222 (223): 4 Pat L Jour 642: 1920 Pat H C C 40.

(7) *Chhote Lal* v. *Sultan Singh*, (1928) 111 Ind Cas 383: 1928 Notes 89 (c); *Diwan Chand* v. *Nanak Chand*, 1932 Lah 271/(272): 33 Pun L R 123: 136 Ind Cas 729.

(8) *Rup Narain* v. *Shibbu Mal*, (1928) 107 Ind Cas 486: 1928 Notes 28-b Lah.

(9) *Balkishen* v. *Khugnu*, (1904) 31 Cal 722 (724): 8 Cal W N 572 F B; *Hakumchand* v. *Kamalanand*, (1906) 33 Cal 927 (932): 3 Cal L Jour 67.

(10) *Harihar Prasad Singh* v. *Keshav Prasad Singh*, (1921) 61 Ind Cas 9 (13) Pat.

(11) *Nagindas Bhukandas* v. *Ghalabhani Guladas*, (1920) 56 Ind Cas 449 (449): 22 Bom L R 322: 44 Bom 673.

(12) *Mulchand* v. *Tarachand*, 1929 Nag 138 (139): 117 Ind Cas 288. See also *Karasji* v. *Dhondiraj*, (1873) 10 Bom H C R 411.

(13) *Hirambho Nath Banerji* v. *Surojani Devi*, 1932 All 655 (656): 1932 All L J 582: 141 Ind Cas 612.

(14) See *Hogarth Shipping Co, Ltd* v. *Mitsui Bussan Kishan, Ltd*, 1926 Cal 119 (120): 53 Cal 735: 98 Ind Cas 238 [Held on construction of the stay order that payment of interest was not a condition of the stay]; *Venkatarama Iyer* v. *South Indian Bank of Tinnevelly*, 1927 Mad 927 (928): 1927 Mad W N 529: 39 Mad L Tim 394: 104 Ind Cas 750 [Order for payment of interest was executable].

Note 5.

(1) *Yamin-ud-Dowlah* v. *Ahmed Ali Khan*, (1894) 21 Cal 561 (564); *Rameshwary* v. *K B Dutt*, (1916) 33 Ind Cas 685 (686): 23 Cal L Jour 310.

(2) *Chaturbhuj Chandra Null* v. *Basdeo Lal Daga*, 1921 Cal 541 (542): 48 Cal 796: 25 Cal W N 928: 66 Ind Cas 198.

O. 41, R.5, Note 5.

for stay is made before the expiry of the period of limitation for the appeal.[3] Thus if a decree has become final and unappealable, the Court has no power to stay the execution thereof in view of a pending application for review.[3-a] The fact that a *preliminary* decree has been appealed against, does not empower the Court to order the stay of execution of the final decree in the suit from which no appeal is intended to be preferred.[3-b] A Court cannot under this rule order the stay of execution of the decree at the instance of a person not a *party* to the suit, who claims immoveable property liable to be taken under the decree.[3-c]

After an appeal has been filed from a decree, it is only the appellate Court that can, under this rule, stay the execution thereof; the lower Court has no power to do so,[4] though it can grant time to the judgment-debtor to enable him to obtain a stay order from the appellate Court.[5] The appellate Court may grant a stay even where an appeal has been filed in *forma pauperis* and the application for leave to appeal as a pauper is pending disposal.[5-a] But in order that the appellate Court may exercise its powers under this rule, it is necessary that there should be an appeal pending against the *decree* the execution of which is sought to be stayed. Thus, where an appeal is filed against an *order* refusing to set aside an *ex parte* decree, the appellate Court has no power to stay the execution of the *decree*,[6] though the original Court can postpone the sale in execution of such decree, under the provisions of O. 21, R. 69.[7] Similarly, the appellate Court cannot, in an appeal against an *order* filing an award, stay the execution of the decree on the award.[8] It has been, however, held by the High Court of Bombay in the case cited below,[9] that, in an appeal from an order refusing to set aside an award, it has *inherent* power to stay the execution under the award.

Rule 6, sub-R. (2), *infra*, provides that the Court which passed the decree may stay the *sale* in an execution of the decree. This, however, does not affect the powers of the appellate Court under this rule to stay such sale.[10] Nor does the refusal of a stay under this rule bar an application under R. 6.[11] A stay

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(3) *Amir Hasan* v. *Ahmad Ali*, (1887) 9 All 36 (41): 1886 All W N 293; *Ishan Chunder* v. *Ashanoollah*, (1884) 10 Cal 817 (819).

(3-a) *Ameer Hasan* v. *Ahmad Ali*, (1886) 9 All 36 (41): 1886 All W N 293.

(3-b) *Punjab Sind Bank, Ltd, Gujranwala* v. *Kanshi Ram*, 1927 Lah 760 (760): 101 Ind Cas 629.

(3-c) *Kheat Chunder* v. *Prosunnomoyee*, (1864) Marsh 478.

(4) *Abbassee Begum* v. *Maharanee Raj Roop Koor*, (1878) 1 Cal L Rep 368 (368); *Satya Shankar* v. *Maharaj Narain*, (1912) 17 Ind Cas 728 (729): 11 All L J 83: 35 All 119; *Muttealammal* v. *Chellayammal*, (1869) 5 Mad H C R 98 (99); *Shyam Kishen* v. *Sunder Koer*, (1904) 31 Cal 373 (376); *Firm, Gobind Ram Ram Chunder* v. *Firm, Rulla Ram Naurta Ram*, 1924 Lah 602 (603): 76 Ind Cas 174; *Satiswar Singh* v. *Bhabeswar Singh*, (1909) 1 Ind Cas 812 (812): 13 Cal W N 690: 9 Cal L Jour 561: 6 Mad L Tim 11; *Ramanadham* v. *Narayanan*, (1904) 27 Mad 602 (606): 14 Mad L Jour 321. See also *Elias Haji Ahmad* v. *Haji Esmail Sait*, 1923 Bom 200 (200): 25 Bom L R 237: 72 Ind Cas 401.

(5) *Bhansingh* v. *Hukam Singh*, (1909) 4 Ind Cas 552 (552): 68 Pun W R 1909: 52 Pun L R 1909.

(5-a) *Lancaster* v. *Lahore Ice Aerated Water, Co*, 1879 Pun Re No 70.

(6) *Jamuna Prasad* v. *Magai Ram*, (1916) 35 Ind Cas 443 (443) Pat; *Bragwat Raj Kuar* v. *Sheo Golam*, (1904) 31 Cal 1081 (1082): 9 Cal W N 123.

(7) *Jumuna Prasad* v. *Magai Ram*, (1916) 35 Ind Cas 443 (443) Pat.

(8) *Agya Singh* v. *Sundar Singh*, 1927 Lah 494 (495): 102 Ind Cas 11.

(9) *Mahomedalli Essabhoy* v. *Dharamsey Jattha & Co*, 1931 Bom 384 (384): 33 Bom L R 702: 133 Ind Cas 864: 55 Bom 801.

(10) *Tribeni Sahu* v. *Babu Bhagwatbux Rai*, (1907) 34 Cal 1037 (1049): 11 Cal W N 1030: 6 Cal L Jour 298 F B; *Lakshumanan* v. *Palaniappa*, (1918) 45 Ind Cas 80 (80): 34 Mad L Jour 470: 7 Mad L W 612: 24 Mad L Tim 18: 1918 Mad W N 502: 41 Mad 813.

(11) *H H the Gaikwar Sirkar* v. *Ghando*, (1900) 25 Bom 243 (244): 3 Bom L R 867.

O. 41, R. 5, Notes 5—7.

may be granted though the decree may have specified a date within which the judgment-debtor should comply with it and such date has passed without the judgment-debtor doing so.[12]

It has been held by the High Court of Lahore that no order staying execution of the decree appealed from can be made when no execution application has been made or is pending before any Court.[13] It purports to rely upon the undermentioned case of the High Court of Bombay[14] which was a case of a stay of a *sale* under the section corresponding to R. 6 which requires an application for execution to be pending before the lower Court. The said decision of the Lahore High Court cannot be accepted as laying down the correct law.

6. "**Sufficient cause**".—A stay of execution under this rule either by the appellate Court or by the Court which passed the decree, can be ordered only on "sufficient cause" being shown for such stay.[1] A stay will not be granted where the appeal does not raise fairly arguable questions.[2] The mere fact that the period of limitation for appeal from the decree has not expired is not a "sufficient cause" for ordering the stay of execution of the decree.[3] The fact that the judgment-debtor has been constructively guilty of contempt of Court in not having complied with a decree which specified a certain time within which he should have done so, does not disentitle him to an order for stay.[4] *See also* the undermentioned cases[5] which bear upon the expression "sufficient cause".

7. "**Substantial loss.**"—Execution should not be stayed unless the Court is satisfied that *substantial* loss may otherwise result to the judgment-debtor.[1] The loss must be a tangible one and not a mere annoyance to the feelings.[2]

In cases of decrees for the possession of immoveable property there is no general rule that there should be a stay of execution as a matter of course. It depends upon the circumstances of each case whether substantial loss will result to the appellant if the stay is refused. The Court should consider the nature of the property[2-a] and the character of the possession and the past

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(12) *Dharmapal* v. *Krista Dyal*, (1909) 4 Ind Cas 746 (748, 750): 10 Cal L Jour 631.

(13) *Narain Singh* v. *Anup Singh*, (1920) 58 Ind Cas 302 (302) Lah; *Nawab* v. *Hukam Din*, (1921) 63 Ind Cas 897 (897) Lah.

(14) *Janardan* v. *Nilkanth*, (1901) 25 Bom 583 (583): 3 Bom L R 142.

Note 6.

(1) In the matter of *Ismaid Kooer*, (1868) 9 Suth W R 448 (449): Beng L R Sup Vol 1007; *Srinivasa* v. *Kesho Prasad*. (1911) 9 Ind Cas 862 (865): 13 Cal L Jour 365: 15 Cal W N 475: 38 Cal 754; *Sughee Monee* v. *Brojoraj*, (1872) 17 Suth W R 69 (70).

(2) *Vathiar Ramanuja Iyengar* v. *Aiyanachariar*, (1912) 17 Ind Cas 219 (221): 23 Mad L Jour 316.

(3) *Deputy Collector, Sonthal* v. *Binode Ram*, (1866) 5 Suth W R Mis 53 (53).

(4) *Dharmapal* v. *Mohunt Krista Dayal*. (1909) 4 Ind Cas 746 (748, 750): 10 Cal L Jour 63.

(5) *Ude Ram* v. *Beni Pershad*, (1921) 60 Ind Cas 378 (378): 57 Pun W R 1920 [Claim by prior mortgagee pending—This is no ground for staying execution of decree on puisne mortgage]; *Mahomed Hossein* v. *Looff Ali*, (1873) 20 Suth W R 393 (393) [Decree for ejectment—Statement that the judgment-debtor has brought another suit for declaration of his title is no ground for staying execution].

Note 7.

(1) *Dhera Mal* v. *Haidar Shah*, 1921 Lah 24 (25): 2 Lah 61: 67 Pun L R 1921: 61 Ind Cas 77; *Gaikwar Sirkar* v. *Ghandi*, (1901) 25 Bom 243 (244): 3 Bom L R 367; *Vathiar Ramanuja Iyengar* v. *P R Aiyanachariar*, (1912) 17 Ind Cas 219 (221): 23 Mad L Jour 316; *Naziar Ali* v. *Ojoodharam*, (1866) 10 Moo Ind App 322 (327) P C; *Jassa Ram* v. *Tharya Ram*, 1894 Pun Re No 2; *Tribeni Sahu* v. *Babu Bhagwant Bux*, (1907) 34 Cal 1037 (1054): 11 Cal W N 1030: 6 Cal L Jour 298 F B; *Mahomed Ishaq* v. *Wahid Uddin*, (1930) 31 Pun L R 216: 1930 Notes 26 (*a*) [Execution application for arrest stayed].

(2) *Vathiar* v. *Aiyanachariar*. (1912) 17 Ind Cas 219 (221): 23 Mad L Jour 316.

(2-a) *Rajindra Singh* v. *Umrao Singh*, (1921) 61 Ind Cas 827 (828) Lah.

enjoyment of the property.[2-b] Where the Court is satisfied that it would be difficult for the appellant to recover back the property if he succeeds in the appeal there is "sufficient" cause for granting a stay.[3] But the mere possibilities that the decree-holder may transfer the property to third parties is not a sufficient cause unless it is alleged that the decree-holder actually contemplates making such a transfer.[4] It has been held by the Lahore High Court that the disturbance of the appellant's possession is itself a "substantial loss" and that such possession should be protected till the plaintiff has *finally* established his title.[5]

The mere fact that the decree-holder is a woman possessed of no property is no ground for staying execution of the decree pending an appeal. The appellant's interest can be sufficiently safeguarded by ordering the respondent to furnish security for restitution of the property taken in execution.[6]

Ordinarily the execution of a mere decree for costs cannot be stayed.[7] It has been held by the Bombay High Court that where the respondent is willing to give security for restitution, execution of a decree for money should not ordinarily be stayed.[8]

See also the undermentioned cases.[9]

8. **Application must have been made without unreasonable delay.**— The application for stay should be made without any unreasonable delay.[1] In the case cited below,[2] where an application for stay was made nine months after the appeal had been filed but soon after an application for execution was made by the decree-holder to the lower Court, it was held by Suhrawardy, J., the applicant could not be said to be guilty of any delay. But Graham, J., who sat with him held that an application for stay of execution should be filed soon after the *appeal* is filed and that the appellant was guilty of unreasonable delay.

(2-b) *Harihar Prasad Singh* v. *Keshav Prasad Singh*, (1921) 61 Ind Cas 9 (13) Pat.

(3) *Ram Gopal* v. *Manpul Singh*, 1923 Lah 445 (446): 75 Ind Cas 791; *Swami Radha Balab Singh* v. *Sawa Ram*, (1912) 15 Ind Cas 876: 94 Pun W R 1912. See also *Karshan Bhaban Chataba* v. *Indra Narain Chandra*, 1923 Pat 597 (598): 4 Pat L Tim 508: 1 Pat L R 393: 76 Ind Cas 49: 79 Ind Cas 188 [Decree for possession—Execution may be stayed if substantial injury may otherwise result]. See however *Kodiva Sahib* v. *Syed Rahimatulla Sahib*, (1908) 3 Mad L Tim 307 [Impossibility of restoring parties to *status quo ante* is not necessarily substantial loss].

(4) *Gulam Mustapha Khan* v. *Ghulam Nabi*, (1920) 58 Ind Cas 442 (444) Lah.

(5) *Fateh Khan* v. *Daim*, 1927 Lah 169 (170): 99 Ind Cas 767: 9 Lah L Jour 130 [Pre-emption decree]; *Gokulchand* v. *Sanwal Das*, (1920) 55 Ind Cas 933 (934): 12 Pun W R 1920: 79 Pun L R 1920: 1 Lah 348: 2 Lah L Jour 82.

(6) *Johnstone, Notary Public of Lahore* v. *Jan Bibi*, 1928 Lah 329: 107 Ind Cas 780.

(7) *Keshub Prasad Singh* v. *Harihar Prasad Singh*, 1926 Pat 54 (55): 90 Ind Cas 703 [Stay of execution for costs is not ordered unless it is clear that the successful party will have no chance of recovering the costs]; *Khan Chand* v. *Jawandi*, (1917) 41 Ind Cas 752 (753): 53 Pun W R 1917. See *Rakhi Kesh* v. *Mela Ram*, 1926 Lah 605 (606): 96 Ind Cas 416 [Execution of decree as to costs awarded in preliminary decree in partition suit need not be stayed till the passing of final decree].

(8) *Dhunjibhoy* v. *Lisbooa*, (1889) 13 Bom 241 (241).

(9) *Ahmed Reza* v. *Khujoorunnissa*, (1870) 13 Suth W R 281 (283) [The mere fact that the day fixed for sale is near the latest safe day for payment of Government Revenue is not sufficient ground for stay]; *The Firm of Badri Das Jankidas of Delhi* v. *Mathanamal*, 1922 Lah 185 (187): 77 Ind Cas 327 [The fact that appellant's business will be seriously disturbed by the account books passing into Receiver's hands was taken into consideration]; *Arjamand Khan* v. *Shankar Lal*, 1922 Lah 364 (364) [Pre-emption suit—Sale in favour of defendant not genuine—Stay refused].

Note 8.

(1) *Leslie* v. *Land Mortgage Bank of India*, (1872) 17 Suth W R 160 (161): 8 Beng L R 382.

(2) *Biresh Chandra Das* v. *Hari Dasi Bose*, 1925 Cal 254 (255, 257): 82 Ind Cas 435.

O. 41. R.5, Notes 9—11.

9. Affidavit in support of the application.—An application for stay of execution should be supported by affidavit showing the existence of "sufficient cause" for stay.[1] Where the allegations in the affidavit are not contradicted by any counter affidavit, stay may be granted.[2] A bare statement, however, in the affidavit, that the applicant will suffer substantial loss if execution was not stayed is not enough.[3] Before applying for stay, a pleader should verify that the statements made to him were made by the proper parties.[4]

10. Notice to decree-holder.—Although an interim stay order can be passed pending the disposal of the application for stay, without notice to the decree-holder[1] a *final* order staying execution should not be made without such notice.[2] In an earlier case of the High Court of Patna it was held that the failure to give such notice was merely an error of procedure and the order for stay is not open to revision on the ground of want of notice.[3] In a later case, however, the same High Court interfered in revision and set aside such an order.[4]

11. Security for performance of decree.—The appellant is not entitled to have an order for stay without furnishing security for the performance of the decree that may be ultimately binding upon him.[1] Thus security may be ordered to be given for the restitution of mesne profits which may be ultimately declared due to the respondent.[2] A stay order on condition of security being given comes into operation only on security being given.[3]

The Court should not accept any security without inquiring into its sufficiency.[4] The judgment-debtor must be allowed an opportunity to show that the security offered is sufficient.[5] A security, the enforcement of which is likely to lead to litigation should not be accepted.[6]

Stay of execution is often granted on condition that the appellant deposits the amount of the security in Court. In such cases, if the appeal is dismissed the money so deposited is held to the credit of the *decree-holder*. The

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Note 9.

(1) *Multan Chand Shiv Ram* v. *Khan Saheb Kharsedji*, (1891) 15 Bom 536 (537); *Gaekwar* v. *Ghandi*, (1901) 25 Bom 243 (244): 3 Bom L R 367 [Affidavit in support of the allegation that substantial loss would result if stay was not granted, is necessary].

(2) *Fariduddin* v. *Wilayat Ali*, 1888 All W N 249 (249).

(3) *Dhera Mal* v. *Hidar Shah*, 1921 Lah 24 (25): 2 Lah 61: 67 Pun L R 1921: 61 Ind Cas 77.

(4) In the case of *Sreenath Roy, Pleader*, (1872) 17 Suth W R 405 (406).

Note 10.

(1) *Amir Hasan* v. *Ahmad Ali*, (1886) 9 All 36 (42): 1886 All W N 293 [Case before the present Code—when *ex parte* order for stay is passed, it may be set aside or varied later on].

(2) *Multanchand Shiv Ram* v. *Khan Saheb Kharsedji Nasarvanji*, (1891) 15 Bom 536 (537); *Hira Lal* v. *Chuni Sao*, 1924 Pat 715 (716): 5 Pat L Tim 556: 2 Pat L R 263: 79 Ind Cas 1.

(3) *Mulchand* v. *Tarni Prasad*, (1919) 54 Ind Cas 222 (223): 4 Pat L Jour 642: 1920 Pat H C C 40.

(4) *Hira Lal* v. *Chuni Sao*, 1924 Pat 715 (716): 5 Pat L Tim 556: 2 Pat L R 263: 79 Ind Cas 1.

Note 11.

(1) See *Sagore Chunder* v. *Sheoburne*, 1865 Bourke O C 103, *Gulam Mustaf Khan* v. *Ghulam Nabi*, (1920) 58 Ind Cas 442 (444) Lah [In fact it is the duty of the judgment-debtor to ask the Court to fix the amount of security].

(2) *Muhammad Din* v. *Nur Din*, 1914 Pun L R 59 (page 182).

(3) *Superior Bank, Ltd* v. *Budh Singh*, 1924 All 698 (699): 22 All L J 413: 5 L R A Civ 769: 83 Ind Cas 1028.

(4) *Rudra Narain Jana* v. *Naba Kumar Das*, (1918) 44 Ind Cas 156 (156): 22 Cal W N 657.

(5) *Bhooria Doohma* v. *Jumahur Lall*, (1873) 20 Suth W R 52 (52).

(6) *Srinibash* v. *Kesho Prasad*, (1911) 9 Ind Cas 862 (872): 13 Cal L Jour 365: 15 Cal W N 475: 38 Cal 754.

O. 41, R.5, Notes 11—14.

depositor cannot withdraw it[7] even if the decree-holder has failed to apply for execution within the prescribed period of limitation.[8] A decree-holder attaching the amount in execution of his decree is not entitled to claim any portion thereof in preference to the decree-holder with reference to whose decree the deposit was made.[9] If the sum so deposited exceeds the sum ultimately awarded to the decree-holder it should be applied towards the payment of the costs.[10] Where, however, the judgment-debtor satisfied the decree otherwise, the sum deposited as security should be returned to him.[11] A security bond hypothecating immoveable property is chargeable with stamp duty under Art. 40 of the Stamp Act, 1899.[12] According to the High Courts of Madras[13] and Rangoon[14] and the Chief Court of Punjab,[15] such a bond for a sum exceeding Rs. 100 is compulsorily registrable. The High Court of Bombay has, on the other hand, held that it is not.[16]

After execution has been stayed on giving security, it is not open to the judgment-debtor to cancel the security bond[17] though, where it is no longer required, the Court may cancel it.[18]

As to the enforcement of security bonds given under this rule, *see* Notes to S. 145, *ante*. As to the form of security bond, *see* Appendix G, Form No. 2.

12. **Liability of Surety.**—*See* Notes to S. 145, *ante*, generally and also the undermentioned cases.[1]

13. **Right of Surety to appeal.**—*See* S. 145, Note 12.

14. **When respondent is insolvent.**—Where the respondent decree-holder was an insolvent and the appellant, judgment-debtor applied for stay of execution as to costs, he was ordered to pay the costs to the respondent's solicitor on his personal undertaking that he would return the amount, if the appellant succeeded in the appeal.[1]

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(7) *Sheo Goolam Sahoo* v. *Rahut Hossein*, (1894) 4 Cal 6 (9): 3 Ind Jur 170.

(8) *Sheo Gholam Sahu* v. *Khub Lall*, (1905) 2 Cal L Rep 206 (206).

(9) *Hamilton* v. *Shankar Das*, (1915) 29 Ind Cas 791 (793): 120 Pun W R 1915: 36 Pun L R 1916.

(10) In re *Horst Guderian*, 1931 Cal 474 (476): 58 Cal 1: 133 Ind Cas 97.

(11) *Saminatha Pathan* v. *Soranatha Ammal*, (1911) 12 Ind Cas 692 (693): 10 Mad L Tim 426: (1911) 2 Mad W N 432: 22 Mad L Jour 190.

(12) *Ram Narain-Kishur Dayal* v. *Ram Prasad*, 1931 All 65 (68): 1930 All L J 913: 130 Ind Cas 712: 52 All 964 [Liability cannot be enforced except by suit]; In re *Jange Lal*, 1931 All 189 (192): 1931 All L J 41: 52 All 844: 131 Ind Cas 675 F B.

(13) *Nagaruru Sambaya* v. *Tangatur Subayya*, (1908) 31 Mad 330 (332): 3 Mad L Tim 317.

(14) *P R P R Somasundaram Chettiar* v. *V P N Nachiappa Chettiar*, 1925 Rang 55 (58): 2 Rang 429: 84 Ind Cas 802.

(15) *Lahore Spinning & Weaving Mills* v. *Uttamchand*, (1919) 53 Ind Cas 463: 122 Pun Re 1919: 45 Pun L R 1920.

(16) *Jeyappa* v. *Shewangouda*, 1928 Bom 42 (44): 30 Bom L R 19: 52 Bom 72: 107 Ind Cas 710.

(17) *Sundar Lal* v. *Khazana Mal*, 1929 Lah 769 (770): 30 Pun L R 278: 116 Ind Cas 224.

(18) *Ameer Ali* v. *Kassim Ali*, (1870) 13 Suth W R 403 (405).

Note 12.

(1) *Sadasiva Pillai* v. *Ramalinga*, (1874) 2 Ind App 219 (234): 15 Beng L R 383: 24 Suth W R 193: 3 Sar 319: 3 Suth 190 P C [Bond can be enforced in execution]; *S Faquir Ali Shah* v. *Jassu Ram*, (1909) 4 Ind Cas 1005 (1005): 147 Pun W R 1909: 113 Pun L R 1909, (Do.); *Abedoonissa Khatoon* v. *Ameroonissa Khatoon*, (1872) 17 Suth W R 464 (464) [Subordinate Court has no jurisdiction to release a security taken under the directions of the High Court]; *Pandu* v. *Balu*, (1906) 8 Bom L R 557 (564) [Bond, was binding on the surety for the period during which it was allowed to operate]; *Har Narain Das* v. *Dhana Mal*, (1929) 117 Ind Cas 65: 1929 Notes 35 (*b*) Lah [The liability of surety is co-extensive with that of the judgment-debtor].

Note 14.

(1) *Ramanujam* v. *Padmanabham*, 1923 Mad 229 (230): 16 Mad L W 975: 1923 Mad W N 73: 31 Mad L Tim 440: 70 Ind Cas 754.

O. 41, R.5, Notes 15—17.

15. **Insolvency of appellant and deposit.**—Where execution is stayed on the appellant depositing in Court the decretal amount, and the appellant is thereafter declared an insolvent the amount deposited in Court is payable, on the appeal being dismissed, to the decree-holder and not to the Official Assignee.[1]

16. **Effect of stay order.**—The jurisdiction of a Court to deal with further proceedings under the decree ceases when the appellate Court stays such proceedings, and an order passed while the stay order is in force is without jurisdiction.[1] Where the stay order is conditional on security being given, it does not come into operation till such security is given and does not affect the validity of a sale held after the order for stay and before the giving of the security.[2] Where an order for stay is set aside on the ground of fraud the effect is, as if the stay had never been ordered at all. Therefore, a sale held while the order was in force, is valid.[3] The appointment of a receiver does not operate as a stay of execution.[4]

17. **Effect of uncommunicated order staying execution.**—There is a conflict of decisions on the question whether execution proceedings held by a Court after the passing of an order for stay, but before the communication thereof to the Court are valid. It has been held by the Calcutta High Court that an order for stay of execution takes effect as soon as it is passed and not after it has reached the executing Court, and that therefore, a sale held after an order for stay has been passed but before it reaches the execution Court is invalid.[1] According to the Madras High Court an order for stay of execution operates only from the time it is communicated to the executing Court and hence, a sale held before such communication, is not invalid.[2] A similar view has been taken by a Full Bench of the Allahabad High Court.[3] But an opinion was expressed therein that if the decree-holder himself was the purchaser, the sale would not be valid as he takes the property subject to all orders made in the suit. The Bombay High Court has held that it is difficult to lay down a principle as to the moment of operativeness of the stay order. According to

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Note 15.

[1] *Chowthmull v. Calcutta Wheat and Seeds Association*, 1925 Cal 416 (417): 51 Cal 1010: 84 Ind Cas 922.

Note 16.

[1] *Rash Behari Mandal v. Hemanta Kumar*, 1925 Cal 1023 (1024): 41 Cal L Jour 849: 88 Ind Cas 921; *Gouri Shankar v. The Collector of Muzaffarpur*, 1925 Pat 553 (555): 6 Pat L Tim 215: 3 Pat L R Cr 127: 26 Cr L Jour 965: 87 Ind Cas 421; *Venkatappayya v. Venkatachalapathi Rao*, 1927 Mad 450 (451): 99 Ind Cas 983.

[2] *Superior Bank, Ltd, Muzaffarnagar v. Budh Singh*, 1924 All 698 (699): 22 All L J 413: 5 L R A Civ 769: 83 Ind Cas 1028: 10 O & A L R 633.

[3] *The Ganges Flour Mills Co, Ltd v. Shadi Ram*, (1918) 43 Ind Cas 656: 16 All L J 46.

[4] *Maharajdhiraj Sir Rameshwar Singh Bahadur v. Hitendra Singh*, 1921 Pat 131 (132): 6 Pat L Jour 208: 2 Pat L Tim 623: 62 Ind Cas 469.

Note 17.

[1] *Hukumchand Baid v. Kamalanand Singh*, (1906) 33 Cal 927 (934): 3 Cal L Jour 67; *Sati Nath v. Ratnamani*, (1912) 14 Ind Cas 608: 15 Cal L Jour 335 [Stay of proceedings for final decree]. But see *Besseswari Chowdhurany v. Horro Sundar Mozumdar*, (1897) 1 Cal W N 226.

[2] *Kasaribada Venkatachalapathirao v. Maddipatla Kameswaramma*, (1917) 43 Ind Cas 214 (216): 22 Mad L Tim 330: 33 Mad L Jour 515: 6 Mad L W 617: 1917 Mad W N 785: 41 Mad 151 F B [Overruling 22 Ind Cas 99 (100)]. See also *Ponnusamy Iyer v. Ganapathy Iyer*, 1924 Mad 393 (394): 45 Mad L Jour 742: 18 Mad L W 809: 33 Mad L Tim 130: 1923 Mad W N 919: 81 Ind Cas 241 [A person *may* be guilty of contempt although the order of Court which he is alleged to have wilfully disobeyed has not been officially communicated to him]; *Muthukumarasamy v. Kuppusamy*, (1910) 3 Ind Cas 82 (84): 6 Mad L Tim 159: 33 Mad 74

[3] *Parsotam v. Brahmanand*, 1927 All 401 (404, 405): 25 All L J 530: 102 Ind Cas 665: 39 Mad L Tim 85 F B [Distinguishing 1926 All 457 (458)]. See also *The Ganges Flour Mills Co, Ltd v. Shadi Ram*, (1918) 43 Ind Cas 656 (656): 16 All L J 46. But see *Mianjan v. Man Singh*, (1878-80) 2 All 686 (687): 5 Ind Jur 323.

O. 41, R.5.
Notes
17—21.

that High Court, a great deal depends on the nature of the order, the question of good faith and other facts.[4] According to the Lahore High Court a sale held before the stay order reaches the auctioneer is valid.[5]

18. **Costs of application.**—It has been held by the High Court of Bombay that, in the absence of special circumstances, the general rule is that the costs of the application for stay should be costs in the appeal.[1] The High Court of Calcutta has, on the other hand, held that the order for stay is only an *indulgence* shown to the appellant and, therefore, he should be made to pay the costs thereof even though he is successful in his application.[2]

19. **Appeal.**—The question whether an order granting or refusing stay of execution is appealable or not depends upon the question whether such an order falls within S. 47. As to this, *see* generally Notes 44, 84 and 86 to S. 47 and the undermentioned cases.[1] It was held in the undermentioned case that an order rejecting the security offered and ordering execution to continue is not one amounting to a refusal to stay the execution of the decree and is not, therefore, appealable as a decree under S. 47.[2]

20. **Letters Patent Appeal.**—An order granting or refusing stay of execution is a "judgment" within the meaning of the Letters Patent and is appealable as such.[1] An order relating to the *sufficiency* of the security tendered does not come within the purview of S. 47 of the Code nor is it a "judgment" within the meaning of the Letters Patent.[2]

Appeal to the Privy Council.—An order refusing to stay execution is not a "final order" within the meaning of Cl. (*a*) of S. 109 of the Code.[3]

21. **Revision.**—This rule does not apply to applications for revision.[1] But, as has been seen in Note 2 above, the Court has an inherent power of stay under S. 151.[2]

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(4) *Rudrappa* v. *Bashetappa*, 1928 Bom 189, (190, 191): 30 Bom L R 465: 52 Bom 290: 110 Ind Cas 710.

(5) *Lakshimichand* v. *Phul Chand*, 1930 Lah 17 (18): 11 Lah L Jour 457: 125 Ind Cas 53. But see *Khan Chand* v. *Jowandi*, (1917) 41 Ind Cas 752 (753): 53 Pun W R 1917.

Note 18.

(1) *Yeshwant Kashinath* v. *Genajee Venajee & Co*, 1932 Bom 127 (128): 34 Bom L R 230: 137 Ind Cas 375: 56 Bom 276 F B.

(2) *Chunt Lal* v. *Anantram*, (1888) 25 Cal 893 (894).

Note 19.

(1) *Bajrang Das* v. *Dongarse Das*, 1923 Lah 446 (446): 75 Ind Cas 793 [Order rejecting surety is only an interlocutory order and does not determine the rights of parties and is therefore not appealable as a decree under S 47]; *Ganga Din Singh* v. *Lal Bahadur Singh*, (1898) 1 Oudh Cas 102 [Order refusing stay is decree under S 47 and is appealable].

(2) *Firm Dittaram Narsingh Das* v. *Firm Dal Chand Tulsi Ram*, 1927 Lah 527 (528): 102 Ind Cas 621.

Note 20.

(1) *Gokul Chand* v. *Sanwal Das*, (1920) 55 Ind Cas 933 (934): 12 Pun W R 1920: 1 Lah 348: 2 Lah L Jour 32: 79 Pun L R 1920; *Sona Chalam* v. *Kumaravelu*, 1924 Mad 597 (599): 47 Mad 816: 46 Mad L Jour 136: 19 Mad L W 427: 34 Mad L Tim 32: 1924 Mad W N 167: 79 Ind Cas 109; *Mussammat Brij Coomaree* v. *Ramrich Doss*, (1900-01) 5 Cal W N 781 (794). But see *Durga Prasad* v. *Mallikarjuna Prasada*, (1901) 24 Mad 358 (360). See also *Kodita Sahib* v. *Syed Rahimatalla Sahib*, (1908) 3 Mad L Tim 307 [Impossibility of restoring parties to status *quo ante* does not render order refusing stay, a "judgment"].

(2) *Govinda* v. *Thiruvengadi*, 1927 Mad 398 (401): 50 Mad 380: 100 Ind Cas 157: 52 Mad L Jour 161: 38 Mad L Tim 51: 1927 Mad W N 248. See also *Pethaperumal Chettiar* v. *Chidambaram Chettiar*, 1927 Mad 592 (592): 52 Mad L Jour 670: 38 Mad L Tim 364: 1927 Mad W N 259: 102 Ind Cas 396 [Order granting an injunction staying execution is appealable].

(3) *Srinivasa* v. *Kesho Prasad*, (1911) 10 Ind Cas 444 (445): 13 Cal L Jour 681.

Note 21.

(1) *Darbar Sahib Amritsar* v. *Central Bank of India, Ltd, Amritsar*, 1929 Lah 167 (168): 117 Ind Cas 815.

(2) See *Ramanath Singh* v. *Kameshwar Prasad*, (1911) 9 Ind Cas 323 (324): 15 Cal W N 432.

22. Review.—An order of stay of execution made under this rule is open to review.[1]

Security in case of order for execution of decree appealed *from*.

R. 6. [S. 546.] (1) *Where* an order is made for the execution of a decree *from* which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security[4] to be *taken* for the restitution[3] of any property which may be *or has been* taken in execution[5] of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) *Where* an order has been *made* for the sale of immovable property in execution of a decree, and an appeal is pending *from* such decree, the sale shall, on the application of the judgment-debtor *to the Court which made the order*, be stayed[8] on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

[1877—S. 546; 1861—S. 36.]

Synopsis.

1. **Legislative changes.**
2. **Scope and applicability of the rule.**
3. **Restitution—See S. 144, ante.**
4. **Security.**
5. **"Property which may be or has been taken in execution."**
6. **Registration and attestation of security bond—See O. 41, R. 5.**
7. **Mode of enforcement of security bond See Notes to S. 145, ante.**
8. **Stay of sale of immovable property.**
9. **Petition to stay sale where to be made.**
10. **Appeal.**
11. **Form.**
12. **Revision.**

Effect of stay of sale. See Note 8, Pt. (4). Powers of the appellate Court. See Note 2, Pt. (3-a) and Note 9, Pt. (2).

1. Legislative changes.—

The present rule corresponds to S. 546 of the old Code, subject to the following changes:—

1. The words "or has been taken" have been added in sub-R. (1). *See* Note 5, *infra.*
2. The words "for money" which occurred after the words "in execution of a decree" in the third para. of the old section [corresponding to sub-R. (2) of the present rule] have been omitted. Hence, sub-R. (2) applies to all decrees whether they are decrees for the payment of money or not. The

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Note 22.

(1) *Amir Hosan* v. *Ahmad Ali*, (1887) 9 All 36 (40, 42): 1886 All W N 293 [Order made without jurisdiction—Reviewed].

O. 41, R. 6, Notes 1—5.

decisions under the old section bearing upon the meaning of the expression "decree for money"[1] are only of acadamic interest now.

3. The words "to the Court which made the order" in sub-R. (2) are new. *See* Note 9, *infra.*

2. Scope and applicability of the rule.—In order that this rule may apply it is essential that an appeal should be pending against the decree under execution, *and* an order should have been made for the execution of the decree. Where, therefore, no appeal has been filed against the decree,[1] or where no order for execution has been made,[2] there can be no order for security for restitution under this rule. Where an appeal is only against a *part* of the decree, an order for security for restitution cannot be passed with reference to the portion not appealed against.[3] It is competent for the trial Court as well as the appellate Court to pass an order for security under this rule. There is, however, a distinction between the powers of the two Courts. The Court which passed the decree shall, on sufficient cause being shown, require security, while the appellate Court *may*, for like cause, direct the trial Court to take security. The rule applies only to parties to the suit.[3-a]

Pending an appeal to the Privy Council, the trial Court has no jurisdiction to pass an order for security under this rule. The matter is governed by the provisions of O. 45 and not by this order.[4]

3. Restitution.—*See* S. 144, *ante.*

4. Security.—A surety is not discharged merely by reason of the death of the decree-holder.[1] Where under a decree for redemption, the mortgagor decree-holder deposits the mortgage money in Court and applies for execution of the decree, the money so deposited can be accepted as security for restitution under this rule.[2] Where the holder of a decree for money is willing to give security for restitution, the Court should not ordinarily grant a stay of execution of the decree.[3] As to the extent of the liability of the surety, *see* Note 8 to S. 145 and the case cited below.[4]

5. "Property which may be or has been taken in execution".—The words in the rule "or has been taken" are new and make it clear that security for restitution may be ordered even after property has passed into the hands

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Order 41, Rule 6—Note 1.

(1) *Banku Behari* v. *Syama Charan,* (1898) 25 Cal 322 (323) [Decree for arrears of rent is a "decree for money"]; *Harsaran Das* v. *Ganga Prasad,* 1889 All W N 139 (140) [Decree for enforcement of hypothecation by sale of immovable property is not a "decree for money"]; *Haidar Bakhsh* v. *Zahur-ul-Hasan,* 1896 All W N 74 (75) [Decree for costs not declared to be chargeable on any specific immovable property is a decree for money].

Note 2.

(1) *Hardeo Das* v. *Zaman Khan,* (1886) 8 All 639 (640): 1886 All W N 238; *Amir Hasan* v. *Ahmad Ali,* (1887) 9 All 36 (41): 1886 All W N 293; *Chowdhry Purladh Mohapattur* v. *Chowdhury Junardhan Mohapattur,* (1866) 6 Suth W R Mis Rul 15 (15).

(2) *Janardhan* v. *Nilkant,* (1901) 25 Bom 583 (583): 3 Bom L R 142.

(3) *Bahram Khan* v. *Bagh Singh,* 1890 Pun Re No 120 [In such a case, stay of execution cannot be granted].

(3-a) *Land Acquisition Officer* v. *Mulji Haridas,* 1932 Bom 326 (326): 34 Bom L R 379: 139 Ind Cas 37.

(4) *Maung Po Shein* v. *Maung Po Kin,* 1925 Rang 254 (255): 3 Rang 158: 4 Bur L Jour 50: 88 Ind Cas 992.

Note 4.

(1) *Kumari* v. *Nilkanth Narayan Singh,* (1916) 32 Ind Cas 807 (808) Cal.

(2) *Singaram Chettiar* v. *Kaliana Sundaram Pillai,* (1912) 15 Ind Cas 383 (383, 384): 11 Mad L Tim 248: (1912) 1 Mad W N 397 [*Per* Abdur Rahim, J, contra, Sundara Ayyar. J].

(3) *Dhunjibhoy* v. *Lisboa,* (1889) 13 Bom 241 (241).

(4) *Shivram* v. *Trimbak,* 1893 Bom P J 264 [Surety for fulfilling such orders or decrees as may be given in appeal—Held surety liable for *costs* awarded in appeal].

O. 41, R.6, Notes 5—9.

of the decree-holder in execution of his decree.[1] They give effect to the case cited below[2] under the Code of 1882. The view seems to have been the same even under the previous Codes.[3]

6. Registration and attestation of security bond.—*See* O. 41, R. 5.

7. Mode of enforcement of security bond.—*See* Notes to S. 145, *ante*.

8. Stay of sale of immovable property.—Sub-R. (2) is a mandatory provision. It is, therefore, incumbent on the Court to stay the sale of immovable property, on such terms as to giving security or otherwise as it thinks fit.[1] An order for stay of sale can be passed even where the sale has already taken place, provided it has not been *confirmed*.[2] The sub-rule applies also to sale of immovable property in execution of a *mortgage* decree.[3]

An order for the stay of sale of immovable property under this rule does not preclude the execution of the decree in other ways, *e.g.*, by proceeding against the *movables* of the judgment-debtor.[4] Where, on the rejection of a claim petition in execution proceedings, the claimant filed a suit for a declaration of his title, and on its being dismissed, appealed from the decree, and, pending the appeal, applied for a stay of sale, it was held that the sale could not be stayed, inasmuch as the rule applied only where the appeal was against the decree *which was to be executed* and not where the decree appealed from was different from the decree to be executed.[5]

9. Petition to stay sale where to be made.—The words "to the Court which made the order" in sub-R. (2) which are new, show that an application for stay of sale under that sub-rule should be made to the executing Court and not to the appellate Court.[1] This is in accordance with the following decisions under the old Code.[1-a] But the Madras High Court has held that the appel-

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Note 5.

(1) See *Chhatra Kumari Debi* v. *Mohan Bikram Shah*, 1928 Pat 187 (188, 189): 9 Pat L Tim 87: 109 Ind Cas 323 [In this case, it was held that the Court has *inherent power* to order security in *such* a case. The learned Judges seem to have overlooked the fact that under the present rule, it is not necessary to resort to inherent power to order security in such a case].

(2) *Hukum Chand Boid* v. *Kamalanand Singh*, (1906) 33 Cal 927 (934): 3 Cal L Jour 67.

(3) *Jariutool Batool* v. *Hoseinee Begam*, (1863-66) 10 Moo Ind App 196 (202): 10 Suth W R P C 10: 2 Sar 416 P C; *Jeynarain* v. *Russick Mohan*, (1867) 8 Suth W R 144 (146): Beng L R Sup Vol 744 F B; *Juggo Lal* v. *Jankee*, (1872) 17 Suth W R 521 (521) [Special cause, such as waste, to be proved]. But see *Mansukhram Purshottam* v. *Jatarevohu*, (1870) 7 Bom H C R A C 122 [No power to order security for restitution, after property has passed into hands of a successful party].

Note 8.

(1) *Shankar Das* v. *Kasturi Lal*, 1925 Lah 69 (69): 75 Ind Cas 789; *Firm of Phallu Mal Hira Lal* v. *Benarsi Das*, 1924 Lah 631 (631): 75 Ind Cas 615; *The Firm, Phaggu Mal Mata Din* v. *Benarsi Das*, 1924 Lah 671 (672): 75 Ind Cas 1001; *Gian Chand* v. *Manohar Lal*, 1929 Lah 68 (69): 108 Ind Cas 605; *Ram Nath Singh* v. *Kamleshwar Prasad Singh*, (1911) 9 Ind Cas 323 (324): 15 Cal W N 432; *Har Karan Das Thakar Das* v. *Anant Ram Mukand Lal*, 1928 Notes 68 (e): 108 Ind Cas 272; *Amir Ali* v. *Batuck Pershad*, (1911) 11 Ind Cas 22 (22) All. But see *Har Narain Sahai* v. *Govind Rai*, 1932 All 551 (552): 1932 All L J 603: 138 Ind Cas 847 [Sub-rule (2) is only complementary to R 5—There is no *obligation* to stay the sale].

(2) *Gian Chand* v. *Manohar Lal*, 1929 Lah 68 (69): 108 Ind Cas 605; *Balbir Prasad* v. *Karan Singh*, (1917) 37 Ind Cas 752 (752) All [Case under O 41, R 5].

(3) *Rup Narain* v. *Gokal Chand*, 1929 Lah 552 (552): 30 Pun L R 371: 117 Ind Cas 83.

(4) *Sukhdayal Gopichand* v. *Jawahir Singh*, 1926 Lah 463 (463): 93 Ind Cas 897.

(5) *Molar* v. *Kanhaiya Lal*, 1922 Lah 58 (59): 4 Lah L Jour 188: 77 Ind Cas 116 [Proper remedy is to ask for temporary injunction under O 39].

Note 9.

(1) *Kanniappan Chetty* v. *Manikavasagam Chetty*, (1912) 17 Ind Cas 763 (764): 23 Mad L Jour 677; *Amir Ali* v. *Batuk Prasad*, (1911) 11 Ind Cas 22 (22) All; *Zohra Jan* v. *Haveli Shah*, 1932 Lah 30 (30): 135 Ind Cas 207: 32 Pun L R 756; *Shaik Faizu* v. *Mahomed Isac*, 1893-1900 L B R 546.

(1-a) In re *Muradunnissa*, (1893) 15 All 196 (197): 1893 All W N 99; *Tribeni Sahu* v. *Bhagawat Bux*, (1907) 34 Cal 1037 (1044): 11 Cal W N 1030: 6 Cal L Jour 298 F B; *Kunj Lal* v. *Bahitram*, (1904) 8 Cal W N 381 (382).

O. 41, R. 6, Notes 9—12.

late Court can direct a *stay* of sale of immovable property by virtue of its general powers under O. 41, R. 5.[2]

The Court cannot, under this rule stay the sale in execution of a decree passed by another Court in another suit.[3]

10. Appeal.—An order requiring security to be given for restitution is one falling within S. 47 and is appealable. [*See* Note 71-A, Pt. (21) to S. 47, *ante.*] An order accepting or refusing to accept security is, however, not appealable either as a decree or under S. 47 of the Code.[1]

A surety against whom a decree is sought to be executed under S. 145 can, by virtue of that section, appeal from an order made against him in execution proceedings.[1-a]

A judgment-debtor at whose instance a sale was stayed cannot subsequently appeal from the stay order even assuming such an order is otherwise appealable.[2]

11. Form.—For form of security bond, *see* App. G, Form No. 3.

12. Revision.—Where the Court refuses an application under sub-R. (2) of this rule, and declines to stay execution pending appeal, the High Court can, under S. 115, revise the order and direct execution to be stayed on the judgment-debtor furnishing security.[1]

O. 41, R. 7.

No security to be required from the Government or a public officer *in certain cases.*

R. 7. [S. 547.] No such security as is mentioned in *rules* 5 *and* 6 shall be required from the Secretary of State for India in Council or, *where* the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

[1877—S. 547; 1859—S. 340.]

O. 41, R. 8.

Exercise of powers in appeal from order made in execution of decree.

R. 8. [New.] *The powers conferred by rules* 5 *and* 6 *shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.*

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[2] *Lakshmanan Chetty* v. *Palaniappa Chetty,* (1918) 45 Ind Cas 30: 34 Mad L Jour 470: 7 Mad L W 612: 24 Mad L Tim 18: 1918 Mad W N 502: 41 Mad 813.

[3] See *Gossain Money Puree* v. *Guru Pershad,* (1885) 11 Cal 146 (149).

Note 10.

[1] *Sri Kishan Das* v. *Sat Narain,* 1932 Lah 120 (121): 32 Pun L R 806: 136 Ind Cas 792. See however *Rudra Narain* v. *Naba Kumar,* (1918) 44 Ind Cas 156 (156): 22 Cal W N 657 [But an order accepting security and directing delivery of possession is a final order and appealable].

[1-a] *Shek Suleman* v. *Shivram,* (1888) 12 Bom 71 (74).

[2] *Mathra Das* v. *Bank of Northern India,* 1930 Lah 190 (191): 124 Ind Cas 678.

Note 12.

[1] *Ram Nath Singh* v. *Kamleswar Prasad Singh,* (1911) 9 Ind Cas 323 (324): 15 Cal W N 432; *Pokhar Das* v. *Ganaya Lal,* 1925 Lah 256 (257): 6 Lah L Jour 510 [Security ordered without making any enquiry as to the value of the property attached—Held order liable to be revised].

O. 41, R. 8, Note 1.

Synopsis.

1. **Scope and object of the rule.**—This rule is new and gives effect to the following decisions under the old Code.[1] It makes the provisions of Rr. 5 and 6 applicable *mutatis mutandis* to cases in which the appeal is not from the decree (as contemplated by those rules) but from an order in execution of the decree.[2]

Under the rules framed by the High Court of Patna, the Registrar has no power to hear an application under this rule.[3]

PROCEDURE ON ADMISSION OF APPEAL.

O. 41, R. 9. Notes 1—2.

Registry of memorandum of appeal.

R. 9. [S. 548.] (1) *Where* a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Register of Appeals.

(2) Such books shall be called the Register of Appeals.

[1877—S. 548; 1859—S. 341.]

Synopsis.

1. **Registration of appeal.**
2. **Ex parte admission of appeal—Power to dismiss appeal subsequently on ground of limitation.**
3. **Second appeal from order of rejection.**
4. **Withdrawal of appeal after registration.**

Power of Sub-Judge to dismiss on ground of limitation. See Note 2, Pt. (3).

1. **Registration of appeal.**—The registration of an appeal is a purely ministerial act. The Court can reject an appeal after it has been registered.[1]

2. **Ex parte admission of appeal—Power to dismiss appeal subsequently on ground of limitation.**—Where an appeal is presented after the expiry of the period of limitation along with an application to excuse the delay under S. 5 of the Limitation Act, the question of excusing the delay ought to be determined at the stage of admission of the appeal after notice to the respondent.[1] Where, however, *ex parte* order is made admitting such an

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Order 41, Rule 8—Note 1.

(1) *Pasupati* v. *Nanda Lal*, (1901) 28 Cal 734 (736): 5 Cal W N 67; *Hariraj* v. *Kirat*, (1888) 8 All W N 245 (246); In the matter of *Harishankar*, (1875-76) 1 All 178 (180) F B.

(2) See *Balbir Prasad* v. *Karan Singh*, (1917) 37 Ind Cas 752 (752) All [Order for sale in execution—Appeal against—Application for stay—Stay can be granted even after sale but before confirmation].

(3) *Narku Mahton* v. *Kamakhya Narayan*, 1932 Pat 217 (218): 13 Pat L Tim 254: 138 Ind Cas 384.

Order 41, Rule 9—Note 1.

(1) *Jafar Hossein* v. *Muhammad Amir*, (1870) 13 Suth W R 351 (352): 4 Beng L R App 103.

Note 2.

(1) *Krishnaswamy Panikondar* v. *Ramasamy Chettiar*, 1917 P C 179 (180, 181): 41 Mad 412: 45 Ind App 25: 16 All L J 57: 20 Bom L R 541: 27 Cal L Jour 253: 22 Cal W N 481: 2 Pun L R 1918: 4 Pat L W 54: 34 Mad L Jour 63: 23 Mad L Tim 101: 7 Mad L W 156: 1918 Mad W N 906: 11 Bur L Tim 121: 43 Ind Cas 493; *Jnanadasundari Shaha* v. *Madhabchandra Mala*, 1932 Cal 482 (484): 59 Cal 388: 138 Ind Cas 643.

O. 41, R. 9, Notes 2—4.

appeal the Court can again go into the question of limitation at the hearing of the appeal and dismiss it if there is no sufficient ground for excusing the delay.[2] Where a District Judge admits such an appeal *ex parte,* and the appeal is thereafter transferred to a Subordinate Judge for disposal, the latter has power to dismiss the appeal on the ground of limitation.[3]

3. **Second appeal from order of rejection.**—An order refusing to admit an appeal under this rule and rejecting it is a decree and is open to appeal.[1] *See* Note 13 to S. 2, sub-S. (2), *ante.*

4. **Withdrawal of appeal after registration.**—*See also* Note 3 to O. 23, R. 1. Where an appellant applies for leave to withdraw the appeal after notice of hearing has been served on the respondent, the respondent should be given notice of the application. He is always entitled to his costs when leave is granted for withdrawal of the appeal.[1]

O. 41, R. 10.

Appellate Court may require appellant to *furnish* security for costs.

R. **10.** [S. 549.] (1) The Appellate Court[2] may *in* its discretion,[1,6] either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both:

Where appellant resides out of British India.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immovable property within British India *other than* the property (if any) to which the appeal relates.

(2) *Where* such security *is* not furnished within such time as the Court orders, the Court shall reject the appeal.[11]

[1877—S. 549; 1859—S. 342.]

Local Amendments.

ALLAHABAD.

Add the following proviso to sub-R. (1):—

"(1) Provided also that in case of every appeal other than a pauper appeal from any decree or order passed in appeal by any Court subordinate to the High Court confirming the decree or order of the Court below or modifying it only in favour of the appellant or in respect of costs, the appellant shall, within two weeks of the admission of the appeal, or within such time as the Court may for special reasons allow, deposit in the appellate Court security for the costs of the appeal.

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(2) *Bishendut* v. *Nandan Prashad,* (1908) 12 Cal W N 25; *Venkatarayudu* v. *Nagedu,* (1886) 9 Mad 450 (451); *Sarat Chunder* v. *Saraswati,* (1907) 34 Cal 216 (221): 5 Cal L Jour 380; *Moshaulla* v. *Ahmedulla,* (1886) 13 Cal 78 (79); *Dubey Sahai* v. *Ganeshi Lal,* (1875-78) 1 All 34 (37) F B; *Jhotee Sahoo* v. *Omesh Chunder Sircar,* (1880) 5 Cal 1 (2): 3 Shome L R 81. But see *Bharutchunder Roy* v. *Issurchunder Sircar,* (1867) 8 Suth W R 141 (144).

(3) *Mulna Amand* v. *Krishnaji,* (1890) 14 Bom 594 (596); *Krishna Bhatt* v. *Subraya,* (1898) 21 Mad 228 (229): 7 Mad L Jour 188; *Manick Dukhandar* v. *Naibulla Sircar,* (1898) 2 Cal W N 461 (462). But see *Jhotee Sahoo* v. *Omesh Chander,* (1880) 5 Cal 1 (2): 3 Shome L R 81.

Note 3.

(1) *Mathura* v. *Amiruddi,* (1904) 8 Cal W N 64 (65).

Note 4.

(1) *Kareem Bee* v. *Beegam Bee,* (1869) 3 Mad H C R 368 (369).

Add Cl. (2):—

(2) In the second proviso to Cl. (1) of this rule "costs of the appeal" means advocate's fee calculated on the valuation of the appeal together with a sum of Rs. 2 for Court-fee on *Vakalatnama* to be filed by the respondent, Re. 1 inspection fee, and in case of second appeals outside the jurisdiction of a single Judge a further sum of Rs. 10 for printing charges payable by respondent. *Original Cl.* (2) *of the rule shall be numbered as* (3)."

Synopsis.

1. Scope and object of the rule.
2. To what appeals the rule applies.
  3. Appeals in forma pauperis.
  4. Insolvency appeals.
  5. Letters Patent Appeals.
6. Grounds for demanding security.
7. Delay in applying for security.
8. Notice to show cause.
9. Amount of security.
10. Extension of time for furnishing security.
11. Dismissal of appeal for failure to give security.
12. Restoration of appeal so rejected.
13. Limitation for application for restoration.
14. Appeal.
15. Stamp and registration.
16. Practice.
17. Enforcement of security.
18. Form—See Appendix G, Form No. 4.

In its discretion. See Note 1, Pt. (1) and Note 6.
Respondent—At what stage should apply for security. See Note 7, Pt. (1).
Revision. See Note 11, Pt. (9).

1. **Scope and object of the rule.**—In *Lekha* v. *Bhauna*, I. L. R. 18 All. 101, which was a case under S. 549 of the old Code corresponding to this rule, Edge, C. J., observed as follows:—

> "The object of that section was to secure the respondent in an appeal from the risk of having to incur further costs which he might never succeed in getting out of the appellant . . . . . . It was intended under the first paragraph that the Court should have entire discretion in all cases not coming under the second paragraph, in making or refusing an order for security for costs. Under the second paragraph which is the proviso to the first, the Court is given no discretion in the matter. In cases falling within that proviso the Court has to follow the mandate of the statute and make an order for security for costs. An order for security for costs having been made under either the first paragraph or the second it is by the third paragraph of the section enacted that if such security be not furnished within such time as the Court orders, the Court shall reject the appeal. There again the Court is given no discretion in the matter."[1] Compare O. 25, Rr. 1 and 2.

Order 41, Rule 10—Note 1. N 238 F B.

[1] (1896) 18 All (101, 103, 104): 1895 All W

O.41, R.10. Notes 1—4.

Under this rule security for costs can be demanded either *before* or *after* the respondent is called upon to appear and answer.[2] Further, the security may be for the costs of the appeal, or of the original suit or of both.[3]

An order for security for costs can be passed under the rule only against the appellant. No such order can be passed against the respondent.[4] Nor can the Court demand, even from the appellant, security for the *entire decree amount*. Thus, the Court cannot, while admitting an appeal under R. 11, of this order issue notice to the respondent conditional on payment by the appellant of the decretal amount plus a sum of Rs. 500 as security for the costs of the respondent.[5]

2. **To what appeals the rule applies.**—This rule applies to appeals from *decrees.* By S. 2, sub-S. (2) an order determining any question under S. 47 is also a decree. It follows that this rule will apply to appeals from orders under S. 47.[1] By virtue of O. 43, R. 2, *infra* this rule will apply also to appeals from *orders* other than those falling under S. 47.

3. **Appeals in forma pauperis.**—There is a conflict of opinion as to the applicability of the rule to appeals in *forma pauperis*. According to the High Courts of Madras[1] and Rangoon[2] and the Judicial Commissioner's Court of Nagpur[3] the rule applies to pauper appeals but the Court should not make an order for security except for very special reasons, such as, the appeal being a speculative one and the pauper, a mere puppet in the hands of persons well able to find security.[4] The High Courts of Calcutta,[5] Bombay[6] and Lahore[7] have, on the other hand, held that O. 41, R. 10 does not apply to appeals by paupers.

4. **Insolvency appeals.**—This rule applies also to an appeal from an order passed by a Judge of the High Court exercising jurisdiction in insolvency under the Presidency Towns Insolvency Act, 1909.[1]

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(2) *Under the Code of 1859, there seems to have been some doubt on this point*—See *for instance the following cases.*—*Hufazutoollah* v. *Humeedhur Rohman*, (1866) 6 Suth W R Mis 123 (124) [Question was left open in this case]; *Jogendro* v. *Funendro*, (1872) 18 Suth W R 102 (102) [Court can order security at any time before hearing of appeal]; *Heera Lal* v. *Oarapiet*, (1870) 13 Suth W R 431 (432), (Do.).

(3) *Bamasundari Dasi* v. *Ramnarayan Mitter*, (1871) 7 Beng L R App 59 [It was held under the Code of 1859 that security could be ordered only for the costs of the appeal and *not* of the original suit]; In re *Calcutta and S E Ry, Co*, (1867) 8 Suth W R 217 (217), (Do.).

(4) See *Fleming* v. *Shearman*, (1870) 4 Beng L R (O C) 92; *Bhugobutty* v. *Issur*, (1871) 16 Suth W R 311 (311).

(5) *Afzali Begam* v. *Kanhya Lal*, 1932 All 511 (511, 512): 1932 All L J 722: 139 Ind Cas 866 F B.

Note 2.

(1) *Dagdu* v. *Chandrabhan*, (1900) 24 Bom 314 (316): 1 Bom L R 887.

Note 3.

(1) *Saldhana* v. *Henry Hart*, (1920) 58 Ind Cas 794 (794): 1920 Mad W N 584: 12 Mad L W 333; *Srinivasa Sastrigal* v. *Subramania Ayyar*, (1907) 17 Mad L Jour 583; *Seshayyangar* v. *Jainulabadin*, (1880) 3 Mad 66 (67): 4 Ind Jur 507.

(2) *Ma Saw* v. *Maung Shwe Gon*, 1923 Rang 244 (245): 2 Bur L Jour 78: 75 Ind Cas 809 [In this case, however, the judgment *assumes* rather than decides that security for costs can be ordered in pauper appeals—The actual decision is that special reasons are necessary for requiring security for costs from a pauper appellant].

(3) *Chhaganlal* v. *Govind Ram*, 1930 Nag 28 (32): 121 Ind Cas 61: 12 Nag L J 92.

(4) *Seshayyangar* v. *Jainulavadin*, (1879) 3 Mad 66 (67): 4 Ind Jur 507.

(5) *Kanchani Bewa* v. *Jadub Paramanic*, (1918) 48 Ind Cas 971 (972) Cal; *Nusseerooddeen Biswas* v. *Ujjul Biswas*, (1871) 17 Suth W R 68 (69); *Mussamat Hafizan* v. *Abdul Karim*, (1908) 7 Cal L Jour 312 (314): 12 Cal W N 163 [Pauper suit security for costs cannot be ordered].

(6) *Khemraj Shrikrishna Das* v. *Kisanlala Kurajmal*, (1917) 42 Ind Cas 67 (68): 19 Bom L R 771: 42 Bom 5.

(7) *Nasim* v. *Abdul Hamid*, 1922 Lah 87 (88): 3 Lah 80: 67 Ind Cas 256: 68 Pun L R 1922.

Note 4.

(1) *Lakhiprya* v. *Raikishori*, (1916) 32 Ind Cas 3 (4): 20 Cal W N 140: 23 Cal L Jour 24: 43 Cal 243. [But see in the matter of *Ramsebak Misser*, (1870) 5 Beng L R 179].

O.41, R.10.
Notes
5—6.

5. **Letters Patent Appeals.**—The rule applies to appeals under Cl. 15 of the Letters Patent[1] unless the rules framed by the particular High Court are inconsistent therewith, in which case, the former will override the latter. R. 736 of the Bombay High Court which requires an appellant to deposit Rs. 500 as security for costs in all cases is *not* inconsistent with this rule and an appellant may be called upon, under that rule to furnish any additional security for costs that may be considered proper.[2] Similarly, R. 354 framed by the Madras High Court is not inconsistent with this rule.[3]

6. **Grounds for demanding security.**—As has been seen in Note 1 above, the Court has, in cases coming under the first paragraph of sub-R. (1), a *discretion* in the matter of demanding security for costs. But in view of the fact that the rule tends to restrict a party's right of appeal, it should be applied with great caution[1] and very satisfactory grounds should be shown before making an order for security under this rule.[2] The discretion is not an arbitrary one but must be exercised in accordance with sound judicial principles.[3] The Appellate Court may well be guided in the exercise of such discretion by the provisions of O. 25, R. 1.[4] The following have been held not to be sufficient grounds for making an order for security under this rule:—

(1) The mere fact that the appellant may lose and may not pay the costs of the appeal[5] or that the appellant is an undischarged insolvent[6] or is a poor man from whom, if the appeal fails, it would be difficult to recover the costs of the appeal.[7] It was never intended by the Legislature in enacting this rule to

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Note 5.

(1) *Mt Sabitri Thakurain* v. *Savi*, 1921 P C 80 (82): 48 Cal 481: 19 All L J 281: 23 Bom L R 681: 33 Cal L Jour 307: 40 Mad L Jour 308: 14 Mad L W 362: 1921 Mad W N 159: 60 Ind Cas 274: 48 Ind App 76 [Overruling 27 Mad 121 (123)]; *Virupaksha Rao Naidu* v. *M Ranganayaki Ammal*, 1925 Mad 1132 (1133): 21 Mad L W 662: 87 Ind Cas 346; In the matter of *Avis Mary Kathleen Goulding*, 1924 Cal 781 (781): 51 Cal 695: 28 Cal W N 676: 80 Ind Cas 275; *Ratanchand* v. *Damji*, 1923 Bom 399 (399): 25 Bom L R 468: 73 Ind Cas 474.

(2) *Ratanchand* v. *Damji*, 1923 Bom 399 (399): 25 Bom L R 468: 73 Ind Cas 474; *Sevadasji* v. *Bombay Municipality*, 1926 Bom 42 (43): 27 Bom L R 1216: 94 Ind Cas 654. But see *Beharam Jung Nawab* v. *Haji Sultan Ali Shustry*, (1912) 17 Ind Cas 739 (740): 14 Bom L R 1106: 37 Bom 572.

(3) *Virupaksha Rao Naidu* v. *M Ranganayaki Ammal*, 1925 Mad 1132 (1133): 21 Mad L W 662: 87 Ind Cas 346.

Note 6.

(1) *Ma Viv* v. *Maung Myat Kyaw*, (1892-96) U B R Vol II, 279. See also *Lakhmi Chand* v. *Gatto Bai*, (1885) 7 All 542 (546): 1885 All W N 127.

(2) *Catherine Bachman* v. *J A H Bachman*, 1884 All W N 103 (103) [Application for order for security—Unsworn statements of very vague character—Security should not be ordered—Applicant may apply again filing a satisfactory affidavit in support of his application].

(3) *Ahmed Bin Shaikh Essa* v. *Shaik Essa*, (1889) 13 Bom 458 (461): 13 Ind Jur 467; *Ratanchand Dayachand* v. *Damji Dharsey*, 1923 Bom 399 (399): 25 Bom L R 468: 73 Ind Cas 474. See however *Gulabrao* v. *Vinayak*, 1923 Bom 264 (264): 25 Bom L R 195: 72 Ind Cas 285 [Where Macleod, C J. observed that the Court being given an absolute discretion, no Bench of Judges, can lay down rules fettering the discretion of other Judges—It is submitted that his Lordship could not have meant by this to lay down that discretionary power need not be exercised in accordance with legal principles but may be exercised arbitrarily].

(4) *Ram Singh* v. *Babubai*, (1903) 5 Bom L R 661 (662).

(5) *Ratanchand Dayachand* v. *Damji Dharsey*, 1923 Bom 399 (399): 25 Bom L R 468: 73 Ind Cas 474.

(6) *Cook* v. *Whellock*, (1890) 24 Q B D 658: 59 L J Q B 329: 62 L T 675: 38 W R 534: 6 T L R 314 (C A) Ref; 30 Mad 145; 46 Cal 156; 48 Ind Cas 622.

(7) *Mahant Raghunath Das* v. *Sheo Kumar Missir*, 1921 Pat 233 (233): 1921 Pat H C C 359: 1 Pat L Tim 114: 55 Ind Cas 835; *Konammal* v. *Annadana Jadaya Goundan*, 1923 Mad 204 (205): 17 Mad L W 26: 1922 Mad W N 801: 70 Ind Cas 586; *Mt Atri* v. *Harnam Singh*, 1930 Lah 629 (630): 129 Ind Cas 121; *Mt Sat Bharai* v. *Barkhurdar Shah*, 1930 Lah 382 (383): 120 Ind Cas 538: 31 Pun L R 601; *Bhagwan Devi* v. *Bhagwan Devi*, 1930 Lah 384: 11 Lah L Jour 157: 114 Ind Cas 708: 31 Pun L R 602; *Hewetson* v. *Deas*, (1894) 21 Cal 526 (527); *Khajah Assenoollajoo* v. *Solomon*, (1887) 14 Cal 533 (536) [Security for costs of suit]; *Manekji* v. *Goolbai*, (1879) 3 Bom 241 (242); *Jiwan Ali* v. *Basamal*, (1886) 8 All 203 (204): 1886 All W N

O.41, R.10, Note 6.

derogate from the right of appeal given by law to every person who is defeated in the Court of first instance.[8]

(2) The mere fact that a third person has incited the appeal[9] or that the appellant has parted with a portion of his interest in the subject-matter of the suit for the purpose of obtaining funds for the carrying on of the litigation[10] or that a relative of the appellant is assisting the appellant financially in the litigation[11] or that the appellant has rich relations who can afford to pay the decree amount.[12]

(3) The mere fact that the appellant has not paid the costs of the original suit.[13]

(4) The fact that one of the appellants is a female.[14]

From the above cases it is clear that mere poverty is no ground for ordering security. But poverty along with other circumstances may justify an order under this rule.[15] Thus where the appellant is proved to be a mere puppet in the hands of others who are promoting the litigation from behind the scenes[16] or where there is evidence of facts which cast doubts on the honesty and *bona fides* of the appellant, or the appeal is vexatious,[17] the appellant may be ordered to furnish security under this rule. Where the parties have agreed that security for costs should be given, the Court should pass an order for security under this rule.[18]

Although mere poverty of the appellant is no ground for ordering security for the costs of the appeal, it is also on the other hand not a ground for dispensing with security where such security is necessary in the circumstances of the case.[19]

58; *Muhammad* v. *Ahmed*, 1886 All W N 286 (286); *Dalip Singh* v. *Azim Ali*, (1884) 4 All W N 99 (99); *Farkhandatunnissa* v. *The Collector of Meerut*, 1889 All W N 147 (148); *Ajbulunnissa* v. *Riasat Hussain*, 1888 All W N 46 (49); *But see the following cases:—Birendra Nath Mitter* v. *Mt Begum*, 1931 Cal 40 (41): 34 Cal W N 495: 127 Ind Cas 669: 58 Cal 117 [Observations in this case seem to indicate that mere poverty of the appellant is a ground for ordering him to give security for costs]; *Monohur Doss* v. *Khodrum*, 1865 Bourke O C 110 [Appellant who has no available property must, if required, give security for the costs of an appeal before proceeding with it].

(8) *Lakhmi Chand* v. *Gatto*, (1885) 7 All 542 (546): 1885 All W N 127.

(9) *Muhammad Husain* v. *Ahmad Baksh*, (1886) 6 All W N 286 (286).

(10) *Khajah Assenoollajoo* v. *Solomon*, (1887) 14 Cal 533 (536).

(11) *Ma Saw* v. *Maung Shiv Gon*, 1923 Rang 244 (245): 2 Bur L Jour 76: 75 Ind Cas 309.

(12) *Raghunath Singh* v. *Preya Sakhi Debi*, (1915) 28 Ind Cas 598 (599): 19 Cal W N 446.

(13) *Hari Ram* v. *Jowala Mal*, 1931 Lah 70 (70): 31 Pun L R 950: 130 Ind Cas 771; *Ramsingh* v. *Balubhai*, (1903) 5 Bom L R 661 (662).

(14) *Muhammad* v. *Ahmed*, 1886 All W N 286 (286).

(15) *Gulab Rao* v. *Vinayak*, 1923 Bom 264 (264): 25 Bom L R 195: 72 Ind Cas 285; *Muzhur Hussein* v. *Dinbundoo Sein*, Broke A O C 40.

(16) *Dalip Singh* v. *Azim Ali Khan*, 1884 All W N 99 (99); *Chanda Kanta Ganguly* v. *Sarojini Debi*, (1916) 32 Ind Cas 786 (788) Cal; *D Weston* v. *Peary Mohun Das*, (1912) 13 Ind Cas 335 (335): 16 Cal W N 119; *Khajah Assenoollajoo* v. *Solomon*, (1887) 14 Cal 533 (536); *Ram Coomar* v. *Chunderkanto*, (1876-77) 2 Cal 233 (259): 4 Ind App 23: 3 Sar 654 P C; *Jogendro Deb Rykut* v. *Funnindro Deb Roykut*, (1872) 18 Suth W R 102 (103); *Seshayyangar* v. *Jainulavadin*, (1881) 3 Mad 66 (67): 4 Ind Jur 507; (*Mahanath*) *Raghunath Das* v. *Sheo Kumar Missir*, 1921 Pat 233 (233): 1921 Pat H C C 359: 1 Pat L Tim 114: 55 Ind Cas 835.

(17) *Ratanchand* v. *Damji*, 1923 Bom 399 (399): 25 Bom L R 468: 73 Ind Cas 474; *Hari Ram* v. *Jowala Mal*, 1931 Lah 70 (70): 31 Pun L R 950: 130 Ind Cas 771 [Conduct indicating wilful determination not to obey the order of Court in respect of costs]; *Ahmed Bin* v. *Essan Bin*, (1889) 13 Bom 458 (462): 13 Ind Jur 467.

(18) *Elias* v. *Chuckerbutty*, 1 Ind Jur N S 223.

(19) *Konammal* v. *Annadana Jadaya Goundan*, 1923 Mad 204 (205): 17 Mad L W 26: 1922 Mad W N 801: 70 Ind Cas 586.

O. 41, R. 10, Notes 6—10.

Security for costs should not be ordered where the consequences of such an order would be unduly penal.[20]

7. **Delay in applying for security.**—The respondent should be prompt in taking advantage of this rule and must apply for security for costs, before he himself or the appellant incurs costs in the appeal.[1] Any delay on his part will be construed as a waiver by him of his right under this rule.[2]

8. **Notice to show cause.**—It is a fundamental principle of law that no order can be passed against a person without giving him an opportunity to be heard in defence. Hence, an order for security for costs of an appeal cannot be passed against a person without giving him notice to show cause why such an order should not be made.[1] A mere notice to show cause does not amount to a demand and, if the order for security is passed in his absence, he cannot be held to have failed to comply with the order if it was not communicated to him.[2]

9. **Amount of security.**—An order under this rule may direct a specified amount to be paid into Court as security for costs.[1] It is, however, not necessary in all cases to specify the sum for which security must be given. It is enough if the order directs security to be given for the costs of the appeal, or of the original suit or of both.[1-a] A surety under this rule is discharged as soon as the appeal is allowed; the liability is not revived merely because the appellate order is reversed by a higher Court.[2] The Taxing Officer's decision as to the amount for which security should be given is subject to revision by the High Court.[3]

In Bombay, the practice is not to require security proportionate to the estimated costs of appeal but to require generally a security of only Rs. 500.[4]

10. **Extension of time for furnishing security.**—The Court may, in its discretion, enlarge the time allowed for furnishing the security ordered[1] and this may be done even though the period originally fixed has expired.[2] (*See* S. 148.) But when once an appeal has been rejected for failure to give the

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(20) *Chhogan Lal* v. *Govind Ram*, 1930 Nag 28 (29): 121 Ind Cas 61: 12 Nag L J 92.

Note 7.

(1) *Musst Dalip Koer* v. *Jagir Singh*, (1918) 44 Ind Cas 23 (24): 41 Pun W R 1918: 20 Pun L R 1918: *Dalip* v. *Azim*, 1884 All W N 99 (99); *Farkhandatunnissa* v. *The Collector of Meerut*, (1889) 9 All W N 147 (148); *Mt Atri* v. *Harnam Singh*, 1930 Lah 629 (630): 129 Ind Cas 121; *Sachindra Nath Dutt* v. *Secretary of State for India*, 1930 Cal 520 (521): 129 Ind Cas 319; *Bhobonath* v. *Radhaprasad*, (1900) 5 Cal W N 119 (120).

(2) *Wise* v. *Jagbundoo*, (1859) 7 Moo Ind App 431 (440): 1 Sar 698 P C.

Note 8.

(1) *Siraj* v. *Khadim*, (1883) 5 All 380 (381): 1883 All W N 60.

(2) *Timmu* v. *Deva*, (1882) 5 Mad 265 (266).

Note 9.

(1) *Shum Shu Bibi* v. *Muhammad Rashid Ali Khan*, 1930 Mad 355 (356): 126 Ind Cas 110.

(1-a) *Lekha* v. *Bhunna*, (1896) 18 All 101 (105): 1895 All W N 238 F B [Overruling 9 All 164 (166)].

(2) *Binderari Prasad* v. *Sat Narain Prasad*, 1927 All 522 (523): 101 Ind Cas 551; *Kedar Nath Chakravarty* v. *Chandi Charan Mitter*, 1924 Cal 528 (528): 38 Cal L Jour 190: 76 Ind Cas 510.

(3) *Rajrajeshwarashrain* v. *Svarupananditrtha*, 1927 Bom 499 (501): 29 Bom L R 1031: 103 Ind Cas 637.

(4) *Ahmed* v. *Essa*, (1889) 13 Bom 458 (462): 13 Ind Jur 467.

Note 10.

(1) *Guruswamy* v. *Narayana*, 1932 Mad W N 655 (659): *Fasih-ud-din* v. *Babu Lal*, 1888 All W N 241 (242); *Rajab Ali* v. *Amir Hossein*, (1889) 17 Cal 1 (3): 5 Sar 389 P C.

(2) *Budri Narain* v. *Sheo Koer*, (1889) 17 Cal 512 (515): 17 Ind App 1: 5 Sar 493 P C; *Jumna Bai* v. *Vissandas*, (1897) 21 Bom 576 (579); *Bhagwan Das Bogla* v. *Haji Abu Ahmed*, (1891) 16 Bom 263 (266) [Case of amendment of pleadings]; *Chunni* v. *Ajudhia*, (1897) 19 All

O.41, R.10, Notes 10—11.

security ordered, it is not thereafter open to the Court to extend the time for furnishing security.[3]

As to the circumstances which would justify extension of time, it is a matter purely in the discretion of the Court.[4] Thus, when the period fixed expires on a day on which the offices of the Court are closed for business, the security may be accepted on the reopening day.[5] Similarly where the appellant applied for extension of time on the ground that, on account of the prevalence of plague in Bombay he was not able to arrange for the security, it was held that time should be extended.[6] That the appellant is a wandering Fakir is no excuse for not furnishing the security in time; it is the duty of every litigant to keep in touch with his case.[7]

11. Dismissal of appeal for failure to give security.—On appellant's failure to give the security within the period fixed, the Court is bound, under sub-R. (2) to reject the appeal.[1] A special application by the respondent to have the appeal rejected is not necessary, and he can raise the objection at the hearing of the appeal.[2] Where the period fixed for giving security expired during the long vacation but the Court office was open during the vacation, it was held that it was not a compliance with the order if the security is given on the reopening day and that the appeal should be rejected.[3] Where the security bond furnished was not drawn up in the terms of the Judge's order, it was held that there was a failure to give security and that the appeal should be rejected.[4] But an appeal should not be rejected merely for a clerical error in the security bond and the error should be allowed to be corrected.[5] In the undermentioned case[6] where it was objected that the executant of the security bond had not been duly authorised to execute it on behalf of the appellant, the Privy Council held that the case should have been adjourned till a proper bond was executed and that the appeal should not have been summarily rejected. The appeal should not be rejected if the order for security has been pass-

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240 (243): 1897 All W N 40. *The following decisions to the contrary are obsolute:—Shrajuddin* v. *Krishna*, (1888) 11 Mad 190 (191); *Budrinarain* v. *Sheo Koer*, (1885) 11 Cal 716 (717); *Haidri Bai* v. *The East Indian Railway Company, Ltd*, (1875-78) 1 All 687 (688).

(3) *Srimati Hari Bhabini Debi* v. *Narendra Nath Roy*, 1923 Cal 817 (818): 67 Ind Cas 883.

(4) *Rajab Ali* v. *Amir Hossein*, (1890) 17 Cal 1(3): 5 Sar 389 P C; *Modhusudan Das* v. *Adhikariprapanna*, (1890) 17 Cal 516 (517): 17 Ind App 9; 5 Sar 496 P C [Discretion not to be lightly interfered with].

(5) In the matter of *Soorjmukhi*, (1876-77) 2 Cal 272 (273). But see *Hijab Banu* v. *Muhammad Shafi*, 1883 All W N 254 (254) [Period expiring during vacation—Court open for such business during vacation—Furnishing security on reopening day is not enough].

(6) *Jumnabai* v. *Vissondas Ruttonchand*, (1897) 21 Bom 576 (579).

(7) *Parmanand* v. *Ram Parkash*, (1920) 68 Ind Cas 806: 2 Lah L Jour 391.

Note 11.

(1) *G Sirur* v. *R Muthili Ammal*, 1932 Mad 170 (171): 61 Mad L Jour 688: 136 Ind Cas 45; *Mt Sabitri Thakurain* v. *Savi*, 1921 P C 80 (84): 48 Cal 481: 19 All L J 281: 23 Bom L R 681: 33 Cal L Jour 807: 40 Mad L Jour 808: 14 Mad L W 862: 1921 Mad W N 159: 60 Ind Cas 274: 48 Ind App 76 P C [Sub-rule mandatory not permissive]; *Haidri Bai* v. *The East Indian Railway Company, Ltd*, (1875-78) 1 All 687 (688); *Parmanand* v. *Ram Parkash*, (1920) 68 Ind Cas 806: 2 Lah L Jour 391; *Kailash Chandra Kandor* v. *Harihar Patra*, (1918) 47 Ind Cas 928 (929) Cal; *Shum Shu Bibi* v. *Mahomed Rashid Ali Khan*, 1930 Mad 355 (356): 126 Ind Cas 110; *Modhusudan Das* v. *Adhikari Prapanna*, (1890) 17 Cal 516 (517): 17 Ind App 9: 5 Sar 496 P C.

(2) *Muhammad Bhai* v. *Banji Topan*, (1865-67) 3 Bom H C R (O C) 64; Contra *Thakur Das* v. *Kishori Lal*, (1887) 9 All 164 (166): 1887 All W N 7 [But in view of the clear language of sub-rule (1) this ruling is of doubtful correctness].

(3) *Hijab Babu* v. *Muhammad Shafi*, 1883 All W N 254 (254).

(4) *Dwarka Das* v. *Sohan Lal*, 1881 All W N 35 (35).

(5) *Jaidat Singh* v. *Baldeo Singh*, 1925 Oudh 402 (403): 12 Oudh L J 83: 86 Ind Cas 752.

(6) *Kojo Pon* v. *Atta Fua*, 1927 P C 264 (265): 107 Ind Cas 349: 47 Cal L Jour 328 P C.

O.41, R.10,
Notes
11—14.

ed without giving notice to the appellant.[7] (*See* Note 8, *supra*). A mere notice to show cause does not amount to a demand for security and where an order for security is passed in the appellant's absence, the order must be communicated to him before he can be held to have failed to comply with it.[8] Reasonable opportunity should be given to the appellant to furnish the security and where it is not given and the appeal is dismissed for the appellant's failure to comply with the order for security, the High Court can interfere in revision.[9]

Once an appeal is dismissed for failure to give security for costs, the Court cannot afterwards extend the time for giving security.[10]

12. **Restoration of appeal so rejected.**—Under S. 107 (2) read with O. 25, R. 2 (2) the Appellate Court may, in its discretion, restore an appeal which has been rejected for failure to give security for costs.[1] But where the appellant's application for extension of time has been heard and dismissed, on the merits, an application for restoration of the appeal rejected for failure to furnish security will be barred.[2] An order restoring an appeal rejected under sub-R. (2) will not bind the respondent if it is made without notice to him.[3]

13. **Limitation for application for restoration.**—It has been held by the Madras High Court that Art. 168 of the Limitation Act applies to an application for the restoration of an appeal dismissed for failure to furnish security under this rule.[1] Even if Art. 168 be held not to apply, the application ought to be made within a reasonable time and ordinarily would be too late after thirty days from the date of dismissal.[2]

14. **Appeal.**—An order rejecting an appeal for failure to furnish security for costs is not appealable either as an order under S. 104 or as a decree.[1] Nor is such an order covered by Ss. 109 and 110, *ante* so as to be appealable

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(7) *Sirajulhaq* v. *Khadim*, (1883) 5 All 380 (381): 1883 All W N 60.

(8) *Timmu* v. *Deva*, (1882) 5 Mad 265 (266).

(9) *Bhola Nath* v. *Kartick Prasad Pande*, (1915) 29 Ind Cas 59 (59) (All).

(10) *Srimati Hari Bhabini* v. *Narendranath*, 1928 Cal 317 (318): 67 Ind Cas 883.

Note 12.

(1) *Srinivasam Pillai* v. *Rukmani Ammal*, 1928 Mad 964 (965): 55 Mad L Jour 330: 28 Mad L W 858: 1928 Mad W N 701 [Dissenting from 4 Ind Cas 165 (165) Mad]; *Sundar* v. *Habib Chick*, (1920) 60 Ind Cas 81 (82): 18 Al L J 838: 2 U P L R (A) 283; *Goljan* v. *Nafar Ali*, (1917) 40 Ind Cas 234 (235): 28 Cal L Jour 163; *Balwant Singh* v. *Daulat Singh*, (1886) 8 All 315 (319): 13 Ind App 57: 4 Sar 707 P C. See also *Mejajennessa Bibi* v. *Sheik Didary*, (1916) 32 Ind Cas 86 (87) Cal [Application for restoration may be treated as application for review].

(2) *Li Tone* v. *S A M Firm*, 1929 Rang 289 (290): 7 Rang 445: 120 Ind Cas 140.

(3) *Goljan* v. *Nafar Ali*, (1917) 40 Ind Cas 234 (235): 28 Cal L Jour 163.

Note 13.

(1) *Sirur* v. *Mythili Ammal*, 1932 Mad 170 (170): 61 Mad L Jour 688; *Nga Lu Dok* v. *Mi San Baing*, 1908 U B R 5 [According to an old decision of Upper Burma, the article applicable was Art 178 of 1877 (now Art 181)].

(2) *Goljan* v. *Nafar Ali*, (1917) 40 Ind Cas 234 (235): 28 Cal L Jour 163.

Note 14.

(1) *Chandra Das* v. *Sarada Kripa Lala*, 1922 Cal 246 (246): 49 Cal 855: 35 Cal L Jour 131: 26 Cal W N 1020: 62 Ind Cas 751; *Tun U* v. *Pha Ri*, 1893-1900 L B R 556; *Fateh Singh* v. *Rama Singh*, (1907) 9 Ind Cas 748 (748): 14 Oudh Cas 40; *Lekha* v. *Bhauna*, (1895) 18 All 101 (104): 1895 All W N 238 [Overruling 5 All 380]; *Singani Mupan* v. *Narasimhachar*, (1910) 8 Ind Cas 436 (437): 9 Mad L Tim 117; *Firozi Begam* v. *Abdul Latif*, (1908) 30 All 143 (145, 146): 5 All L J 109: 1908 All W N 53: 3 Mad L Jour 221; *Nazim* v. *Abdul Hamid*, 1922 Lah 87 (87): 3 Lah 30: 67 Ind Cas 256: 68 Pun L R 1922; [Contra *Gopal Khunde Rao* v. *Deokee Nundan*, (1874) 6 N W P H C 172. This case is obsolete].

O.41, R.10, Notes 14—18.

to the Privy Council.[2] No appeal lies against an order restoring[3] or refusing to restore[4] an appeal rejected under sub-R. (2) for failure to give security.

Letters Patent Appeal.—An order dismissing a petition asking the Court to receive a sum of money as security for the costs of an appeal is a "judgment" within the meaning of Cl. 15 of the Letters Patent and is appealable as such.[5]

15. **Stamp and registration.**—*See* Arts. 15 and 57 Sch. I of the Stamp Act, 1899[1] and Art. 6, Sch. II of the Court Fees Act, 1870. In cases where a security bond is compulsorily registrable, it is not necessary to register the bond until the security has been accepted.[2]

16. **Practice.**—The usual procedure followed when ordering security for costs under this rule is that the respondent first obtains a rule *nisi* on affidavit as to the facts on which he relies. On the day fixed for hearing, the appellant shows cause and the respondent then replies. The respondent has a right of reply though the appellant has used no affidavit.[1] If neither party appears on the day fixed for hearing the rule *nisi* and the rule is discharged in consequence, it can be restored if a sufficient cause for the non-appearance of the applicant be shown.[2]

17. **Enforcement of security.**—Under S. 145 of the Code, the liability of a surety under a security bond given under this rule can be enforced by summary proceedings in execution and a separate suit is not necessary for the purpose.[1] But the remedy by suit is *also* available and a suit against the surety is maintainable though execution of the decree against the judgment-debtor is barred by limitation. *See* Note 11 to S. 145, *ante*.

18. **Form.**—*See* Appendix G, Form No. 4.

O.41, R.11.

Power to dismiss appeal without sending notice to Lower Court.

R. 11. [S. 551.] (1) The Appellate Court, *after sending for the record*[3] if it thinks fit *so to do, and after* fixing a day for hearing the appellant or his pleader[5] and hearing him accordingly if he appears on that day, may dismiss the appeal[4,6] without sending notice to the Court *from* whose decree the appeal is *preferred* and without serving notice on the respondent or his pleader.

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[2] *Md A Gaffoor Khan* v. *Secretary of State for India in Council*, (1914) 23 Ind Cas 532 (532): 12 All L J 451: 36 All 325; *Radha Kishen* v. *Jamna Prasad*, (1910) 5 Ind Cas 940 (941): 13 Oudh Cas 59.

[3] *Sundar* v. *Habib Chick*, (1921) 60 Ind Cas 81 (83): 18 All L J 838: 2 U P L R (All) 283.

[4] *Mejajennessa* v. *Sheik Didary*, (1916) 32 Ind Cas 86 (88) Cal; *Firoze* v. *Abdul Latif*, (1908) 30 All 143 (145): 5 All L J 109: 1908 All W N 53: 3 Mad L Jour 221.

[5] *Vysachary* v. *Keshavacharya*, (1902) 25 Mad 654 (655): 12 Mad L Jour 34.

Note 15.

[1] See also *Kulwanta* v. *Mahabir*, (1889) 11 All 16 (17): 1888 All W N 281 F B.

[2] *Danue* v. *Ameroonissa*, (1870) 13 Suth W R 41 (43).

Note 16.

[1] *Bamasundari Dassee* v. *Ramanarayan*, (1871) 7 Beng L R App 59.

[2] *Lakhmi Chand* v. *Gatoo*, (1885) 7 All 542 (544): 1885 All W N 127.

Note 17.

[1] The following are decisions to the same effect, prior to the present Code:—*Chatterdharee* v. *Rambellashee*, (1877-78) 3 Cal 818 (319): 1 Cal L Rep 347: 2 Ind Jur 602; *Abdul Wahed* v. *Fareedoonnissa*, (1889) 16 Cal 323 (326); *Raghbar Das* v. *Salig Ram*, 1906 Pun Re No 109: 1 Pun L R 1907: 122 Pun W R 1906 F B.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not *appear when the appeal is called on for hearing, the Court may make an order that the* appeal be dismissed.[11]

(3) The dismissal of an appeal under this *rule* shall be notified to the Court *from* whose decree the appeal is *preferred.*

[1877—S. 551.]

Synopsis.

1. **Legislative changes.**
2. **Scope and object of the rule.**
3. **"After sending for the record."**
4. **"May dismiss the appeal."**
5. **Notice to appellant.**
6. **Judgment, if should be written.**
7. **Time barred appeal.**
8. **Order of dismissal, if a decree.**
9. **Effect of dismissal—Amendment of decree.**
10. **Effect of dismissal of appeal from mortgage decree. See O. 31, R. 3.**
11. **Dismissal for default under sub-R (2).**
12. **Re-admission of appeal dismissed for default.**
13. **Review.**
14. **Reference.**
15. **Revision.**
16. **Second appeal.**
17. **Restriction of grounds of appeal on admission.**
18. **Insolvency appeals.**

Dismissal after issue of notice to respondent, whether legal. See Note 2, Pt. (4-a).

1. Legislative changes.—

1. The words in sub-R. (1) "after sending for the record *if it thinks fit* so to do" are new. This makes it clear that the Court is not *bound* to send for the record in any case. (*See* Note 3.)
2. In sub-R. (2) the words "the Court may make an order that the appeal be dismissed" have been substituted for the words "the appeal shall be dismissed for default". This makes it clear that when an appeal is dismissed under sub-R. (2) the order is merely an order of dismissal for default and not a *decree* and hence is not appealable. [*See* S. 2, sub-S. (2).]

2. Scope and object of the rule.—This rule refers to a stage after the memorandum of appeal has been admitted, and the appeal has been registered under R. 9, *ante*.[1] It applies also to Letters Patent Appeals where the rules of the High Court do not prohibit its application to them.[2] But the rule does not apply to the summary dismissal of an appeal under S. 476 of the Criminal Procedure Code.[3] An order of dismissal for the appellant's failure to make the necessary deposit for printing may be covered by this rule or R. 16.[4] The procedure of the rule is not applicable to a case where notice of the appeal has been issued to the respondent.[4-a] The rule con-

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Order 41, Rule 11—Note 2.

[1] *Rudr Prasad* v. *Baijnath*, (1893) 15 All 367 (369): 1893 All W N 115; *Asma Bibi* v. *Ahmad Husain*, (1908) 30 All 290 (292, 293): 1908 All W N 109: 5 All L J 584.

[2] *Jagdis Chandra Das* v. *Chandra Mohan Das*, (1920) 54 Ind Cas 230 (230, 231): 4 Pat L Jour 695: 1919 Pat H C C 416 [Patna High Court Rules permit of summary dismissal of Letters Patent Appeals].

[3] *Sarat Chandra Bhattacharjee* v. *Haricharan*, 1930 Cal 282 (284): 51 Cal L Jour 45: 127 Ind Cas 265: 1930 Cr Cas 362.

[4] *Keepilacheri* v. *Vannathankandiyil*, (1915) 31 Ind Cas 74 (75): 2 Mad L W 999: 18 Mad L Tim 383: 29 Mad L Jour 784: 1915 Mad W N 817.

[4-a] *Hamid Husain* v. *Bhola Nath*, 1906 All W N 186 (186).

O.41, R.11, Notes 2—7.

templates the dismissal of an *appeal*. Hence pending an appeal by the *defendant*, the summary dismissal by the appellate Court, of plaintiff's suit as not being properly stamped, is irregular.[5] The rule applies also to proceedings under the Agra Tenancy Act, III of 1926, but the Board is not bound under that Act to hear any *party before* rejecting an appeal summarily.

3. **"After sending for the record".**—The words in sub-R. (1) "after sending for the record if it thinks fit so to do" are new. But even prior to the present Code, it was held that it was not obligatory on the appellate Court to send for the record in every case, in which it summarily dismissed the appeal.[1] But when the record has been lost and the appeal has been dismissed in consequence, the appeal should be retried when the record is found.[2]

4. **"May dismiss the appeal".**—The discretion given by this rule is a *judicial* discretion and not an arbitrary discretion.[1] It should be very sparingly used and only in exceptional cases.[2]

A pre-emption suit was decreed on condition of plaintiff paying the pre-emption money within a month from the decree. The plaintiff appealed against the condition but the appeal was dismissed on the ground that the money had not been paid within one month. It was held that the suit should not have been dismissed on that ground inasmuch as the condition of payment of money within one month was itself the subject of appeal.[3] Where the High Court in dismissing under this rule, an appeal from an order of remand, reframed a certain issue it was held that the procedure adopted though irregular, was not *ultra vires*.[4]

5. **Notice to appellant.**—An appeal should not be dismissed under this rule unless notice of the day of hearing has been given to the appellant or his pleader.[1] The mere fact that the appellant on the day of filing the appeal may say that he does not intend to appear at the preliminary hearing, is no justification for the failure to give notice.[2]

6. **Judgment, if should be written.**—*See* O. 41, R. 31, Note 9.

7. **Time-barred appeal.**—An appeal cannot be rejected on the ground of limitation, *at the time of admission*, without fixing a date for hearing the appellant. If the Judge thinks that the appeal is too late, he should admit the appeal if it is otherwise valid, and fix a date for hearing the appellant on the question of limitation under R. 11 before issuing notice to the respon-

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[5] *Kammathi* v. *Kunhamad*, (1892) 15 Mad 288 (289).

Note 3.

[1] *Pachi Dassi* v. *Baladas*, (1909) 2 Ind Cas 405 (406): 13 Cal W N 1031; *Ram Das* v. *Lachman Das*, 1876 Pun Re No 48.

[2] *Mangal Prasad* v. *Kalwanta*, 1881 All W N 26 (27).

Note 4.

[1] *Nga San Baw* v. *Nga Lu E*, (1916) 33 Ind Cas 666 (667): (1915) 2 U B R 92.

[2] *Mahru Begam* v. *Gilpin*, 1888 All W N 221 (221). See *Gurunath Nilkanth* v. *Krishnaji*, (1879-80) 4 Bom 462 (465) [*Held*, that the lower appellate Court had gone wrong in disposing of the appeal by *ex parte* order under R 11 summarily].

[3] *Khurshedunnissa* v. *Alim Unnissa*, (1912) 17 Ind Cas 868: 10 All L J 421.

[4] *Shariful Hasan* v. *Lachmi Narayan*, 1932 All 16 (18): 1931 All L J 858: 135 Ind Cas 558.

Note 5.

[1] *Bahala* v. *Mamraj*, 1892 Pun Re No 7 (Rev); *Gurdit Singh* v. *Sardhar Jawala Singh*, 1892 Pun Re No 19 (Rev).

[2] *Khushala* v. *Khushwaqt Rai*, 1888 Pun Re No 7 (Rev).

O.41, R.11,
Notes
7—12.

dent.[1] The rejection of an appeal under R. 11 as being time-barred is equivalent to a *dismissal* thereof and such an Order is appealable.[2]

8. **Order of dismissal, if a decree.**—The dismissal of an appeal under this rule is a decree[1] and appealable as such[2] even if a formal judgment is not written under the provisions of R. 31, *infra*.

9. **Effect of dismissal—Amendment of decree.**—The dismissal of an appeal under this rule amounts to a decree, which supersedes the decree of the lower Court. Hence, after the dismissal, the decree can be amended only by the appellate Court and not by the lower Court.[1] The Bombay High Court has, however, held that the dismissal of an appeal under this rule leaves untouched the decree appealed from, and the lower Court alone can amend the decree notwithstanding such dismissal.[2] The High Court of Patna[3] and the Judicial Commissioner's Court of Nagpur[4] have taken a similar view.

10. **Effect of dismissal of appeal from mortgage decree.**—*See* O. 34, R. 3.

11. **Dismissal for default under sub-R. (2).**—If the appellant or his pleader does not appear when the appeal is called on for hearing, the appeal may be dismissed for default.[1] But when no notice of the date fixed for hearing has been given to the appellant, the appeal cannot be dismissed for default under sub-R. (2).[2] A dismissal for default implies the *absence* of the party or his pleader—so where the pleader of the appellant is present, but is unable through a physical disability to argue the case, and the appeal is dismissed, such dismissal is not for default.[3] Where an appeal is dismissed for default, it is the lower Court's decree that is the executable decree in the case.[4]

12. **Re-admission of appeal dismissed for default.**—Under R. 19, *infra*, an appeal dismissed for default under this rule may be re-admitted. *See* R. 19, *infra*.

Note 7.

(1) *Abdulla Kaka* v. *Palaniappa*, (1909) 2 Ind Cas 859 (860): 5 L B R 15; *Sripat* v. *Hubdar*, 1925 Oudh 643 (643, 644): 2 Oudh W N 678: 90 Ind Cas 115 [Appeal rejected as time-barred without fixing date for hearing appellant—Order of rejection may be set aside on review].

(2) *Farzand Ali* v. *Sheikh Abdul Hamid*, (1921) 60 Ind Cas 493 (495) Pat.

Note 8.

(1) *Altap Ali* v. *Jamsur Ali*, 1926 Cal 638 (639): 30 Cal W N 334: 93 Ind Cas 909; *Umasundari* v. *Bindu Bahshini*, (1897) 24 Cal 759 (762); *Royal Reddi* v. *Linga Reddi*, (1881) 3 Mad 1 (2): 5 Ind Jur 518; *Chandra Kanta* v. *Lakshman*, (1916) 36 Ind Cas 460 (462): 24 Cal L Jour 517: 21 Cal W N 430; *Shera* v. *Rahman Shah*, 1900 Pun Re No 9.

(2) *Bishen Singh* v. *Bishen Kaur*, (1914) 23 Ind Cas 902 (902): 191 Pun L R 1914: 116 Pun W R 1914 [Where, however, no decree was drawn up, the appeal was treated as a revision].

Note 9.

(1) *Asma Bibi* v. *Ahmad Husain*, (1908) 30 All 290 (292): 1908 All W N 109: 5 All L J 584; *Munisami* v. *Munisami*, (1899) 22 Mad 293 (294); *Umasundari* v. *Bindu Bashini*, (1897) 24 Cal 759 (762); *Peary Mohan* v. *Mohendranath*, (1906) 4 Cal L Jour 566 (567); *Abbas Khan* v. *Niba Rani Dassi*, (1910) 5 Ind Cas 261 (262): 11 Cal L Jour 159. See also *Shera* v. *Rahman Singh*, 1900 Pun Re No 9. See further *Pichuvayyangar* v. *Seshayyangar*, (1895) 18 Mad 214 (216): 5 Mad L Jour 39 F B [Decree confirmed on appeal—Appellate Court alone can amend decree].

(2) *Bapu* v. *Vajir*, (1897) 21 Bom 548 (551).

(3) *Batuk Prasad Singh* v. *Ambica Prasad Singh*, 1932 Pat 238 (239, 240): 11 Pat 409: 13 Pat L Tim 484: 138 Ind Cas 908.

(4) *Sheo Lal* v. *Mahommad Ismail*, 1933 Nag 117 (118): 142 Ind Cas 143.

Note 11.

(1) *Gopal Singh* v. *Khushal Khan*, 1892 Pun Re No 4 (Rev).

(2) *Gurdit Singh* v. *Sardar Jawala Singh*, 1892 Pun Re No 19 (Rev).

(3) *Sheollambh Singh* v. *Bodhai Singh*, (1911) 9 Ind Cas 857 (857, 858) All.

(4) *See* Note 5 to S 38, *ante*.

O.41, R.11, Notes 13—16.

13. **Review.**—The dismissal of an appeal under sub-R. 1 precludes the lower Court from entertaining an application for review of the decree because it cannot be said in such a case that no appeal was "preferred" within the meaning of S. 114 and O. 47, R. 1.[1]

But it is open to the appellate Court to review its order dismissing an appeal under sub-R. (1), and it is not necessary to send notice to the respondent before doing so.[2] An order granting a review of such an order of dismissal without notice to the respondent cannot be questioned by a different bench from that which granted the review.[3] When the dismissal of an appeal is set aside on review, the hearing of the appeal cannot be restricted to the grounds on which review was asked for.[4] Conversely the grounds urged in the application for review which were not raised in the original memorandum of appeal, cannot be argued at the hearing of the appeal after its restoration on review.[5] The summary rejection of an appeal as being time barred without fixing a date for hearing the appellant is in contravention of the law and forms a good ground for review.[6]

When a second appeal is dismissed under R. 11 (1) no application is maintainable for review of the Order on the ground of the discovery of *new and important matter* as the High Court in second appeal is bound by the findings of fact of the lower Court.[7]

14. **Reference.**—*See* the undermentioned case.[1]

15. **Revision.**—Where no decree is drawn up on the dismissal of an appeal under sub-R. (1) the so-called appeal from the order of dismissal may be treated as an application for revision.[1] In the undermentioned case[2] where the dismissal was due to a mistake of fact a revision was allowed.

16. **Second appeal.**—*Summary rejection.*—At the time of admitting a second appeal the admission Judge is entitled to consider whether any of the grounds mentioned in S. 100 and raised in the memorandum of appeal in fact exist and apply to the case before him and if they do not, to reject the appeal summarily[1] without fixing any date for hearing the appellant.

Note 13.

(1) *Ramappa* v. *Bharma,* (1906) 30 Bom 625 (630): 8 Bom L R 842; *Peary Mohan Mukherjee* v. *Mohendra Nath Manna,* (1906) 4 Cal L Jour 566 (567); *Shivappa Passa* v. *Ramachandra Narsingh,* 1922 Bom 130 (131): 46 Bom 1: 23 Bom L R 597: 63 Ind Cas 910; *Chandra Kanta Bhattacharjee* v. *Lakshman Chandra Chakravarthi,* (1916) 36 Ind Cas 460 (462, 463): 24 Cal L Jour 517: 21 Cal W N 430.

(2) *Janaki Nath* v. *Prabhasini,* (1915) 30 Ind Cas 898 (900): 22 Cal L Jour 99: 19 Cal W N 1077: 43 Cal 178; *Official Trustee of Bengal* v. *Benode Behari,* 1925 Cal 114 (115): 51 Cal 943: 84 Ind Cas 147.

(3) *Mohammad* v. *Abdul Hamid,* (1919) 50 Ind Cas 431 (433) Cal; *Jankinath* v. *Prabhasini,* (1915) 30 Ind Cas 898 (899, 900): 22 Cal L Jour 99: 19 Cal W N 1077: 43 Cal 178; *Haldhar Jha* v. *Sheik Mohammad Ashraf,* (1914) 25 Ind Cas 880 (881): 22 Cal L Jour 95. See also *Brij Lal* v. *Harji Mal,* 1903 Pun Re No 8 (Rev): 81 Pun L R 1903 [Application to set aside a decree passed under S 551 (now O 41, R 11) should be made to the Court which passed it].

(4) *Jankinath* v. *Prabhasini,* (1915) 30 Ind Cas 898 (900): 22 Cal L Jour 99: 19 Cal W N 1077: 43 Cal 178.

(5) *Sesadhar* v. *Arunkumar,* (1920) 54 Ind Cas 631 (631) Cal.

(6) *Sripat* v. *Hubdar,* 1925 Oudh 643 (643, 644): 2 Oudh W N 678: 90 Ind Cas 115.

(7) *Rajani Kanta Das* v. *Kali Prasanna Mukherjee,* (1915) 26 Ind Cas 281 (281): 41 Cal 809; *Sailabala* v. *Gadadhar,* 1922 Cal 165 (165): 36 Cal L Jour 76: 27 Cal W N 918: 70 Ind Cas 408.

Note 14.

[illegible] *Thakur of Masuda* v. *The Widows,* (1878) 2 [illegible] 819 (823) F B.

Note 15.

(1) *Bishen Singh* v. *Bishen Kuar,* (1914) 28 Ind Cas 902 (902, 903): 191 Pun L R 1914: 116 Pun W R 1914.

(2) *Bishen Singh* v. *Bishen Kuar,* (1914) 28 Ind Cas 902 (902, 903): 191 Pun L R 1914: 116 Pun W R 1914.

Note 16.

(1) *Rudr Prasad* v. *Baijnath,* (1893) 15 All 367 (369): 1893 All W N 115. Compare *Ganga*

O.41, R.11, Notes 17—18.

17. **Restriction of grounds of appeal on admission.**—A Court cannot, on admission of an appeal under R. 11, restrict the grounds on which the appeal is to be heard finally and any such restrictive order is *ultra vires.*[1] Where an appeal summarily dismissed under R. 11 is restored on review, the appellant is not confined at the hearing of the appeal, to the grounds taken by him in his application for review.[2]

18. **Insolvency appeals.**—The High Court has concurrent jurisdiction with the District Judge to grant leave to appeal under S. 46 of the Insolvent Debtor's Act (11 and 12 Vic., C. 21) and if the District Judge refuses leave to appeal, the High Court may grant the same in which the appeal may be taken as "admitted" and there is no necessity to make a further application under O. 41.[1] There is nothing in the Provincial Insolvency Act (III of 1907) to interfere with any right of appeal to the Privy Council that might otherwise exist.[2]

O.41, R.12.

Day for hearing appeal.

R. **12.** [S. 552.] (1) Unless the Appellate Court dismisses the appeal under *rule* 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

[1877—S. 552; 1859—S. 344.]

1. **Day for hearing appeal.**—Care should be taken not only in fixing the original date for the hearing of a case, but in altering the date of hearing so that none of the parties is taken by surprise. But there is nothing illegal in a Judge taking up an appeal on any day he chooses to fix so long as the parties or their pleaders have sufficient notice and no prejudice is caused.[1] When fixing a date for the hearing of the appeal under this rule, the appellate Court is not entitled to restrict the appeal to one or more of the grounds specified in the memorandum of appeal.[2]

Baksh v. *Har Prasad,* (1917) 40 Ind Cas 139: 4 Oudh L J 140 [This was a decision of the United Provinces Board of Revenue. It was held in it that an allegation that there is no evidence to support a specific finding of fact is a ground of law and where such a ground is taken in a memorandum of second appeal, the Court is not justified in summarily dismissing the appeal under R 19, Board's Circular 8—II, without giving notice to the parties].

Note 17.

(1) *Lakhi Narain* v. *Sri Ramchandra,* (1911) 11 Ind Cas 212 (213): 15 Cal W N 921: 14 Cal L Jour 146; *Jankinath Hore* v. *Prabhasini Dasi,* (1915) 30 Ind Cas 898 (899, 900): 22 Cal L Jour 99: 19 Cal W N 1077: 48 Cal 178.

(2) *Janki Nath Hore* v. *Prabasini Dasi,* (1915) 30 Ind Cas 898 (899, 900): 22 Cal L Jour 99: 19 Cal W N 1077: 43 Cal 178.

Note 18.

(1) *Madhusudhen* v. *Parabati,* (1915) 29 Ind Cas 406 (407): 19 Cal W N 760.

(2) *Chatrapat* v. *Kharaj,* (1913) 19 Ind Cas 485 (486): 17 Cal W N 752: 17 Cal L Jour 547: 40 Cal 685.

Order 41, Rule 12—Note 1.

(1) *Andha Kuar* v. *Dalip Lal,* (1889) 9 All W N 20 (21).

(2) *Lakhi Narain* v. *Sri Ram Chandra,* (1911) 11 Ind Cas 212 (213): 15 Cal W N 921: 14

Appellate Court to give notice to Court whose decree appealed *from*.

R. 13. [S. 550.] (1) *Where* the appeal is *not dismissed under rule* 11, the Appellate Court shall send notice of the appeal to the Court *from* whose decree the appeal is *preferred*.

Transmission of papers to Appellate Court.

(2) *Where* the appeal *is* from *the decree of* a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

Copies of exhibits in Court whose decree appealed *from*.

(3) Either party may apply in writing to the Court *from* whose decree the appeal is *preferred*, specifying any of *the* papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, *and given to*, the applicant.

[1877—S. 550; 1859—S. 343.]

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Form.

Records. See Note 2, Pts. (1) and (3).

1. Legislative changes:—

The words "where the appeal is not dismissed under R. 11" have been substituted for the words "when the memorandum of appeal is registered".

2. Scope of the rule.—If any part of the record has not been sent up by the lower Court and the appellant wishes to bring it before the appellate Court, he should ask the appellate Court to send for it before the day of trial.[1] When a notice of appeal is sent by the High Court to the Court below with instructions to make a return within a specified time, the appellant is entitled to the whole of the time allowed, and may deposit his *talabana* and cause service of the notices any time within the period limited. Where the appellant is denied this liberty by the lower Court, he ought to come before the High Court with a substantial application for orders.[2]

When the record has been lost at the time of the determination of an appeal, the appeal should be retried when the record is found again.[3]

Cal L Jour 146; *Jankinath v. Prabhasini Dasi*, (1915) 30 Ind Cas 898 (900): 22 Cal L Jour 99: 19 Cal W N 1077: 43 Cal 178 [Nor is appellant restricted to the ground on which the application for review of order summarily dismissing the appeal under O 41, R 11 was based].

Order 41, Rule 13—Note 2.

(1) *Buksh Ali Sowdagir v. Joyanut Khan*, (1869) 11 Suth W R 248 (249).

(2) *Rungo Debee Boistobee v. Huree Narain Oopadhya*, (1869) 11 Suth W R 138 (139).

(3) *Mongal Prasad v. Kalwanta*, (1881) 1 All W N 26 (27).

O.41, R.13, Note 3.

3. **Form.**—For form of notice to the lower Court of the admission of an appeal, *see* Appendix G, Form No. 5.

O.41, R.14.

Publication and service of notice of day for hearing appeal.

R. **14.** [S. 553.] (1) Notice of the day fixed *under rule* 12 shall be *affixed* in the Appellate Courthouse, and a like notice shall be sent by the Appellate Court to the Court *from* whose decree the appeal is *preferred*, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all *the provisions* applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

Appellate Court may itself cause notice to be served.

(2) Instead of sending the notice to the Court *from* whose decree the appeal is *preferred*, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the *provisions* above referred to.

[1877—S. 553; 1859—S. 345.]

Local Amendments.

ALLAHABAD.

Add the following sub-R. (3):—

"(3) Notwithstanding anything in sub-R. (1) it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent, other than a person impleaded for the first time in the appellate Court, unless he has appeared and filed an address for service either in the trial Court or in the case of a second appeal, in the lower appellate Court, or has appeared in the appeal."

BENGAL.

Insert the following as Cl. (3):—

"(3) It shall be in the discretion of the appellate Court to make an order, at any stage of the appeal whether on its own motion, or *ex parte*, dispensing with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of that Court or on the legal representatives of any such respondent:

Provided that—

(*a*) The Court may require notice of the appeal to be published in any newspaper or newspapers as it may direct.

(*b*) No such order shall preclude any such respondent or legal representative from appearing to contest the appeal."

MADRAS.

Insert the following as a proviso to sub-R. (1):—

O. 41, R. 14.

"Provided that the appellate Court may dispense with service of notice on respondents against whom the suit has proceeded *ex parte* in the Court from whose decree the appeal is preferred."

NAGPUR.

To R. 14, the following sub-rule shall be *added*:—

"(3) The appellate Court may in its discretion dispense with notice to any respondent against whom the suit was heard *ex parte*."

N.-W. F. P.

Add the folowing proviso to sub-R. (1):—

"Provided that with the permission of the Court no notice need be served upon a respondent who was a *pro forma* defendant in a suit which was decided *ex parte* against him."

OUDH.

To R. 14, *add* the following sub-R. (3):—

"(3) Provided that in a case where a respondent has not appeared either during the hearing of the case in the Court from whose decree or order the appeal is preferred or at any proceeding subsequent to that decree, it shall only be necessary for the Court to make one attempt to effect personal service on such respondent or, if such respondent is dead, on his legal representative; and, thereafter service may be effected by affixing a notice in some conspicuous place in the Court-house of the District Judge within whose jurisdiction the suit or proceeding was instituted along with one or other of the following methods, namely, publishing the notice in a newspaper or affixing it to the wall or door of the *chaupal* of the village where the respondent last resided or any other method as the Court may direct."

PATNA.

Add the following as R. 14-A:—

"14-A. The appellate Court may, in its discretion, dispense with the service of notice hereinbefore required on a respondent, or on the legal representative of a deceased respondent, in a case where such respondent did not appear, either at any stage of the proceedings in the Court whose decree is appealed from or in any proceedings subsequent to the decree of that Court and no relief is claimed against such opposite party or respondent or his legal representative either in the original case or appeal."

RANGOON.

Add the following as sub-R. (3) to R. 14:—

"(3) Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to an opposite party or respondent who did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court, or on or to the legal representative of any such opposite party or respondent if deceased."

SINDH.

Add the following as sub-R. (3) to R. 14 in O. 41:—

"(3) The appellate Court may, however, in its discretion, dispense with the service of notice of the appeal or interlocutory application therein, on a respondent or opponent who has made no appearance at the trial Court.

Add the following as R. 14-A in O. 41:—

"14-A. Subject to the leave of the appellate Court nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given

O.41, R.14, Notes 1—2.

to the legal representative of any deceased opposite party or deceased respondent, where such opposite party or respondent did not appear, either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court."

Synopsis.

1. Service of notice.
2. Dismissal of appeal after return of notices as not served.
3. Form.

1. **Service of notice.**—An appeal cannot be heard and decided without fixing a date for such hearing or without giving the respondent due notice of such date.[1] But failure to give notice to an unnecessary respondent does not vitiate the appeal.[2] It is the duty of the appellant to give the correct address of the respondent. The latter is not bound to communicate his address to the Court or to the appellant and his omission to do so is not an abuse of the provisions of the Code.[3]

The service of notice on the respondent should be in the manner provided for the service of summons on a defendant.[4]

Service of notice of appeal on the respondent's pleader is sufficient.[5] Where a guardian *ad litem* of a minor has been appointed by the Court, notice of the appeal may be served on the guardian.[6]

2. **Dismissal of appeal after return of notices as not served.**—Under O. 9, R. 5, if a summons is returned unserved and the plaintiff does not apply for fresh summons within three months thereafter, the suit must be dismissed unless within those three months, the plaintiff satisfies the Court that there

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Order 41, Rule 14—Note 1.

[1] *Baldeo Das* v. *Bishambar*, 1895 Pun Re No 10 (Rev) [This principle applies also to a Revenue Court]. See *Jamnadas* v. *Bishan Das*, (1917) 41 Ind Cas 889 (890): 63 Pun W R 1917: 136 Pun L R 1917 [Appellate Court should not presume that the respondent has knowledge of the date of hearing of the appeal, if notice has not been duly served upon him]; *Nauroz* v. *Farzaladad*, 1890 Pun Re No 9 (Rev); *Judu Kanta Sarma* v. *Hema Kanta Goswmi*, (1916) 36 Ind Cas 624 (624) Cal [A Judge cannot decide an appeal *ex parte* when notice of appeal does not specify the date on which the appeal will be heard]; *Rudra Pratap Narain* v. *Ratan Dei*, (1924) 11 Oudh L J 376 (376).

[2] *Dayal Singh* v. *Uttam Kuar*, (1909) 1 Ind Cas 604 (606): 21 Pun Re 1909: 27 Pun W R 1909: 82 Pun L R 1909; *Jadu Nath Sarkar* v. *Haran Chandra Sarkar*, 1923 Cal 221 (223): 49 Cal 1048: 36 Cal L Jour 217: 70 Ind Cas 687.

[3] *Jamnadas* v. *Bishen Das*, (1917) 41 Ind Cas 889 (890): 63 Pun W R 1917: 136 Pun L R 1917.

[4] See the following cases:—*Sonatin* v. *Gopal*, (1871) 15 Suth W R 31 (31) [Respondent residing outside British territory—Notice may be served by being sent by registered post]; *Satish Chandra Mukherjee* v. *Porter*, (1909) 1 Ind Cas 158 (161): 13 Cal W N 18; 9 Cal L Jour 244: 36 Cal 226 [Respondent living in England—Best way would be to make over notice to appellant's pleader for service on respondent through an agent in England to be appointed for the purpose]; *Doolechand* v. *Nibran Singh*, (1873) 20 Suth W R 62 (62) [Affixing on outer door of respondent's house when his address is known is illegal]; *Lootf Ali Meah* v. *Pearee Mohun Roy*, (1871) 16 Suth W R 223; *Jogender Chunder* v. *Dwarka Nath Karmokar*, (1888) 15 Cal 681 (683) [Person refusing registered letter is estopped from pleading ignorance of contents]; *Bedhoo Koolanee* v. *Bonomallee Gorain*, (1869) 11 Suth W R 496 (496) [When respondent is not found in the place where he resided at the commencement of the suit, the substituted service may be ordered]; *Mathura Prasad* v. *Bhup Narain*, 1921 All 52 (52, 53): 43 All 411: 19 All L J 145: 61 Ind Cas 135 [Service by affixing notice on outer door—Respondent not appearing at hearing—Under O 7, R 22 of the rules of the Allahabad High Court, it is the duty of the Court to fix a fresh date and direct additional service by registered post]; *Gopal* v. *Greedharee*, (1866) 6 Suth W R 13 (14) [Notice not served on respondent personally or on his recognised agent, must be served by being affixed on the outer door of his house—Substituted service should be applied for if respondent cannot be served personally]; *Bashiram* v. *Bishambhar Nath*, 1922 Oudh 268 (269): 9 Oudh L J 439: 69 Ind Cas 667; *Prosonna Kumar* v. *Bani Kanta Batta*, (1903) 30 Cal 758 (760) [Order in winding up of company under Companies Act—Appeal against order—Notice of appeal must be given within three weeks from the date of the order complained of]; *Lallah Baroomul* v. *The Official Liquidator of the Sarawak and Hindustan Banking and Trading Co, Ltd*, (1879) 4 Cal 704 (707): 3 Cal L Rep 581, (Do.); *Anand Sarup* v. *Sultan Singh*, (1905) 27 All 509 (510): 2 All L J 311: 1905 All W N 75, (Do.).

[5] *Ishur Dutt* v. *Shib Pershad*, (1912) 15 Suth W R 290 (290).

[6] *Rasik Moral* v. *Kumar Jyotish Kantha Roy*, 1926 Cal 1106 (1107): 30 Cal W N 949: 97 Ind Cas 614 [O 41, R 14 read with O 5, R 12 does not mean that the service must be on the minor himself and not on the guardian *ad litem*].

O.41, R.14, Notes 2—3.

is a sufficient cause for extending the period for applying for fresh summons. This rule does not apply to appeals. Hence, although the appellant has applied neither for fresh notices nor for extension of time within the time allowable under O. 9, R. 5, the appeal need not be dismissed and the Court can excuse the delay and order fresh notices to issue.[1] Conversely, the appellant cannot claim to be entitled, as of right, to apply for fresh notices within the period allowed under O. 9, R. 5. If the appellant fails to take out fresh notices within the time ordered by the Court, the appeal can be disposed of under O. 17, R. 3, notwithstanding that the period allowable under O. 9, R. 5 has not expired.[2] If after the return of a notice of appeal as not served, the appellant makes undue delay in applying for fresh notices the appellate Court may refuse to issue fresh notice.[3] Where an appeal against a decree for joint possession of land is dismissed as against some of the respondents for failure to serve notice of appeal on them, the appeal cannot proceed even as against the others.[4] *See* Note 5 to O. 9, R. 5.

3. **Form**.—For form of notice to respondent, *see* Appendix G, Form No. 6.

O.41, R.15, Note 1.

Contents of notice.

R. **15**. [S. 554.] The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex parte*.

[1877—S. 554; 1859—S. 345.]

1. **Contents of notice**.—An appeal cannot be decided *ex parte* if the notice served on the respondent did not specify the date of hearing.[1]

PROCEDURE ON HEARING.

O.41, R.16.

Right to begin.

R. **16**. [S. 555.] (1) On the day fixed,[5] or on any other day to which the hearing may be adjourned, the appellant shall be heard[3] in support of the appeal.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

[1877—S. 555.]

Note 2.

[1] *Babanna Sangappa* v. *Puvava Ninghasappa*, 1927 Bom 68 (69, 70): 50 Bom 815: 28 Bom L R 1446: 100 Ind Cas 147 [Single Judge of High Court can excuse delay].

[2] *Jaisary Singh* v. *Jaisary Singh*, (1912) 17 Ind Cas 294 (295) All. But compare *Gopisetti* v. *Namburi*, (1915) 21 Ind Cas 420 (420): 25 Mad L Jour 451 [In this case the Madras High Court held that O 9, R 5 applies to appeals and the appellant can apply for fresh summons at any time within the period specified in R 5].

[3] See *Doolchand* v. *Nirban Singh*, (1873) 20 Suth W R 62 (63).

[4] *Baser Shaik* v. *Fazale Karim*, (1915) 28 Ind Cas 703 (704): 19 Cal W N 290.

Order 41, Rule 15—Note 1.

[1] *Jadu Kanta* v. *Hem Kanta*, (1917) 36 Ind Cas 624 (624) Cal.

Synopsis.

1. **Right to begin.**
2. **Respondent's failure to appear on day specified in notice of appeal.**
3. **"Shall be heard."**
4. **Hearing counsel of one party in the absence of the other.**
5. **Hearing of appeal before day fixed.**
6. **Effect of non-compliance with the rules relating to appeals.**

Failure to make necessary deposit for printing. See Note 3, F.-N. (1).

1. **Right to begin.**—The mere fact that the respondent challenges the right of the appellant to appeal does not give the respondent the right to begin.[1] In the Calcutta High Court when the appellant's right to appeal is challenged, the practice is to require the respondent at the outset to indicate briefly the grounds upon which his objection is based.[2]

In every appeal the burden is on the appellant to show that the judgment of the lower Court is wrong[3] and this is so notwithstanding the fact that the records of the suit have been destroyed.[4]

Where there is a slip in the order in an appeal heard *ex parte*, the error will be attributed to the appellant.[5] Where an appeal is heard *ex parte*, it is the duty of the counsel for the appellant to bring to the notice of the Court all the authorities on the point, adverse as well as favourable.[6]

2. **Respondent's failure to appear on day specified in notice of appeal.**—A respondent who had not appeared on a date fixed for hearing but on which the appeal was not heard, is not precluded from appearing on any subsequent day to which the hearing may stand adjourned.[1]

3. **"Shall be heard".**—An appellant is not entitled to be heard on the merits, if the appeal is liable to be dismissed on a preliminary ground.[1] The Appellate Court is bound to hear the respondent before determining an appeal unless it dismisses the appeal at once.[2]

Order 41, Rule 16—Note 1.

(1) *Rustomji v. Kessowji*, (1884) 8 Bom 287 (289).

(2) *Srinivas v. Kesho*, (1911) 12 Ind Cas 745 (747): 14 Cal L Jour 489 [Appellant is then heard in support of his right to appeal—Respondent then answers the argument and appellant is finally heard in reply].

(3) *Fakir Muhammad Khan v. Shambhu Datt*, 1926 Jour 94 (1): 13 Oudh L J 167: 91 Ind Cas 1014; *Secretary of State v. Bejoy Kumar*, 1925 Cal 224 (225): 40 Cal L Jour 303: 84 Ind Cas 732; *Po Kin v. Po Shein*, 1926 P C 77 (79): 24 All L J 758: 96 Ind Cas 142: 4 Rang 518: 31 Cal W N 252: 3 Oudh W N 845 P C; *Mani Lal v. Moolchand*, 1925 Oudh 224 (224): 80 Ind Cas 688 [Equal possibility of judgment on either side being right, is not enough]; *Narain Das v. Debi Din Singh*, 1926 Oudh 38 (39): 90 Ind Cas 566 [Equal possibility of other view being right is not enough]; *Musst Fakrunissa v. Moulavi Lazarus*, 1921 P C 55 (56): 17 Nag L R 72: 25 Cal W N 866: 63 Ind Cas 898 P C [Some balance in appellant's favour must be established].

(4) *Hara Kumar v. Asiatulla*, (1898) 3 Cal W N 28 (Notes).

(5) *Champat Singh v. Jangu Singh*, (1912) 16 Ind Cas 830 (831): 16 Cal W N 793: 12 Mad L Tim 482: 10 All L J 379: 1912 Mad W N 115: 14 Bom L R 1223: 17 Cal L Jour 14 P C.

(6) *Deonandan Prasad v. Janki Singh*, 1916 P C 227 (229): 44 Cal 573: 44 Ind App 30: 15 All L J 154: 19 Bom L R 410: 25 Cal L Jour 259: 21 Cal W N 473: 32 Mad L Jour 206: 21 Mad L Tim 240: 5 Mad L W 526: 1917 Mad W N 254: 1 Pat L W 294: 39 Ind Cas 346 P C.

Note 2.

(1) *Hanmantbhat v. Basappa*, 1926 Bom 424 (424, 425): 28 Bom L R 788: 96 Ind Cas 326. See however *Arunachallam Chettiar v. Kasi Nevenda Pillai*, (1914) 24 Ind Cas 1007 (1008) Mad [Doubted].

Note 3.

(1) *Keepilacheri Parkum C. Ammad v. Vannathan Kandiyil Ambalathan Kandi*, (1915) 31 Ind Cas 74 (76): 2 Mad L W 999: 18 Mad L Tim 388: 29 Mad L Jour 784: 1915 Mad W N 617 [Rule 105 of Appellate Side Rules directing dismissal of appeal if appellant fails to deposit printing charges].

(2) *Anoopchand Hazarimal v. Hira Bapu Zamindar*, (1890) 3 C P L R 178 (179); In re *Anupram Kirparam*, (1911) 9 Ind Cas 850

O.41, R.16. Notes 3—6.

The rule does not compel the Court to permit written arguments to be filed.[3]

4. **Hearing counsel of one party in the absence of the other.**—The Court cannot, having regard to the provision contained in sub-R. (2), hear the arguments of the respondent's pleader alone in the absence of the appellant or his pleader and proceed to judgment without giving the latter an opportunity to reply. If the Court does so, it acts illegally and the judgment is not valid.[1]

5. **Hearing of appeal before day fixed.**—Where, subsequent to the adjournment of an appeal the hearing of the appeal is advanced without notice to the respondent, and the appeal is decided *ex parte* before the date to which it was adjourned, the respondent can have the *ex parte* decree set aside.[1] But the irregularity of deciding an appeal before the day fixed, will be condoned if the pleaders of both the parties were present and argued the case.[2]

If an appellate Court decides an appeal before the usual hour of commencing Court business and refuses to hear the appellant's counsel on his appearing in due time, it acts with grave irregularity.[3]

6. **Effect of non-compliance with the rules relating to appeals.**—If the rules of the Court relating to appeals have not been complied with and no adequate excuse is offered, the appeal should be dismissed.[1]

O.41, R.17.

Dismissal of appeal for appellant's default.

R. **17.** [S. 556.] (1) *Where* on the day fixed, or *on* any other day to which the hearing may be adjourned, the appellant does not *appear*[3] *when the appeal is called on for hearing, the Court may make an order that* the appeal be dismissed.[2]

Hearing appeal *ex parte*.

(2) *Where* the appellant *appears* and the respondent does not *appear*, the appeal shall be heard *ex parte*.[13]

[1877—S. 556; 1859—S. 346.]

Synopsis.

1. Legislative changes.
2. Dismissal for default of appearance.
3. "Appearance"—Meaning of. See Notes to O. 3, R. 1.
4. Dismissal on merits illegal.
5. Compromise after dismissal for default.
6. Dismissal for default of prosecution.
7. Dismissal for default if affects cross objections. See Notes under O. 41,

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(351): 13 Bom L R 27: 12 Cr L Jour 64 [Respondent's counsel stopped in the course of argument with the remark that he would be heard again if necessary—Appeal decided against respondent without giving time and opportunity to argue further—Order set aside].

(3) *Trimbak* v. *Krishna Rao*, 1929 Nag 89 (90): 11 Nag L J 288: 115 Ind Cas 178.

Note 4.

(1) *Kesho Das* v. *Ram Narain*, (1921) 63 Ind Cas 945 (946) Lah.

Note 5.

(1) *Hanumantbhat Shankarbhat* v. *Basappa Chanbsappa*, 1926 Bom 424 (425): 28 Bom L R 738: 96 Ind Cas 826.

(2) *Hakeemunissa* v. *Muckdoonum*, (1864) 1 Suth W R 246 (246).

(3) *Hukeemunissa* v. *Muckdoonum*, (1864) 1 Suth W R 246.

Note 6.

(1) *Bhimji Girdhar* v. *Morgan*, (1885) 3 Bom H C R 68.

R. 22.

8. Dismissal for default of appeal from ex parte decree—Application to set aside ex parte decree.
9. Effect of dismissal for default.
10. Notice of date for hearing appeal.
11. Restoration of appeal dismissed for default. See R. 19, post.
12. Re-hearing of appeal decided ex parte. See R. 21 below.
13. Hearing of appeal ex parte. Sub-R. (2).
14. Appeal.
15. Letters Patent Appeal.
16. Revision.

Amendment of decree after dismissal of appeal for default. See Note 9, Pts. (3) and (4).

Limitation for restoring appeal dismissed for default. See Note 9 to R. 19, post.

1. Legislative changes:—

The words "the Court may make an *order* that the appeal be dismissed" have been substituted for the words "the appeal shall be dismissed for default."

As to the effect of the change, *see* Notes 4 and 14, *infra*. Also Note 16 to S. 2, sub-S. (2).

2. Dismissal for default of appearance.—Under the old Code, where the appellant did not appear when the appeal was called on for hearing, the Court was bound to dismiss the appeal. Under the present rule the Court is not *bound* to dismiss an appeal for default but *may* do so.[1] The rule applies not only to the date originally fixed for hearing the appeal but also to any date to which the hearing may have been adjourned. But it does not apply when the hearing has been completed and the case is merely adjourned for pronouncing judgment.[1-a]

An appeal cannot be dismissed for default, if the appellant is dead at the time because, the orders and rules dealing with the case of the non-appearance of a suitor are not applicable to the situation which arises when the suitor is dead.[2]

Applicability of rule to remanded appeal.—The rule applies also to a remanded appeal, and if the appellant fails to appear on the day fixed for the hearing of the appeal after remand, the appeal may be dismissed for default.[3] But where the appellate Court remands a case for further enquiry and fixes a date for the return of the report, it cannot dismiss the appeal in default, before that date for non-appearance of the appellant in the *lower Court* on the date

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Order 41, Rule 17—Note 2.

[1] *Basudev* v. *Bideshi*, 1929 Rang 11 (12): 6 Rang 612: 114 Ind Cas 302; *Maung Po Thin* v. *Maung Than Ge*, 1925 Rang 96 (97): 4 U B R 164: 76 Ind Cas 166; *Musaliarakath Muhamas* v. *Manavikrama, the Zamorin Raja Avergal*, 1923 Mad 13 (14): 45 Mad 882: 16 Mad L W 434: 43 Mad L Jour 317: 1922 Mad W N 604: 69 Ind Cas 513; *Taher Sheikh Chowkidar* v. *Otaruddi Howladar*, 1929 Cal 475 (476): 56 Cal 412: 119 Ind Cas 129; *Muruga Chetty* v. *V Rajasami*, (1912) 14 Ind Cas 823 (828, 829): 1912 Mad W N 832: 11 Mad L Tim 280: 22 Mad L Jour 284. See *Ramdhan* v. *Bisnu Prasad*, (1920) 54 Ind Cas 715 (717, 718): 5 Pat L Jour 17: 1 Pat L Tim 156 [It is desirable to accommodate litigants to some extent if their pleaders happen to be absent in another Court and have a chance of attending within a short time so as not to disturb the business of the Court]. See also *Nasaruddin Khan* v. *Emperor*, 1927 Cal 98 (100): 53 Cal 827: 99 Ind Cas 124 [*Held*, that under the circumstances of the case, the appellate Court was fully justified in dismissing the appeal for default].

[1-a] *Gangadhar Kesheo* v. *Ramchandra*, (1894) 7 C P L R 1 (2); *Sheo Singh* v. *Subh Karan Singh*, (1905) 8 Oudh Cas 261 (263) [Rule does not apply when arguments have been heard].

[2] *Raja Debi Bahksh Singh* v. *Habib Shah*, (1913) 19 Ind Cas 526 (527): 17 Cal W N 829: 11 All L J 625: 18 Cal L Jour 9: 15 Bom L R 640: 14 Mad L Tim 88: 1913 Mad W N 566: 25 Mad L Jour 148: 35 All 331: 16 Oudh Cas 194: 40 Ind App 150 P C; *Daulat Rai* v. *Jagat Ram*, (1918) 47 Ind Cas 962 (963): 96 Pun Re 1918 [Order of dismissal for default should be set aside on application of legal representative].

[3] *Nga Chok* v. *Nga On Gaing*, (1909) 4 Ind Cas 816 (817): U B R 1907-09, Civ Pro C, p 27.

O. 41, R. 17, Notes 2—5.

fixed for the enquiry.[4] Where, however, a case is remanded to the lower appellate Court for *disposal* that Court is entitled to dismiss the appeal for default if the appellant does not appear before it on the date fixed for the hearing.[5]

3. **"Appearance"—Meaning of.**—*See* Notes to O. 3, R. 1.

4. **Dismissal on merits illegal.**—It was held under the former Code that the appellate Court had no power, in the absence of the appellant or his pleader, to dismiss the appeal on the merits, but could only dismiss it for default.[1] In the present rule, the words "the Court *may* make an order that the appeal be *dismissed*" have been substituted for the words "the appeal *shall* be *dismissed for default*" which occurred in the corresponding section, *viz.*, S. 556 of the former Code. This change in the language of the rule has given rise to a conflict of decisions as to the power of an appellate Court to dismiss an appeal on the *merits*, if the appellant does not appear at the time of hearing. On the one hand, it has been held by the High Courts of Allahabad,[2] Calcutta,[3] Madras[4] and Rangoon[5] that the fact that the Court is not *bound* to dismiss an appeal for default does not enable it to dismiss the appeal on the merits, but only to adjourn it to another date. The High Court of Patna has, on the other hand, held that the powers of an appellate Court under the present rule as altered in the new Code are wide enough to include the power to dismiss the appeal on the merits if the appellate Court should think fit to do so.[6]

5. **Compromise after dismissal for default.**—An appeal was dismissed for default of both the parties. Subsequently the appellant applied to the Court for restoring the appeal and, pending the disposal of the application both the parties filed a petition of compromise praying for a decree in terms of the compromise. The Court subsequently rejected the application for restoring the appeal. It was held that in the circumstances of the case, the Court ought to have restored the case and given effect to the petition of compromise filed.[1]

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(4) *Harnam Singh* v. *Abdullah*, 1926 Lah 574 (574): 96 Ind Cas 808; *Dhondya* v. *Mt Sita*, (1895) 8 C P L R 69 (70).

(5) *Triloke Chunder Sen* v. *Aukhil Chunder Sen*, (1874) 21 Suth W R 65 (65); *Anand Rao* v. *Balaram Bapu*, (1889) 2 C P L R 32 (33) [Parties to remanded appeal should apply to Court to which it has been remanded, to fix a date for further hearing of the case].

Note 4.

(1) *Kanahai Lal* v. *Naubat Rai*, (1881) 3 All 519 (520): 1881 All W N 17; *Zainab Begum* v. *Manawar Hussain Khan*, (1886) 8 All 277 (278, 279): 1886 All W N 95; *Mohesh Chunder* v. *Thakoor Das*, (1873) 20 Suth W R 425 (426) [Appeal though purporting to be dismissed on merits is to be considered as dismissed only for default]; *Murdari* v. *Mariam Bibi*, 1895 All W N 140 (140) [Decision of Court dismissing on merits in such circumstances, regarded as dismissal for default]; Compare *Brij Lal* v. *Khubi*, 1884 All W N 167 (167) [Order dismissing appeal on merits is not such an irregularity as would justify interference in revision].

(2) *Nisir Khan* v. *Itwari*, 1924 All 144 (144): 44 All 669: 21 All L J 667: 5 L R A (Civ) 26: 74 Ind Cas 905.

(3) *Taher Sheikh* v. *Otaruddi Howaladar*, 1929 Cal 475 (476): 56 Cal 412: 119 Ind Cas 129.

(4) *Musali Arakath Muhammad* v. *Manavikrama*, 1923 Mad 13 (14): 45 Mad 882: 16 Mad L W 434: 43 Mad L Jour 317: 1922 Mad W N 604: 69 Ind Cas 513.

(5) *Basudev* v. *Bedeshi*, 1929 Rang 11 (12): 6 Rang 612: 114 Ind Cas 802; *Maung Than Ge* v. *Maung Po Thin*, 1925 Rang 96 (97): 4 U B R 164: 76 Ind Cas 166 [Order treated as one for dismissal for default though purporting to be one of dismissal on merits].

(6) *Daulat Singh* v. *Maharaja Kesho Prasad Singh*, 1921 Pat 325 (325): 2 Pat L Tim 36: 57 Ind Cas 75 (76).

Note 5.

(1) *Aswini Kumar Dutt* v. *Sukhoda Sundari Debya*, 1923 Cal 319 (319): 66 Ind Cas 448.

6. **Dismissal for default of prosecution.**—Where the materials essential for the progress of an appeal such as supplying translations of vernacular documents, preparation of Bench copies, etc., are wanting owing to the appellant's default, the Court can dismiss the appeal for default of prosecution.[1]

In the undermentioned case[2] the High Court of Madras has held that under R. 105 of the Madras Appellate Side Rules, the High Court can dismiss a second appeal for failure to translate and print the necessary records. Such an order of dismissal is not *ultra vires* and does not contravene the provisions of this order.

7. **Dismissal for default if affects cross-objections.**—*See* Notes under O. 41, R. 22.

8. **Dismissal for default of appeal from ex parte decree—Application to set aside ex parte decree.**—The dismissal of an appeal for default is not a decree and, therefore, the decree of the Court of first instance is not superseded by or merged in the order of the appellate Court. Hence after an appeal from an *ex parte* decree has been dismissed for default the first Court can allow an application to set aside the *ex parte* decree.[1] *See* Note 11 to O. 9, R. 13, *ante*.

9. **Effect of dismissal for default.**—An order dismissing an appeal for default is not a decree and hence, the decree of the lower Court is not superseded by or merged in it.[1] *See Note* 16 to S. 2, [sub-S. (2)]. It will follow from this that the decree to be executed in such a case is the decree of the lower Court.[2] (*See* Note 5 to S. 38.) It will also follow that an application for amendment of the decree must be made to the lower Court and not to the appellate Court.[3] A contrary view has, however, been expressed by the High Court of Madras in the undermentioned case.[4] It is submitted that the view is not correct. On the dismissal of an appeal for default a fresh appeal from the same decree may be entertained, provided the period of limitation has not expired.[5]

The decision of the lower Court operates as *res judicata* although the appeal against it has been dismissed, not on the merits, but for default.[6]

Note 6.

(1) *Ma On Bwin* v. *Ma Shew Mi*, (1918) 47 Ind Cas 691 (692): 9 L B R 266; *Ram Hari* v. *Madan Mohun*, (1896) 23 Cal 339 (346) [Order dismissing appeal for failure to deposit cost of preparing paper book]; *Kabuli* v. *Bhuli*, (1890) 17 Cal 289 (289) [Failure to deliver copies to Registrar according to rules].

(2) *Keepilicheri Parkum C. Ammad* v. *Vannathan Kandiyil Ambalathan Kandi*, (1915) 31 Ind Cas 71 (75): 2 Mad L W 999: 18 Mad L Tim 383: 29 Mad L Jour 784: 1915 Mad W N 817.

Note 8.

(1) *Rafiquat Hussain* v. *Bibi Tawaef*, (1917) 39 Ind Cas 519 (520): 15 All L J 286: 39 All 393.

Note 9.

(1) *Rafiquat Hussain* v. *Bibi Tawaef*, (1917) 39 Ind Cas 519 (520): 15 All L J 286: 39 All 398; *Chandri Abdul Majid* v. *Jawahir Lal*, 1914 P C 66 (67): 36 All 350: 12 All L J 624: 16 Bom L R 395: 19 Cal L J 626: 18 Cal W N 963: 27 Mad L Jour 17: 16 Mad L Tim 44: 1 Mad L W 483: 1914 Mad W N 485: 23 Ind Cas 649 P C.

(2) *Shyam Mandal* v. *Satinath*, (1917) 38 Ind Cas 493 (496): 24 Cal L Jour 523: 21 Cal W N 776: 44 Cal 954.

(3) *Daulat* v. *Rajaram*, (1918) 43 Ind Cas 360 (361) Nag.

(4) *Pakaram Haji* v. *Koviliath Parkum*, (1911) 10 Ind Cas 96 (97) Mad.

(5) *Surajdeo Narayan Singh* v. *Pratab Rai*, 1923 Pat 514 (514): 4 Pat L Tim 405: 1923 Pat H C C 213: 2 Pat 739: 75 Ind Cas 284.

(6) *Mt Pura* v. *Behari Lal*, 1923 Nag 1 (2): 7 Nag L J 163: 68 Ind Cas 239.

O.41, R.17.
Notes
10—14.

10. **Notice of date for hearing appeal.**—The appellant must have due notice of the date of hearing.[1] Where no date has been fixed for the hearing of an appeal, the appellate Court has no power to dismiss the appeal for default. (*See* R. 12, *infra.*)[2] Where an appeal has been remanded for hearing, it is the duty of the parties to apply to the Court to fix a date for the hearing of the appeal or to ascertain from the Court what date has been fixed therefor.[3] An appeal may be taken up and disposed of before the appointed day if the pleaders of the parties are present and argue the case without objection.[4] Notice of the date of hearing must be given to the respondent before the appeal can be decided *ex parte.* (*See* R. 14, *ante.*)[5]

11. **Restoration of appeal dismissed for default.**—*See* R. 19, *post.*

12. **Re-hearing of appeal decided ex parte.**—*See* R. 21, below.

13. **Hearing of appeal ex parte—Sub-R. (2).**—The absence of the respondent on the date fixed for hearing is not by itself, a ground for deciding the appeal in appellant's favour. The Court must go into the merits of the case and record a judgment.[1]

14. **Appeal.**—Under the former Code there was a conflict of decisions as to whether an appeal lay against an order dismissing an appeal for default, some cases holding that such an order was a decree and as such appealable[1] while other cases holding a contrary view.[2] The definition of a decree in S. 2 (2) in the present Code expressly provides that an order of dismissal for default does not amount to a decree. Also, in the present rule the words "the Court may make an *order* that the appeal be dismissed" have been substituted for the words "the appeal shall be dismissed for default" which occurred in the

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Note 10.

(1) *Shib Chunder* v. *Allad Monee,* (1866) 5 Suth W R Mis 22 (22); *Isabli* v. *Bhagwan Chandra Shah,* (1918) 46 Ind Cas 881 (882) Cal [Appeal transferred to another Court without notice to any party—Appellants misled—Appeal dismissed for default—Appeal should be restored]; *Sukh Mangal Tewari* v. *Raunaq Bibi,* (1915) 30 Ind Cas 199 (200): 2 Oudh L J 198 [Appeal adjourned —Notice of date to which appeal was adjourned not properly served on appellant—Appellant not appearing—Appeal not to be dismissed for default]; *Baij Nath* v. *Wali Hussan,* (1916) 32 Ind Cas 936 (937) All [Date of hearing postponed—Date not communicated—Dismissal of appeal for default—*Held,* that there was "sufficient cause" for appellant's absence and that appeal should be retored]. See also *Jeebun Monee* v. *Tarini Charan,* (1865) 3 Suth W R Act X 164 (164) [Long holiday intervening—Case on list but not taken up before the holidays—New date to be fixed for hearing after the holidays].

(2) *Ata Mahomed* v. *Shankar Das,* 1924 Lah 279 (280): 69 Ind Cas 618; *Huro Chunder* v. *Ram Coomar,* (1865) 2 Suth W R 254 (254).

(3) *Anand Rao* v. *Balaram Bapu,* (1889) 2 C P L R 32 (33); *Atma Ram* v. *Krishna,* (1908) 4 Nag L R 166 (168).

(4) See *Hukumunnissa* v. *Bibee Muckdoomun,* (1864) 1 Suth W R 246 (246).

(5) *Jamna Das* v. *Bishan Das,* (1917) 41 Ind Cas 889 (889, 890): 63 Pun W R 1917: 136 Pun L R 1917 [Appellant must give correct address of respondent—Respondent not bound to communicate his address].

Note 13.

(1) *Mussamat Raj Rani* v. *Ram Kishore,* (1920) 56 Ind Cas 386 (386): 2 U P L R (B R) 26 [Failure to do so is an irregularity within S 219 of U P Land Revenue Act].

Note 14.

(1) *Radha Nath* v. *Chandi Charan,* (1903) 30 Cal 660 (665): 7 Cal W N 486 F B [Overruling 23 Cal 827 (829) and 23 Cal 115 (116, 117)]; *Lal Narain* v. *Muhammad Rafiuddin,* (1900) 28 Cal 81 (83); *Ram Chandar* v. *Madhav Purushotam,* (1892) 16 Bom 23 (25). See also *Soodhamonee Dossee* v. *Gooroo Pershad Dutt,* 1864 Suth W R 176 (177).

(2) *Mansab Ali* v. *Nihal Chand,* (1893) 15 All 359 (363): 1893 All W N 118; *Kanahallal* v. *Naubat Rai,* (1881) 3 All 519 (520): 1881 All W N 17; *Mukhi* v. *Fakir,* (1881) 3 All 382 (383); *Nand Ram* v. *Muhammad Bakhsh,* (1878-80) 2 All 616 (617); *Gopi Koeri* v. *Gajadhar,* 1892 All W N 2 (2); *Muhammad Ali* v. *Hyat,* 1879 Pun Re No 113; *Dhakishanamurthy* v. *The Municipal Council of Trichinopoly,* (1907) 31 Mad 157 (160): 3 Mad L Tim 336; *Mannoo Ravoot* v. *Govind Rao Ganpat Chitnavis,* (1897) 10 C P L R 32 (32); *Ma Tha Dun* v. *Maung Shwe Dok,* (1900-1902) 1 L B R 183 (183, 184); *Fateh Shah* v. *Akbar Shah,* 1897-1901 U B R Vol 2, 206. See also *Gilkinson* v. *Subramania,* (1898) 22 Mad 221 (223): 8 Mad L Jour 287 [Decision dismissing suit in default of appearance by plaintiff is an order and not a decree and there is no first or second appeal therefrom].

O.41, R.17, Notes 14—16.

old section. Reading, S. 2 (2) and O. 41, R. 17 together, it is clear that an order dismissing an appeal for default is not a decree. Nor is it one of the appealable orders referred to in S. 104. Hence, no appeal lies from such an order.[3] The proper procedure to set aside the order is to apply under R. 19, *infra*.

Where an appeal is dismissed on the merits, the order is a *decree* and is appealable as such, notwithstanding that the Court *ought to have* dismissed the appeal for default and not on the merits.[4] But in some old decisions it was held that in such cases, the order, though dismissing the appeal on the merits, must nevertheless be regarded as an order dismissing the appeal for default.[5]

An appeal was dismissed as against some of the respondents on the ground of want of proper service of notice on them. When the appeal came on for hearing against the other respondents, it was dismissed on the ground that it was not maintainable against them alone. *Held*, that in an appeal against the decree of dismissal, the previous order dismissing the appeal against some of the respondents could be attacked under S. 105.[6]

An order dismissing an appeal for failure to pay the deficiency in the stamp for the appeal is an order of rejection of the appeal and as such constitutes a decree.[7] [*See* S. 2 (2).] It has been held by the Oudh Judicial Commissioner's Court[8] that when an appeal is dismissed under an erroneous impression as to procedural law, an appeal lies from the order of dismissal, because the effect in such a case is that of dismissal on a preliminary point. (*See* Notes under R. 11, *supra*.)

See also Note 12 to S. 96, *ante*.

15. **Letters Patent Appeal.**—No appeal lies under the Letters Patent from an order dismissing an appeal for default.[1]

16. **Revision.**—An application for revision may lie against an order dismissing an appeal for default.[1]

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(3) *Baij Nath* v. *Syed Wali Hasan*, (1916) 32 Ind Cas 936 (937) All; *Rukminio Dasi* v. *Puran Chandra*, (1912) 14 Ind Cas 823 (823): 15 Cal L Jour 334; 39 Cal 841; *Ganesh Prashad* v. *Bhangilal*, 1925 Nag 236 (238): 63 Ind Cas 257; *Nga Chock* v. *Nga On Gaing*, (1909) 4 Ind Cas 816 (817) Rang: U B R 1907-09 Civ Pro C p 27; *Parbati* v. *Tulsi Kapri*, (1913) 20 Ind Cas 1 (1): 18 Cal L Jour 128: 18 Cal W N 604 [An order dismissing suit for default—No appeal lies from order—The fact that a decree was drawn up cannot alter the nature of the order].

(4) *Nasir Khan* v. *Itwari*, 1924 All 144 (144): 44 All 669: 21 All L J 667: 5 L R A (Civ) 26: 74 Ind Cas 905; Conversely see *Lalta Prasad* v. *Nand Kishore*, (1899) 22 All 66 (77): 1899 All W N 176 F B [Which held overruling on this point, 3 All 519 (520) that order for purporting to dismiss suit for default was one under S 102 (Now O 9, R 8) although it was erroneously passed as one of dismissal for default].

(5) *Mohesh Chunder* v. *Thakoor Dass*, (1873) 20 Suth W R 425 (426); *Baldeo Misser* v. *Ahmed Hossein*, (1871) 15 Suth W R 143 (143); *Murdari* v. *Mariam Bibi*, 1895 All W N 140 (140); *Brij Lal* v. *Khubi*, 1884 All W N 167 (167).

(6) *Ram Lal Gope* v. *Kali Prasad Sahu*, 1929 Pat 609 (610, 611): 10 Pat L Tim 589: 120 Ind Cas 304.

(7) *Surajpal Pandey* v. *Uttim Pandey*, 1922 Pat 281 (282): 3 Pat L Tim 117: 1921 Pat H C C 337: 6 Pat L Jour 625: 63 Ind Cas 99.

(8) *Subhadra Kuar* v. *Bireshwar Prasad*, (1914) 25 Ind Cas 916 (917): 1 Oudh L J 485.

Note 15.

(1) *Mansab Ali* v. *Nihal Chand*, (1893) 15 All 359 (363): 1893 All W N 113; *Pohkar Singh* v. *Gopal Singh*, (1892) 14 All 361 (361): 1892 All W N 80.

Note 16.

(1) *Ganesh Prasad* v. *Bhangilal*, 1925 Nag 236 (238): 63 Ind Cas 257; *Jawahir Singh* v. *Debi Singh*, (1896) 18 All 119 (120): 1896 All W N 9.

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

R. 18. [S. 557.] *Where* on the day fixed,[2] or *on* any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of *serving* the notice, the Court may *make an* order that the appeal be dismissed.

Provided that no such order shall be *made* although the notice has not been served upon the respondent, if on *any such* day the respondent appears *when the appeal is called on for hearing.*

[1877—S. 557; 1861—S. 5.]

Local Amendment.

MADRAS.

In R. 18, *after* the words "cost of serving the notice" *insert* the words "or if the notice is returned unserved, to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice."

Synopsis.

1. **Dismissal for default in depositing cost of notice.**
2. **Appeal cannot be dismissed before day fixed for hearing.**
3. **Effect of dismissal of appeal against one of several respondents.**
4. **Dismissal for failure to supply identifier.**
5. **Re-admission of appeal dismissed. See R. 19 below.**
6. **Appeal.**
7. **Revision.**

1. **Dismissal for default in depositing cost of notice.**—This rule enables the appellate Court to dismiss an appeal only when the process fees for service of notice on the respondent have not been deposited. But it does not warrant the dismissal of an appeal merely because the appellant has not filed the notice required to be filed by the circular orders in the Court for the purpose of issuing process.[1] An appeal is liable to be dismissed for default in depositing the cost of notice although the default was committed by an ignorant business agent of the appellant.[2]

An order of dismissal cannot be made under this rule unless the appellate Court has fixed a date by which the cost of notice is to be paid.[3]

2. **Appeal cannot be dismissed before day fixed for hearing.**—An order of dismissal cannot be made under the rule before the date fixed for

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Order 41, Rule 18—Note 1.

[1] *Gul Mahomed* v. *Abdul Jubbar*, (1912) 13 Ind Cas 694 (2) (694): 16 Cal W N 498: 15 Cal L Jour 683.

[2] *Pran Chunder* v. *Juggesur*, (1869) 11 Suth W R 417 (418): 3 Beng L R 68.

[3] *Attar Singh* v. *Karam Chand*, (1919) 52 Ind Cas 179 (180): 169 Pun Re 1919: 64 Pun W R 1919; *Pare Ram* v. *Kharati*, 1880 Pun Re No 13. See also *Purshadee Lall* v. *Umbika Pershad*, (1869) 11 Suth W R 290 (290): 8 Beng L R App 25.

hearing, merely because the appellant has failed to deposit the cost of notice within the time fixed by the Court.[1]

3. **Effect of dismissal of appeal against one of several respondents.**—Where a decree for joint possession is passed in favour of three respondents, and the appeal from the decree is dismissed as against one of them for failure to serve notice on him, the appeal cannot proceed against the other two respondents; the reason is that even if the decree is set aside in the appeal against them, the entire decree which is a joint one, can be executed by the other respondent so as to nullify the decree of the appellate Court.[1]

4. **Dismissal for failure to supply identifier.**—The default referred to in the rule is default in paying the cost of notice before the time fixed. Hence, an appeal cannot be dismissed under the rule on account of the appellant's failure to supply an identifier for identifying the respondent to the process server.[1]

5. **Re-admission of appeal dismissed.**—*See* R. 19, below.

6. **Appeal.**—No appeal lies against an order under this rule. The proper remedy is under R. 19.[1]

7. **Revision.**—Before an appellate Court can dismiss an appeal under this rule it must fix a date by which the process fees are to be paid. If it does not do so, its order of dismissal can be set aside in revision. Where, however, the appellant fails to pay the process fees even on the date of the hearing of the appeal and also omits to plead that the non-payment was due to the fact that he had not been directed to pay by any fixed date, the order of the appellate Court will not be interfered with in revision.[1]

O.41, R.19.

Re-admission of appeal dismissed for default.

R. **19.** [S. 558.] *Where* an appeal *is* dismissed under *rule* 11, sub-rule (2) or *rule* 17 *or rule* 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, *where* it is proved that he was prevented by any sufficient cause[3] from *appearing* when the appeal was called on for hearing or from depositing the sum so required, the Court *shall* re-admit[2] the appeal on such terms as to costs or otherwise as *it* thinks fit.

[1877—S. 558; 1859—S. 347.]

Note 2.

[1] *Chandra Nath* v. *Kali Prosanna*, (1908) 35 Cal 535 (537).

Note 3.

[1] *Baser* v. *Fazle*, (1914) 28 Ind Cas 703 (704): 19 Cal W N 290. See also *Afajaddin* v. *Jahed*, 1930 Cal 346 (347) [Suit for possession against five defendants—Suit dismissed—Appeal by plaintiff—Service on respondents 4 and 5 not proved and hence appeal dismissed as against them—Respondents 4 and 5 were necessary parties and hence whole appeal stood dismissed].

Note 4.

[1] *Nagendra Nath* v. *Sambu Nath*, 1928 Pat 114 (115): 3 Pat L Tim 498: 65 Ind Cas 49. See also *Ram Lal Gope* v. *Kali Prasad Sahu*, 1929 Pat 609 (610): 10 Pat L Tim 589: 120 Ind Cas 304 [Failure to file identifier's evidence—O 41, R 18 does not apply].

Note 6.

[1] *Attar Singh* v. *Karam Chand*, (1919) 52 Ind Cas 179 (179): 169 Pun Re 1919: 64 Pun W R 1919.

Note 7.

[1] *Attar Singh* v. *Karam Chand*, (1919) 52 Ind Cas 179 (180): 169 Pun Re 1919: 64 Pun W R 1919.

O. 41, R. 19, Notes 1—3.

Local Amendment.

MADRAS.

Re-number R. 19 as 19 (1) and *insert* the following as sub-R. (2):—

"(2) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-R. (1)."

Synopsis.

1. Scope and applicability of rule.
2. "Shall re-admit the appeal."
3. Sufficient cause.
4. Court to which application for restoration is to be made.
5. Notice.
6. Dismissal for failure to deposit cost of paper book or to pay Court-fees.
7. Inherent power to restore appeal dismissed for default. See S. 151, Note 2.
8. Other remedy.
9. Limitation.
10. Appeal.

Summary rejection of application to restore—If proper. See Note 3, Pt. (1).

1. **Scope and applicability of rule.**—This rule applies only where an appeal has been dismissed under any of the rules *specified* therein.[1] O. 41, R. 17 does not apply when the arguments have been heard. Hence the dismissal of an appeal in default when the arguments have been heard is not covered by R. 17 and this rule does not therefore apply to such a case.[2]

2. **"Shall re-admit the appeal".**—The expression used in the corresponding section of the former Code, *viz.*, S. 558, was "may re-admit the appeal." Nevertheless it was held by the Madras High Court under the old Code that the Court was *bound* to restore the appeal if "sufficient cause" was established.[1] In the present rule, legislative effect is given to this view.[2]

3. **Sufficient cause.**—*See* Note 8 to O. 9, R. 9, *ante.*

When an application is made to restore an appeal dismissed for default, the Court should not reject the application summarily, but should give the applicant an opportunity to substantiate his allegations, as to sufficient cause. A summary rejection without enquiry is improper.[1]

As to what amounts to "sufficient cause," *see* the undermentioned cases.[2]

Order 41, Rule 19—Note 1.

(1) See *Tara Chand* v. *Anand Chander,* (1868) 10 Suth W R 450 (451): 2 Beng L R A C 110. See also *Beary Choudhury* v. *Sonoory Dass,* (1915) 27 Ind Cas 628 (628, 629): 19 Cal W N 419 [Consent decree passed due to appellant's fraud —Re-hearing of appeal—R 19 does not apply]; In re *Bisharat Hussain,* 1898 All W N 155 (156) [Dismissal under R 43-A of the High Court Rules—Application under S 558 of the Code of 1882 held not maintainable].

(2) *Sheo Singh* v. *Subh Karan Singh,* (1905) 8 Oudh Cas 261 (262).

Note 2.

(1) *Somayya* v. *Subbamma,* (1903) 26 Mad 599 (601).

(2) See *Maung Po Tu* v. *Chaung Taik,* (1912) 15 Ind Cas 858 (858, 859): 5 Bur L Tim 72.

Note 3.

(1) *Govinda Chandra Mukherjee* v. *Banka Behari Das,* 1927 Cal 888 (889): 104 Ind Cas 347; *Jatindra Nath Mukerjee* v. *Suradhani Debi,* 1928 Cal 102 (102): 105 Ind Cas 851; *Jaha Baksh* v. *Abdul Latif,* 1925 Cal 500 (501): 79 Ind Cas 819; *Krishna Charan* v. *Chinibasi,* 1925 Cal 269 (269): 82 Ind Cas 880; *Hementa* v. *Punchanan,* (1920) 57 Ind Cas 762 (762) Cal; *Shomaed Ali* v. *Eusoof Khan,* (1871) 15 Suth W R 80 (80) [Judge refusing application because appellants had not conformed to a rule of Court that two pleaders should be engaged in every appeal—*Held,* that the Judge was bound to see if the reasons set forth in the application were reasonable or not]. See also *Shimbu Narain* v. *Mubarak Ali,* 1881 All W N 22 (22) [Before dismissing application for re-admission of appeal Court should enquire into the appellant's allegations]; *Gopal Singh* v. *Kanshi Ram Brij Lal,* (1930) 31 Pun L R 969: 132 Ind Cas 5: 1930 Notes 27 (a); *Ramsaran Das* v. *Nathwa,* (1919) 52 Ind Cas 926 (926): 88 Pun W R 1919: 68 Pun L R 1919; *Ramnath Mandal* v. *Atal Mandal,* 1933 Pat 126 (126).

(2) Absence of pleader in another Court—Miscalculation of time—May be sufficient cause:— *Lachhman* v. *Murari Lal,* 1932 Lah 65 (65): 134 Ind Cas 120: 33 Pun L R 85; *Mrigendra Nath Bir* v. *Dibakar Bir,* 1926 Cal 1231 (1231): 44 Cal L Jour 165: 97 Ind Cas 578; *Balmokand* v. *Wazir Chand,* 1921 Jur 21 (4): 5 Lah L Jour 89: 79 Ind Cas 504: 12 Pun L R 1928 [Counsel

O.41, R.19, **Notes 4—6.**

4. **Court to which application for restoration is to be made.**—The application must be made to the Court which dismissed the appeal for default.[1]

5. **Notice.**—O. 9, R. 9, lays down, that notice must be given to the defendant before a suit dismissed for default of plaintiff's appearance is restored. In the undermentioned case[1] it was held by the Allahabad High Court that even if O. 9, R. 9 be held to apply to appeals by force of S. 107, sub-S. (2), notice is not necessary for the restoration of an appeal dismissed for default owing to the absence of *both the parties*. But the propriety of an *ex parte* order setting aside an order of dismissal for default may be questioned at the hearing of the appeal.[2] The dismissal of an appeal for failure to pay the deficit Court-fee on the memorandum of appeal is not a dismissal for default. An application for restoration in such a case is not covered by this rule but is an application for review under O. 47 and notice to the opposite party is necessary.[3]

6. **Dismissal for failure to deposit cost of paper book or to pay Court-fees.**—This rule applies, as has been in Note 1 above only where the dismissal has been under any of the rules *specified* therein. Hence, the rule does not apply where an appeal has been dismissed under the High Court rules for failure to deposit the cost of preparing the paper book. The remedy in such a case is not by an application under this rule but by an application for

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turning up immediately and satisfying that his failure to appear was unintentional]. But see *Saif Ali v. Chiragh Ali*, 1923 Lah 97 (97): 68 Ind Cas 785; *Mojidunnessa Bibi v. Amnessa* (1914) 24 Ind Cas 826 (827) Cal; *Hari Das Faqir v. Praduman Nath*, 1925 Oudh 284 (234, 285): 79 Ind Cas 550.

Appeal unexpectedly called earlier than expected is sufficient cause; *Bhagwan Das v. Mt Dakhan*, 1932 Lah 387 (388): 33 Pun L R 420: 138 Ind Cas 702 [But see 1924 Lah 189]; *Nabi Bakshi v. Abu Somad Khan*, 1907 Pun W R 69; *Maung Saw v. Ma Bwin*, 1926 Rang 109 (110): 4 Rang 18: 5 Bur L Jour 8: 95 Ind Cas 521. But see *Dakshinamurthy v. Municipal Council of Trichinopoly*, (1908) 31 Mad 157 (159): 3 Mad L Tim 336 [Appeal taken up at an earlier date but ample notice given—Not a sufficient cause].

Appeal transferred to another Court without notice—It is sufficient cause.—*Isabali v. Bhagaban*, (1918) 46 Ind Cas 881 (882) Cal; *Ram Sukul Pathak v. Maharaj Kesho Prasad Singh*, (1918) 48 Ind Cas 925 (930, 931): 3 Pat L Jour 218: 1918 Pat H C C 17: 4 Pat L W 75; *Narain Singh v. Bheurab Churn Panda*, (1881) 8 Cal L Rep 350 (351) [Pleader failing to inform party of transfer of appeal to another Court.

Other cases in which it was held there was sufficient cause; *Sankar Das v. Narain Das*, (1910) 8 Ind Cas 226 (227): 195 Pun W R 1910: 34 Pun L R 1910 [The pleader's absence in a case need not be satisfactorily explained if the appellant can give a reasonable excuse for his own absence]; *Hare Krishna v. Bishnu Chandra*, (1908) 35 Cal 799 (802, 806): 7 Cal L Jour 426: 12 Cal W N 888 [Pleader being ill had transferred his brief to another pleader whom the Judge declined to hear as his name did not appear in the vakalatnama]; *Ajai Verma v. Baldeo Prosad*, 1930 All 217 (218): 1930 All L J 682: 52 All 536: 127 Ind Cas 523 [Appellant's agent looking after appeals going out to answer calls of nature when appeal called for hearing]; *Kikabhai v. Khandu*, 1896 Bom P J 22 [*Bona fide* mistake of the pleader as to date of hearing]; *Ram Chandar Rao v. Madho Rao*, 1889 All W N 125 (126) [Illness of pleader].

Illness of one of several appellants—Not a sufficient cause:—*Sharf-ud-din v. Haji Khan*, 1888 Pun Re No. 33.

Laches of advocate or carelessness of his clerk is not a sufficient cause; *Maung Than v. Zainat Bibi*, 1926 Rang 50 (51): 3 Rang 488: 92 Ind Cas 208; *P V Varivan Chetty v. Po Saing*, (1909) 2 Ind Cas 538 (539): 5 L B R 44; *Rang Behari Lal v. Racheya Lal*, (1916) 35 Ind Cas 429 (429): 1 Pat L Jour 65. See also *Shambu Nath v. Secretary of State*, (1910) 5 Ind Cas 120 (121) All; *Kumar Satya Ram v. Md Hamedulla*, 1926 Cal 1152 (1152): 96 Ind Cas 377 [Pleader arriving late owing to rain—Not a sufficient cause].

Note 4.

(1) *Kisto Pershad Dutt v. Cowie*, 1864 Suth W R 315 (316) [District Judge cannot restore appeal dismissed in default by Subordinate Judge]; *Sakharam Lakshman v. Govind Joti*, (1890) 15 Bom 107 (109) [Appeal transferred by District Judge to Assistant Judge under S 17 of Bombay Civil Courts Act for trial—Assistant Judge dismissing appeal for default—Application for re-admission of appeal to be made to him and not to District Judge].

Note 5.

(1) *Brij Lal v. Bua Ram*, (1912) 17 Ind Cas 292 (293): 10 All L J 399.

(2) *Musst Janat v. Kamilshah*, (1921) 60 Ind Cas 948 (949): 14 Sind L R 239.

(3) *Surajpal Pandey v. Utim Pandey*, 1922 Pat 281 (283): 3 Pat L Tim 117: 1921 Pat H C C 337: 6 Pat L Jour 625: 63 Ind Cas 99.

review.[1] Similarly, where an appeal is dismissed for failure to pay deficit Court-fees within the time allowed by the Court, the appeal cannot be restored under this rule.[2]

7. **Inherent power to restore appeal dismissed for default.**—*See* S. 151, Note 2.

8. **Other remedy.**—When an appeal is dismissed for default the applicant may present a fresh appeal provided the period of limitation for an appeal has not expired. He is not confined to his remedy under this rule.[1] An appellant whose appeal has been dismissed for default may also apply for review in a proper case. The Allahabad High Court has held that when the appellant has allowed his remedy under this rule to become time-barred he cannot come by way of an application for review.[2] But the Punjab Chief Court has held a contrary view.[3]

In an application for restoration under this rule the only thing that the Court can consider is whether there was "sufficient cause" for appellant's default. Questions as to the *legality* of the order of dismissal can only be raised in an application for review.[4]

9. **Limitation.**—An application for restoration of an appeal under this rule is governed by Art. 168 of the Limitation Act[1] and must be filed within 30 days from the date of the dismissal of the appeal.[2] The Court has no power to enlarge the said period.[3] Proceedings taken on an application filed after the period of limitation are invalid.[4] An application for re-admission made not under S. 558 (O. 41, R. 19) but under the rules of the Court, is not governed by Art. 168 and is not subject to any law of limitation.[5]

Note 6.

(1) *Fatimunnissa* v. *Deoki*, (1897) 24 Cal 850 (354): 1 Cal W N 21 F B [Overruling 28 Cal 339 (844)]; *Anant Potdar* v. *Mangal Potdar*, 1926 Pat 27 (28): 4 Pat 704: 91 Ind Cas 483: 7 Pat L Tim 291. See also *Keepilacheri* v. *Vennathan Kandiyal*, (1915) 31 Ind Cas 74 (75): 2 Mad L W 999: 18 Mad L Tim 883: 29 Mad L Jour 784: 1915 Mad W N 817 [Order of dismissal in such a case is covered by R 11 or R 18 of O 41].

(2) *Surajpal Pandey* v. *Utim Pandey*, 1922 Pat 281 (282): 3 Pat L Tim 117: 1921 Pat H C C 337: 6 Pat L Jour 625: 68 Ind Cas 99; *Sirdar Singh* v. *Christian*, (1920) 55 Ind Cas 502 (503) Pat.

Note 8.

(1) *Surajdeo Narain Singh* v. *Partap Rai*, 1923 Pat 514 (514, 515): 4 Pat L Tim 405: 1923 Pat H C C 218: 2 Pat 739: 75 Ind Cas 284.

(2) *Manphul Singh* v. *Hakim Hamid Ali Khan*, 1923 All 576 (577): 21 All L J 416: 4 L R A Civ 276: 74 Ind Cas 528.

(3) *Kashi Ram* v. *Gopi Mal*, (1910) 6 Ind Cas 482 (483): 7 Pun L R 1910: 24 Pun W R 1910.

(4) *Mussammat Janat* v. *Syed Kamil Shah*, (1921) 60 Ind Cas 948 (949): 14 S L R 239; *Srinivas* v. *Raja Kumara*, (1915) 28 Ind Cas 64 (65): 28 Mad L Jour 67: 1915 Mad W N 101 [Question of competency of Judge to pass order under R 18 not to be raised in application under R 19].

Note 9.

(1) *Sonubai Babu Rao* v. *Shivaji Rao Krishna Rao*, 1921 Bom 20 (20): 45 Bom 648: 28 Bom L R 110: 60 Ind Cas 919; *Shaikh Mitto* v. *Rahman Khan*, (1867) 8 Suth W R 361 (361); *Tarkalee Dabee* v. *Nitya Moyee Dabee*, (1868) 10 Suth W R 437 (437) [Under S 347 of Act VIII of 1859 also the period of limitation was 30 days]; *Buta* v. *Rattan Singh*, 1882 Pun Re No 76 F B [This case in which it was held that Art. 168 did not apply to cases of dismissal for default under R 11 was based on the language of S 558 of the Code of 1877 and is not good law under the present Code].

(2) *Hinga Bibee* v. *Munna Bibee*, (1903) 31 Cal 150 (154): 8 Cal W N 97 [Notice that application would be made on further date does not prevent limitation]; *Alikhan Umarkhan*, Ex parte, (1867) 4 Bom H CR A C 92 [Under S 347 of Act VIII of 1859, where appellant's pleader had died and appellant had not heard of this till his appeal was dismissed and he applied for restoration after 30 days from the dismissal, it was held that the 30 days time should not be counted till the appellant had an opportunity of coming in under provisions of Regulation II of 1827].

(3) *Manrakhan* v. *Sobha Singh*, 1890 All W N 196 (196).

(4) *Ram Lal* v. *Natha Singh*, 1882 Pun Re No 45.

(5) *Ramhari* v. *Madan Mohan*, (1896) 23 Cal 339 (347): *Duraiyya Solagan* v. *Venkatarama Naicker*, (1921) 60 Ind Cas 123 (124): 12 Mad L W 535 [Even Art 181 does not apply to such a case].

O.41, R.19, Notes 9—10.

Where the order of dismissal is *ultra vires* Art. 168 does not apply.[6] Thus, an appeal cannot be dismissed for default where the appellant is dead. Where an appeal is dismissed for default under such circumstances, the appellant's legal representatives need not apply for restoration within the period of 30 days allowed under Art. 168. The order of dismissal is no bar to the application of the legal representatives to be brought on the record and such an application is governed by Art. 176 of the Limitation Act.[7] The provisions of S. 5 of the Limitation Act[8] or of S. 6 of that Act[9] do not apply to an application under this rule.

See, however, the amendments of this rule by the High Court of Madras.

10. **Appeal.**—No appeal lies against an order granting an application for restoration of an appeal under this rule.[1] An order *refusing* such an application is appealable under O. 43, R. 1 (*t*).[2] But no appeal lies against an order refusing an application for restoration to which this rule does not apply.[3]

An appeal lies against an order refusing to restore an insolvency appeal dismissed for default, because by virtue of S. 5 of the Provincial Insolvency Act. 1920, the general procedure applicable to insolvency cases is that laid down

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(6) *Ata Muhammad* v. *Shankar Das,* 1924 Lah 279 (280): 69 Ind Cas 618 [Date of hearing not fixed—No notice of date of hearing—Order of dismissal for default—Appellants not informed of dismissal, order of dismissal is *ultra vires*]. But see *Abdul Ganny* v. *Russell*, 1930 Rang 228 (234): 8 Rang 380: 127 Ind Cas 161 F B [Appeal dismissed under R 18 before date of hearing contrary to that rule Art 168 applies].

(7) *Debi Baksh* v. *Habib Shah,* (1913) 19 Ind Cas 526 (527): 17 Cal W N 829: 11 All L J 625: 18 Cal L Jour 9: 15 Bom L R 640: 14 Mad L Tim 33: 1913 Mad W N 566: 25 Mad L Jour 148: 35 All 331: 16 Oudh Cas 194: 40 Ind App 151 P C; *Daulat Rai* v. *Jagat Ram,* (1918) 47 Ind Cas 962 (963): 96 Pun Re 1918. But see *Musammat Janat* v. *Syed Kamilshah,* (1921) 60 Ind Cas 948 (950): 14 Sind L R 239 [It is submitted that the view expressed in this case that an order of dismissal for default *can* be passed against an appellant's legal representatives before expiry of limitation for application to be brought on record, is wrong].

(8) *Mahi* v. *Jiwan*, 1879 Pun Re No 141.

(9) *Sonubai* v. *Sivajirao,* 1921 Bom 20 (20): 45 Bom 648: 23 Bom L R 110: 60 Ind Cas 919.

Note 10.

(1) *Gulab Kunwar* v. *Thakur Das,* (1902) 24 All 464 (465): 1902 All W N 136; *Hirdhamun* v. *Jinghoor,* (1880) 5 Cal 711 (712).

(2) A right of appeal was given in such a case by the Codes of 1882 and 1877 also. See for instance the following cases:—*Baxi Bahadur Singh* v. *Ganesh Pandit,* (1890) 3 C P L R 166 (167) [S 558 (1882 Code) (now O 41, R 19) applies to appeal from orders. S 588 gives a right of appeal against order refusing to restore appeal against an *order* of dismissal for default]; *Elahi Buksh* v. *Marachow,* (1879) 4 Cal 825 (828): 3 Cal L Rep 593: 4 Ind Jur 135: 2 Shome L R 175 [Case under Code of 1877]; *Mahi* v. *Jiwan,* 1879 Pun Re No 141 [Case under Code of 1877]. There was a conflict of decisions under the Code of 1859 regarding the appealability of an order refusing to restore an appeal dismissed for default. See for instance the following cases which held that no appeal lies:—*Kalee Kisto* v. *Hureehur,* (1868) 10 Suth W R 160 (162): 1 Beng L R A C 155; *Kashee Chunder Dutt* v. *Judoonath Chuckerburthy,* (1868) 10 Suth W R 29 (39): 8 Beng L R 512 (*n*); *Shaikh Mittoo* v. *Ruhman Khan,* (1867) 8 Suth W R 361 (361) [Previous rulings allowing special appeal from order under S 347, Act VIII of 1859 corresponding to O 41, R 19 followed but doubted]. Cases holding that an appeal lay:—*Huro Chunder Chowdhry* v. *Kishen Koomar Chowdhry,* (1866) 5 Suth W R 27 (27); *Watson* v. *Ambika Dasi.* (1865) 27 Cal 529; *Nil Kishen Thakoor* v. *Beer Chunder Thakoor Gossani,* (1865) 2 Suth W R Mis 23 (24).

(3) *Jawahir Singh* v. *Debi Singh,* (1886) 18 All 119 (120): 1896 All W N 9 [Order of dismissal not covered by R 17—R 19 does not apply—Order refusing to restore is not appealable]; *Watson & Co* v. *Ambika Dasi,* (1900) 27 Cal 529 (531): 4 Cal W N 237 [No default of appearance—Rr 17 and 19 do not apply—Order refusing to restore is not appealable]; *Srinivas* v. *Raja Kumar,* (1915) 28 Ind Cas 64 (65): 28 Mad L Jour 67: 1915 Mad W N 101 [Order of dismissal under R 18—Court not having jurisdiction to pass order—R 19 does not apply—Order refusing to restore is not appealable]; *Girdhari Lal* v. *Zorawar Singh,* 1925 All 57 (58): 5 L R A Civ 608: 80 Ind Cas 649: 47 All 1 [Application for review dismissed for default—Refusal to restore is not appealable]. See also *Kameshwar* v. *Misiri Lal,* (1917) 40 Ind Cas 336 (336) All [Application to set aside a decree—Dismissal of application—Application to restore it refused[Order of refusal is not appealable]. But see *Golmahomed* v. *Abdul Jabbar,* (1912) 13 Ind Cas 694 (695): 16 Cal W N 498: 15 Cal L Jour 683 [Order of dismissal under R 18—Order beyond the scope of the rule—Application to restore refused—Appeal lies against refusal].

O.41, R.19, Note 10.

in this Code.[4] Similarly, an order refusing to re-admit an appeal under S. 109-A of the Bengal Tenancy Act which was dismissed for default is appealable.[5]

An order rejecting an application under this rule is a "Judgment" within Cl. 10 of the Letters Patent (Lahore) and is appealable as such.[6]

O.41, R.20, Notes 1—2.

Power to adjourn hearing and direct persons appearing interested to be made respondents.

R. 20. [S. 559.] *Where* it appears to the Court at the hearing[2] that any person who was a party to the suit[3] in the Court *from* whose decree the appeal is *preferred*, but who has not been made a party to the appeal, is interested in the result of the appeal,[4] the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.[5]

[1877—S. 559; 1859—S. 73.]

Synopsis.

1. Scope and applicability of the rule.
1a. "At the hearing."
2. "Any person who was a party to the suit."
3. "Interested in the result of the appeal."
4. "The Court may . . . . direct that such person be made a respondent."
5. Adding appellant.
6. Adding respondent.
7. Adding party for the purpose of cross-objections—See Note 21 to O. 41, R. 22.
8. "Inherent power to add parties."
9. Power to pass decree against party—See R. 4, ante, and R. 33, post.
10. Effect of non-joinder.
11. Limitation.
12. Addition of parties in second appeal.

1. **Scope and applicability of the rule.**—This rule does not apply to the addition of fresh parties by the Court of first instance after the case is remanded to it by the appellate Court for re-trial.[1] (*See also* Note 4, *infra.*)

1-a. **"At the hearing".**—The power to add parties under this rule is to be exercised *at the hearing*, for, it is necessary that before acting under this rule the Court should have before it all the circumstances of the case.[1] The rule does not contemplate the addition of a party after the judgment has been pronounced.[2]

2. **"Any person who was a party to the suit".**—The rule applies only when the proposed party respondent was a *party to the suit* in the Court from whose decree the appeal is preferred.[1] On the question whether apart

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[4] *Bir Singh* v. *Humphrey*, 1930 Lah 112 (112): 120 Ind Cas 791: 31 Pun L R 906.

[5] *Manmatha* v. *Gadadhar*, (1917) 41 Ind Cas 751 (752): 28 Cal L Jour 155: 45 Cal 638. But see *Mathur Nath Roy Chowdhry* v. *Basantha Kumar Chowdhry*, (1909) 2 Ind Cas 572 (572): 36 Cal 510 [This decision is not referred to in the latter decision above cited].

[6] *Mohar Chand* v. *Habib*, 1925 Lah 617 (617): 89 Ind Cas 795.

Order 41, Rule 20—Note 1.

[1] *Apparao Baburao Shinde* v. *Vithal Govind Padhye*, 1931 Bom 408 (409): 33 Bom L R 608: 134 Ind Cas 365.

Note 1-a.

[1] *Umed Singh* v. *Dalip*, 1898 All W N 35 (36); *Rajendra Nath Chatterjee* v. *Moheshata Debi*, 1926 Cal 533 (535): 91 Ind Cas 649: 53 Cal 270; *Romesh Chandra Das* v. *Anthony Penherio*, (1915) 29 Ind Cas 470 (470) Cal [Application to add parties made before that date is incompetent]; *Bheema Raut* v. *Durga Prosad Singh*, (1912) 16 Ind Cas 908 (909): 17 Cal L Jour 183: 40 Cal 323.

[2] *Burendra* v. *Aghore*, 1921 Cal 534 (535): 25 Cal W N 525: 62 Ind Cas 464.

Note 2.

[1] *Bheema Raut* v. *Durga Prosad Singh*, (1912) 16 Ind Cas 908 (909): 17 Cal L Jour 183: 40

from R. 20, the appellate Court has power to add as respondent to the appeal persons who were not parties to the suit in the Court below, there is a conflict of decisions. According to the High Courts of Calcutta[2] and Patna[3] the appellate Court has such power independently of this rule to add as respondents to the appeal persons who were not parties to the suit in the Court of first instance. The High Courts of Allahabad,[4] Bombay[5] and Lahore[6] have, on the other hand, held that the appellate Court has no such power. The High Court of Rangoon also seems to be of the same view.[7] It is submitted that the Calcutta and Patna view is correct. However, there is nothing to prevent the appellate Court, in a proper case, to remand the case to the lower Court with a direction to add the omitted parties.[8] Further in a case where a person can be added as a respondent to an appeal by virtue of the Provisions of O. 22, R. 10, there is no objection to his being so added though he was not a party to the suit in the lower Court.[9] Persons who were parties to the suit in the lower Court originally but whose names were struck off before the passing of the decree are nevertheless parties to the suit within the meaning of R. 20.[10]

The words "any person who was a party to the suit" include the representative of such a party.[11] (*See also* Note 12, *below.*)

3. **"Interested in the result of the appeal"**.—Before the Privy Council decision in *Chokalingam* v. *Scethai*[1] there was a conflict of decisions as to the meaning of these words. One set of decisions

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Cal 823; *Maung Po Mya* v. *Ma Gyan Bon*, 1923 Rang 114 (115): 1 Bur L Jour 272: 4 U B R 150: 72 Ind Cas 205.

(2) *Pulin Bihari Roy* v. *Mahendra Chandra Ghosal*, 1921 Cal 722 (724): 34 Cal L Jour 405: 67 Ind Cas 10 [Has inherent power]; *Sarada Kanta Das* v. *Golunda Mohan Das*, (1910) 6 Ind Cas 912 (918): 12 Cal L Jour 91, (Do.); *Jafar Ali* v. *Hargobinda*, (1917) 41 Ind Cas 65 (67) Cal [Has power under O 1, R 10]; *Gyanananda Asram* v. *Kisto Chandra*, (1903-04) 8 Cal W N 404 (404, 406), (Do.); *Banbihari Mukerji* v. *Bhejnath Singh*, 1932 Cal 448 (449, 450): 59 Cal 829: 138 Ind Cas 104, (Do.); *Bheema Raut* v. *Durga Prasad Singh*, (1912) 16 Ind Cas 908 (909): 17 Cal L Jour 183: 40 Cal 823, (Do.). But see *R Watson & Co* v. *Ranee Surno Moyee*, (1868) 9 Suth W R 259 (267).

(3) *Hemangini Debi* v. *Haridas Banerjee*, (1918) 46 Ind Cas 398 (399): 3 Pat L Jour 409: 1918 Pat H C C 276: 5 Pat L W 216.

(4) *Mohin* v. *Imtiaz*, (1896) 18 All 332 (333): 1896 All W N 91; *Shiam Lal Joti Prasad* v. *Danpat Rai*, 1925 All 768 (768): 23 All L J 757: 6 L R All (Civ) 386: 88 Ind Cas 493: 47 All 853. Compare *Ranjit Singh* v. *Sheo Prasad Ram*, (1878-80) 2 All 487 (489, 492): 4 Ind Jur 641 [Party respondent can be added under O 1, R 10 read with S 107].

(5) *Monjiram* v. *Maneklal*, 1929 Bom 353 (354): 31 Bom L R 672: 53 Bom 598: 119 Ind Cas 654.

(6) *Haliman* v. *Nur Muhammad Khan*, 1923 Lah 490 (491): 73 Ind Cas 136; *Sundar Singh* v. *Mt Gurdevi*, (1915) 31 Ind Cas 27 (28): 163 Pun W R 1915.

(7) *Maung Po Mya* v. *Ma Gyan Bon*, 1923 Rang 114 (115): 1 Bur L Jour 272: 4 U B R 150: 72 Ind Cas 205.

(8) *Jadab* v. *Anath*, (1910) 5 Ind Cas 998 (999): 37 Cal 171; *Mihin Lal* v. *Imtiaz Ali*, (1896) 18 All 332 (333): 1896 All W N 91; *Firm, Shiam Lal Joti* v. *Dhanpat Rai*, 1925 All 768 (768): 23 All L J 757: 6 L R All (Civ) 386: 88 Ind Cas 493: 47 All 853. See also *Juan Man* v. *Ohe Som*, 1932 P C 146 (151): 136 Ind Cas 632: 36 Mad L W 135: 63 Mad L Jour 369 P C [Appellate Court should not indicate the order which the trial Judge should make when he tries the case in the presence of proper parties].

(9) *Chunnilal* v. *Abdul Ali*, (1901) 23 All 331 (335): 1901 All W N 91. See also *Chail Behari Lal* v. *Rahmat Das*, (1898) 20 All 38 (39): 1897 All W N 194 [In this case it was held that O 22, R 10 does not apply to an attaching creditor. But this case must be regarded as superseded by sub-R (2) of R 10 now].

(10) *Issakkan Akath Malayakkal Mahomed Haji* v. *Pourakurikkalakath Kunhi Mahommod*, (1915) 27 Ind Cas 423 (423) Mad. Compare *H H Maharaja Sahib* v. *Kanshi Ram*, 1926 Lah 499 (500): 8 Lah L Jour 338; 97 Ind Cas 388: 27 Pun L R 576: 8 Lah 161 [Person party to suit but not party to decree and not interested in result of appeal—He cannot be added under R 20].

(11) *Romesh Chandra Das* v. *Anthony Penheiro*, (1915) 29 Ind Cas 470 (470) Cal [Contra 1923 Rang 114 (115)].

Note 3.

(1) (1928) 107 Ind Cas 237: 55 Ind App 7: 6 Rang 29: 27 Mad L W 1: 1928 Mad W N 20: 4 Oudh W N 1231: 32 Cal W N 281: 47 Cal L Jour 136: 30 Bom L R 220: 26 All L J 371: 54 Mad L Jour 88: 1927 P C 252 P C.

O.41, R.20, Note 3.

proceeded upon the view that the fact that the presence of the proposed party respondent before the Court was *necessary for the adequate disposal of the appeal or cross-objections on the merits* was enough for making him a respondent under this rule. Thus, it was held that where the constitution of an appeal was impeached on the ground that the necessary parties had not been impleaded, the defect could be cured by their being added under this rule.[1-a] Similarly, where in a suit filed by *A* against *B* and *C*, a decree was passed against *B* but was dismissed against *C*, and *B* appealed from the decree making *A* alone, a respondent, and the appellate Court finds that *C*, and not *B*, is liable to *A*, it was held that the appellate Court could make *C* a respondent to the appeal under this rule and that, in allowing *B's* appeal, it can pass a decree against *C*.[2] On the other hand, it was held in another set of cases that the rule was intended to protect parties to the suit who had not been made respondents in the appeal, from being prejudiced by modifications made behind their backs in the decree under appeal, and that the party whom it was sought to bring on record must be shown to be interested in the result of the appeal before he is brought on the record. Hence, where a defendant had been exonerated in the lower Court and no appeal was filed against him, it was held that he was not interested in the result of the appeal filed against other parties and could not be added as a respondent to such an appeal under this rule unless it could be shown that the decree that might be passed in the appeal as framed might prejudice his interests in some way or other.[3] According to this group of cases, the mere fact that the presence of a party before the Court is necessary for the disposal of the appeal or cross-objections on the merits was not sufficient justification for making him a party respondent under this rule.

[1-a] *Manindra Chandra Nandi* v. *Bhagabathi Devi Chaudurani*, 1926 Cal 385 (386): 30 Cal W N 45: 90 Ind Cas 986 [Rule is ordinarily intended to apply to cases where the Court finds that it cannot proceed with the suit without the presence of a party who was not made a party to the appeal]; *Jangli Sahu* v. *Gopinath Sahu*, (1912) 15 Ind Cas 295 (295) All [Defect due to want of parties can be cured under R 20]; *Lallu Mal* v. *Firm of Nanke Mal Kallan*, 1927 Lah 788 (739): 104 Ind Cas 400, (Do.); *Chirag Din* v. *Samanda*, 1926 Lah 689 (690): 8 Lah L Jour 473: 97 Ind Cas 223: 27 Pun L R 731, (Do.); *Ali Mir* v. *Gulab Din*, 1892 Pun Re No 5 (Do.); *Deokaran* v. *Nathu*, 1921 Nag 12 (13): 4 Nag L J 138: 63 Ind Cas 352, (Do).

[2] *Karviraya* v. *Laxmibai*, (1901) 3 Bom L R 172 (177, 178); *Rup Jan* v. *Abdul Kadir*, (1904) 31 Cal 643 (646): 8 Cal W N 496 F B; *Bishun Churn* v. *Jagendra Nath*, (1899) 26 Cal 114 (121); *Hudson* v. *Basdeo Bajpye*, (1899) 26 Cal 109 (113): 3 Cal W N 76; *Upendra Lal* v. *Girindra Nath*, (1898) 25 Cal 565 (568): 2 Cal W N 425; *Padarath Mahton* v. *Hitan Singh*, 1924 Pat 773 (774): 5 Pat L Tim 509: 1924 Pat H C C 249: 82 Ind Cas 600; *Yoosuf Oosman Bros & Co* v. *Winneya*, (1921) 59 Ind Cas 798 (799): 10 L B R 191; *Ponnusamy Asari* v. *Palaniandi Mudali*, (1920) 56 Ind Cas 612 (613): 11 Mad L W 602: 27 Mad L Tim 266.

[3] *Subramaniyam Chetty* v. *Veerabhadram Chetty*, (1908) 31 Mad 442 (444, 445): 18 Mad L Jour 452: 4 Mad L Tim 104; *Bhoneswar Ram* v. *Ram Khelawan Sahoo*, (1910) 5 Ind Cas 654 (658): 12 Cal L Jour 137; *Atma Ram* v. *Bal Kishen*, (1883) 5 All 266 (267): 1883 All W N 24; *Rajendra* v. *Moheshata*, 1926 Cal 583 (585): 91 Ind Cas 649: 53 Cal 270; *Maharajah Sahib Faridkote* v. *Kanshi Ram*, 1926 Lah 499 (500): 8 Lah L Jour 333: 97 Ind Cas 338: 27 Pun L R 576: 8 Lah 161; *Chokalingam Chetty* v. *Singaram Chetty*, 1925 Rang 108 (109, 110): 2 Rang 541: 3 Bur L Jour 259: 84 Ind Cas 522 [This is especially so where the period of limitation for filing an appeal against the exonerated defendant has expired]. See also *Rai Bhola Ram* v. *Rai Seth Chand Mal*, 1901 Pun Re No 23: 17 Pun L R 1901. See also *India General Navigation and Railway Co, Ltd* v. *Giridharilal Gobardhone Das*, 1927 Cal 394 (395): 31 Cal W N 858: 100 Ind Cas 903: 54 Cal 480. *For instances of "Interest" in this sense, see the following cases:*—*Saru Khan* v. *Jan Muhammad*, 1928 Lah 43 (44): 106 Ind Cas 318 [Co-plaintiffs—Suit dismissed—One co-plaintiff appealing on behalf of all under O 41, R 4—The others are "interested in the result of the appeal"]; *Kanagappa* v. *Sokkalinga*, (1892) 15 Mad 362 (365): 2 Mad L Jour 175 [Decree against defendants 1 to 4—Defendant 1 appealing—Defendants 2 to 4 trying to come in subsequently—The decision of the appeal as filed by defendant No 1 would affect the interests of defendants 2 to 4—Latter are "interested"]; *Bishun Churn Roy Chowdhry* v. *Jogendra Nath Roy*, (1899) 26 Cal 114 (121) [Suit decreed in part against several defendants—Appeal by some alone—Cross-objections by plaintiff—Result likely to affect interests of other defendants—They are "interested"].

O.41, R.20, Note 3.

In this state of the authorities, it was held by the Privy Council in *Chokalingam* v. *Seethai*[4] that where a defendant had been exonerated in the lower Court and no appeal had been filed against him within the period of limitation, he was not interested in the result of the appeal filed by the plaintiff against other defendants, and that, in any event, it was for the plaintiff appellant who sought to make him a respondent to show what was the nature of the interest he had in the appeal. Their Lordships reached this view in spite of the fact that the presence of the proposed party respondent was necessary to enable the Court to decide on their merits certain questions that arose in the appeal. This shows that in their Lordships' view the test for the addition of a party respondent under this rule was not, whether his presence before the Court was necessary for the adequate disposal of the appeal on its merits, but whether the proposed party is one whose interests are likely to be prejudiced by the determination of the appeal as framed. So interpreted, their Lordships' judgment accords with the latter of the two views set forth above. Hence, the other view, *viz.*, that it is enough for the application of this rule that the addition of the proposed party is necessary for the adequate disposal of the appeal on the merits should be regarded as no longer good law. It may be noted in this connection that their Lordships' judgment confirmed the judgment of the Rangoon High Court in the undermentioned case[5] and that, in this judgment, the Rangoon High Court followed the Madras decision in *Subramaniya* v. *Veerabadra*[6] which contains the clearest exposition of the second view referred to above, so that the Privy Council may be taken to have adopted this view in preference to the other view.[7] Some decisions of the High Courts[8] though pronounced subsequent to the above Privy Council case have adopted the view overruled by the Privy Council and hence must be regarded as not correct. The decisions in the undermentioned cases[9] accord with the view approved by the Privy Council and may be taken as correctly representing the law on the subject now.

But where a person can be added as a respondent under any other provision of law, his not being interested in the result of the appeal within the meaning of this rule is no objection to his being so added.[10] (*See* Note 8, *infra.*)

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(4) 1927 P C 252 (255, 256): 27 Mad L W 1: 1928 Mad W N 20: 4 Oudh W N 1231: 54 Mad L Jour 88: 47 Cal L Jour 136: 32 Cal W N 281: 30 Bom L R 220: 107 Ind Cas 237: 6 Rang 29: 26 All L J 371 P C.

(5) *Chokkalingam Chetty* v. *M R S P Singaram Chetty*, 1925 Rang 108 (109, 110): 2 Rang 541: 3 Bur L Jour 259: 84 Ind Cas 522.

(6) (1908) 31 Mad 442 (444, 445): 18 Mad L Jour 229: 4 Mad L Tim 271.

(7) See Notes of Indian Cases in 54 Mad L Jour (N I C) 50.

(8) *Bejoy Kumar Sen* v. *Kusum Kumar Debi*, 1929 Cal 315 (317): 33 Cal W N 221; *Jalal Din* v. *Karim Baksh*, 1930 Lah 295 (296): 11 Lah L Jour 523: 124 Ind Cas 682; *Firm of Moti Ram-Prem Chand* v. *Kewal Ram Dharam Chand*, 1928 Lah 202 (206): 9 Lah L Jour 550: 28 Pun L R 468: 105 Ind Cas 569; *Mst Sawani* v. *Jiwan*, 1928 Lah 120 (120): 103 Ind Cas 223.

(9) *Dipan Ray* v. *Kapel Deo Singh*, 1932 All 120 (121): 1931 All L J 1004: 15 R D 810: 135 Ind Cas 553; *Saktiprasanna Bhattacharaya* v. *Naliniranjan Bhattacharya*, 1931 Cal 738 (740): 58 Cal 923: 133 Ind Cas 177; *Nandigiri Venkata Narasimharao* v. *Nandagiri Krishnabayamma*, 1929 Mad 479 (480): 120 Ind Cas 369: 1929 Mad W N 381; *Ma Than May* v. *Mahomed Eusoof*, 1932 Rang 16 (17): 9 Rang 624: 135 Ind Cas 645; *Muniruddin Kedwai* v. *Mt Raisulnisa*, 1932 Oudh 288 (289): 9 Oudh W N 687: 140 Ind Cas 483; *Ganpat Rao* v. *Gangadhar Rao*, 1933 Nag 66 (67). See also *Nandu Sa* v. *Nana*, (1932) 15 Nag L J 173 (175, 176).

(10) *Baluswami Iyer* v. *Lakshmana Iyer*, 1921 Mad 172 (174): 44 Mad 605: 41 Mad L Jour 129: 13 Mad L W 562: 1921 Mad W N 316: 63 Ind Cas 374 F B [Party may be added under O 1, R 10 read with S 107]; *Ponnusamy Asari* v. *A M Palaniandi Mudali*, (1920) 56 Ind Cas

O.41, R.20, Notes 3—4.

"Appeal" in this rule includes also cross-objections.[11]

4. **"The Court may . . . direct that such person be made a respondent."**—The power given to the Court under this rule is a discretionary one to be exercised in view of all the circumstances of a case.[1] Strong grounds are necessary to induce the Court to exercise its discretion in favour of an appellant who has failed to implead any party within the period of limitation.[2]

It will not be exercised in favour of an appellant where he has deliberately[3] or out of extreme negligence[4] failed to implead any party. But where he has not been guilty of any neglect the appellate Court may very well exercise its power under this rule in his favour.[5]

The power under this rule cannot be exercised so as to negative the provisions of O. 22. Hence, where a respondent has died and the appeal has *abated* as against him owing to his legal representatives not being brought on the record within the period of limitation, the legal representatives cannot be added under this rule[6]. Where, however, the legal representative was actually brought on the record in the suit, but was not impleaded in the appeal, he may

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612 (614): 11 Mad L W 602: 27 Mad L Tim 266 [Respondent may be added under O 1, R 10 read with S 107]; *Valliammal Achi* v. *Nataraja Pillai*, (1912) 18 Ind Cas 906 (906): 11 Mad L Tim 157: 1912 Mad W N 198; *Beas Singh* v. *Baldeo Pathak*, 1928 Pat 843 (845): 9 Pat L Tim 267: 7 Pat 510: 109 Ind Cas 609 [Respondent may be added in exercise of inherent power]. See also *Kunhanna Rai* v. *Manakke*, 1929 Mad 348 (344): 56 Mad L Jour 815: 29 Mad L W 546: 1929 Mad W N 874: 117 Ind Cas 796; *Pulin Bihari Roy* v. *Mahendra Chandra Ghosal*, 1921 Cal 722 (724): 34 Cal L Jour 405: 67 Ind Cas 10; *Thakurdas* v. *Golam Mohyuddin*, 1882 Pun Re No 20.

(11) *Ponnusamy Asari* v. *Palaniandi Mudali*, (1920) 56 Ind Cas 612 (618): 11 Mad L W 606: 27 Mad L Tim 266; *Saktiprasanna Bhattacharya* v. *Naliniranjan Bhattacharya*, 1931 Cal 738 (740): 58 Cal 923: 188 Ind Cas 177.

Note 4.

(1) *Midnapore Zamindary Co* v. *Amulya Nath*, 1926 Cal 893 (895): 43 Cal L Jour 401: 95 Ind Cas 649: 53 Cal 752; *Amolak Chand* v. *Sarat Chandra*, (1911) 11 Ind Cas 943 (944): 16 Cal W N 49: 38 Cal 918; *Ridnath Sahoy* v. *Gopee Sahoo*, (1870) 14 Suth W R 90 (91); *Bhupa* v. *Chetu*, 1881 Pun Re No 26. See also *Koylashnath Roy* v. *Nurendur Koomar Dutt Chowdhry*, (1866) 5 Suth W R 109 (109) [Application for addition of parties not to be arbitrarily refused].

(2) *Feroaze A Cooper* v. *Secretary of State for India*, 1928 Lah 947 (948): 111 Ind Cas 692; *Nandagiri Venkatanarasimha Rao* v. *Nandigiri Krishnabayamma*, 1929 Mad 479 (480): 120 Ind Cas 369: 1929 Mad W N 381; *Pitambardas* v. *Bhawani Lal*, 1932 Sind 220 (221): 26 Sind L R 362 [Discretionary power should be refused if party is *deprived of his valuable* right]. See also *V P R Chockalingam* v. *Seethai Ache*, 1927 P C 252 (255, 256): 27 Mad L W 1: 1928 Mad W N 20: 4 Oudh W N 1281: 54 Mad L Jour 88: 47 Cal L Jour 136: 32 Cal W N 281: 30 Bom L R 220: 107 Ind Cas 237: 6 Rang 29: 26 All L J 371 P C [The right of a decree-holder against whom an appeal has not been filed within the period of limitation to hold the decree in his favour is a substantive right of a very valuable kind of which he should not lightly be deprived].

(3) *Tulsidas Keshowdas Khatri* v. *Ahmed*, 1929 Sind 120 (120): 115 Ind Cas 805; *Parmeshwar* v. *Chhab Nath*, 1925 Oudh 606 (607): 87 Ind Cas 904 [Omission to implead not due to oversight—Court refused to add respondent under R 20].

(4) *Kali Dayal Bhattacharjee* v. *Nagendra Nath Pakrashi*, (1920) 54 Ind Cas 822 (826): 30 Cal L Jour 217: 24 Cal W N 44; *Lachman Das* v. *Baghu Ram*, 1927 Lah 189 (189, 190): 100 Ind Cas 17; *Municipal Committee, Bhera* v. *Shivram*, 1928 Lah 503 (504): 75 Ind Cas 90; *Raushan Ram* v. *Sheran Khan*, (1920) 57 Ind Cas 259 (260) Lah; *Shahab Din* v. *Miran Bakhsh*, (1914) 25 Ind Cas 549 (551): 79 Pun Re 1914: 268 Pun L R 1914: 169 Pun W R 1914; *Chokalingam* v. *Seethai Ache*, 1925 Rang 108 (110): 2 Rang 579: 3 Bur L Jour 259: 84 Ind Cas 522.

(5) *Amar Singh* v. *Kanshi*, 1924 Lah 629 (630): 76 Ind Cas 285; *Jalal Din* v. *Karim Baksha*, 1930 Lah 295 (296): 11 Lah L Jour 523: 124 Ind Cas 682; *Moti Ram Prem Chand* v. *Kewal Ram Dharman Chand*, 1928 Lah 202 (206): 9 Lah L Jour 550: 28 Pun L R 468: 105 Ind Cas 569; *Mt Sawani* v. *Jiwan*, 1928 Lah 120 (120): 103 Ind Cas 223. See also *Deokaran* v. *Nathu*, 1921 Nag 12 (13): 4 Nag L J 138: 63 Ind Cas 352 [Certain parties omitted due to mistake of pleader—They may be added under R 20].

(6) *Manindra* v. *Bhagabati*, 1926 Cal 335 (336): 30 Cal W N 45: 90 Ind Cas 986; *Midnapore Zamindary Co, Ltd* v. *Amulya Nath Roy Chowdhury*, 1926 Cal 893 (894, 895): 43 Cal L Jour 401: 95 Ind Cas 649: 53 Cal 752; *Badri Nath Narain* v. *E I Ry Co*, 1927 Pat 23 (24): 5 Pat 755: 98 Ind Cas 1003: 8 Pat L Tim 378; *Surajmal* v. *Pyarkhan*, 1931 Nag 184 (186): 27 Nag L R 220: 134 Ind Cas 679. But compare *Pulin Behari Roy* v. *Mahendra Chandra Ghosal*, 1921 Cal 722 (724): 34 Cal L Jour 405: 67 Ind Cas 10 [Joint appeal by several appellants—One of them dying—His legal representatives not bringing themselves on record within the period of limitation—Court has inherent power to add them as respondents, on the application of the surviving appellants so that they may not suffer for the remissness of others].

O. 41, R. 20, Notes 4—8.

be added under the provisions of this rule.[7] There is a conflict of opinion as to whether this rule can be applied where a party who is necessary for the very constitution of the appeal is not impleaded in the appeal with the result that the period of limitation for an appeal against him has expired. According to the High Court of Patna the Court has no power, to add the non-impleaded party, as a party to the appeal.[8] The Lahore High Court has held that Court has such power.[9] The High Court of Allahabad[10] and the Judicial Commissioner's Court of Sind[11] seem to be of the same view. Where, however, the only person that could be impleaded in the appeal is not impleaded, and there is consequently no valid appeal at all, this rule will not apply.[12]

The power under the rule may be exercised by the Court on its own motion or on the application of any party.[13] If the Court finds the presence of any party not already joined necessary it may direct the appellant to apply for bringing him on the record and if he fails to do so, may dismiss the appeal.[14]

5. **Adding Appellant.**—The present rule provides only for the addition of a party as a *respondent*. On the question whether an *appellant* can be added or substituted under O. 1, R. 10 read with S. 107, *see* S. 107, Note 16 and O. 1, R. 10, Note 11.

6. **Adding Respondent.**—An appellate Court can add a person as respondent who, in the trial Court, was arrayed on the same side as the appellant.[1]

7. **Adding party for the purpose of cross-objections.**—*See* Note 22 to O. 41, R. 22.

8. **"Inherent power to add parties".**—The power of an appellate Court to add party respondent is not confined to cases falling under O. 41, R. 20. In cases to which this rule does not apply, the appellate Court can under O. 1, R. 10 read with S. 107 or by virtue of its inherent power, add parties respondents to the appeal.[1] Thus where, owing to a *bona fide* mis-

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(7) *Chiraj Din* v. *Samanda*, 1926 Lah 689 (690): 8 Lah L Jour 478: 97 Ind Cas 223: 27 Pun L R 781.

(8) *Badri Narayan* v. *E I Ry*, 1927 Pat 23 (24): 5 Pat 755: 98 Ind Cas 1003: 8 Pat L Tim 378.

(9) *Lallu Mal* v. *Firm, Nanke Mal*, 1927 Lah 738 (739): 104 Ind Cas 400; *Ali Mir* v. *Gulab Din*, 1892 Pun Re No 5; *Jalal Din* v. *Karim Bakhsh*, 1930 Lah 295 (296): 11 Lah L Jour 523: 124 Ind Cas 682. See also *Mela Ram* v. *Narain Das*, 1882 Pun Re No 188 [But held no valid reason shown for adding after limitation].

(10) *Umed Singh* v. *Dalip*, 1898 All W N 35 (36) [The application and order was not under this rule—It was conceded that if it was under this rule, the necessary party might have been added].

(11) *Tulshidas Keshowdas Khatri* v. *Ahmed Nur Mahomed Khatri*, 1929 Sind 120 (120): 115 Ind Cas 805 [It was assumed that the Court had a discretion to add the party, but was not exercised by reason of the deliberate omission of the appellant].

(12) *Fakir Chand* v. *Municipal Committee of Hazaro*, (1913) 18 Ind Cas 87 (89): 59 Pun L R 1913: 88 Pun W R 1913: 59 Pun Re 1913.

(13) *Sohna* v. *Khaluk*, (1891) 13 All 78 (84, 85): 1891 All W N 1; *Chiraj Din* v. *Samanda*, 1926 Lah 689 (690): 8 Lah L Jour 473: 97 Ind Cas 223: 27 Pun L R 731.

(14) *Changama Naidu* v. *Gangulu*, 1925 Mad 235 (236): 20 Mad L W 402: 1924 Mad W N 789: 82 Ind Cas 420.

Note 6.

(1) *Sohna* v. *Khatak*, (1891) 18 All 78 (87): 1891 All W N 1; *Konagappa* v. *Sokkalinga*, (1892) 15 Mad 362 (364): 2 Mad L Jour 175.

Note 8.

(1) *Valli Ammai Ache* v. *Nataraja Pillai*, (1912) 13 Ind Cas 906 (906): 11 Mad L Tim 157: 1912 Mad W N 198; *Pulin Behari Roy* v. *Mahendra Chandra Ghosal*, 1921 Cal 722 (724): 34 Cal L Jour 405: 67 Ind Cas 10; *Beas Singh* v. *Baldeo Pathak*, 1928 Pat 348 (345): 9 Pat L Tim 267: 7 Pat 510: 109 Ind Cas 609; *Hemagini* v. *Haridas*, (1918) 46 Ind Cas 398 (399): 3 Pat L Jour 409: 1918 Pat H C C 276: 5 Pat L W 216; *Sarada Kanta* v. *Govinda*, (1910) 6 Ind Cas 912 (918): 12 Cal L Jour 91; *Baluswamy* v. *Lakshman*, 1921 Mad 172 (174): 44 Mad 605: 41 Mad L Jour 129: 13 Mad L W

O. 41, R. 20, Notes 8—11.

take caused by a similarity of names of two persons who were parties in the lower Court, the names of those persons were left out in the appeal, it was held that the appellate Court had power to correct the mistake and have the appeal memorandum amended by inserting the proper name.[2] But the inherent powers of the Court should be invoked only in exceptional circumstances.[3]

9. **Power to pass decree against party.**—*See* R. 4, *ante* and R. 33, *post*.

10. **Effect of non-joinder.**—The principle of O. 1, R. 9 applies to appeals. No appeal should be made to fail merely on the ground of the non-joinder of any party[1] but the Court may deal with the matters in controversy so far as the parties actually before it are concerned. In this connection, reference may be made to the difference between proper parties and necessary parties. (*Vide* Notes under O. 1, R. 10). If the non-joinder is not of necessary parties the appeal may proceed with reference to the parties actually before the Court.[2] But if *necessary* parties have not been joined, the effect of the non-joinder on the appeal is fatal to the appeal, because in such a case there is no proper appeal before the Court at all.[3] In such cases, the Court may in its discretion add the necessary parties under this rule and then proceed with the appeal.[4] (*See* Note 4, *ante* and O. 1, R. 10.)

A person who is not joined as a party to an appeal is not bound by the decree passed in the appeal. But the assignee of a decree is, in the absence of fraud, bound by the decree of the appellate Court though he has not been made a party to the appeal against the decree.[5]

11. **Limitation.**—The power of the Court under this rule is not subject to the provisions of the Limitation Act and a party who is interested in the result of the appeal may be added as a respondent under this rule though the period of limitation for an appeal by or against him may have expired.[1] The Privy Council decision in *Chokalingam* v. *Seethai*[1-a]

562: 1921 Mad W N 316: 63 Ind Cas 374; *Ponnusamy Asari* v. *A M Palaniandi Mudali*, (1920) 56 Ind Cas 612 (614): 11 Mad L W 602: 27 Mad L Tim 266. But see cases cited in Note 2, *supra*, foot-notes (4), (5) and (6) and in Note 12 *infra*, foot-note (1).

(2) *Kunhanna Rai* v. *Manakke*, 1929 Mad 343 (344): 56 Mad L Jour 315: 29 Mad L W 546: 1929 Mad W N 374: 117 Ind Cas 796.

(3) *Mussammat Haliman* v. *Nur Muhammad Khan*, 1923 Lah 490 (491): 73 Ind Cas 136.

Note 10.

(1) *Bhagban* v. *Palturam*, (1916) 32 Ind Cas 749 (751) Cal.

(2) *Nalinakha Sinha* v. *Ram Taran Pal*, 1927 Cal 733 (735): 46 Cal L Jour 51: 104 Ind Cas 151; *Nagina Singh* v. *Jiwan Singh*, 1925 Lah 87 (87): 79 Ind Cas 107; *Pakkiri Muhamed Rowther* v. *Bava Moideen*, 1927 Mad 82 (83): 1926 Mad W N 919: 98 Ind Cas 790; *Ma On Thin* v. *Ma Ngwe Yin*, 1929 Rang 265 (267): 7 Rang 398: 120 Ind Cas 666.

(3) *Jogesh* v. *Bama*, (1916) 34 Ind Cas 138 (140, 141) Cal; *Bejoy Gopal* v. *Umesh Chandra*, (1902) 6 Cal W N 196 (197); *Vellammal* alias *Thayammal* v. *Lakshumu Ammal*, (1915) 31 Ind Cas 814 (815) Mad; *Saminatha* v. *Devasikamoney*, (1910) 5 Ind Cas 924 (925): 7 Mad L Tim 174: 20 Mad L Jour 364: 1910 Mad W N 511; *Kicha Reddiar* v. *Reddiappa Reddiar*, (1909) 4 Ind Cas 1076: 6 Mad L Tim 346; *Jitendranath Chatterjee* v. *Jaku Mandar*, 1922 Pat 4 (4): 3 Pat L Tim 456: 66 Ind Cas 780.

(4) *Joy Tara Dossee Chowdhrani* v. *Roy Chunder Ghose*, 1864 Suth W R 136 (137); *Bai Gobind Ram* v. *Hirusranee*, (1865) 2 Suth W R 255 (255); *Jonab Ali Mollah* v. *Golam Assad Chowdary*, (1874) 21 Suth W R 187 (187).

(5) *Govindappa* v. *Hanumantappa*, (1912) 17 Ind Cas 420 (421): 23 Mad L Jour 513: 1912 Mad W N 1152: 38 Mad 36.

Note 11.

(1) *Bindeshri* v. *Ganga Saran*, (1892) 14 All 154 (155, 156): 1892 All W N 13 F B; *Sohna* v. *Khalak Singh*, (1891) 13 All 78 (85): 1891 All W N 1; *Umed Singh* v. *Dalip*, 1893 All W N 35 (36); *Jodhishtar* v. *Sannu*, (1909) 1 Ind Cas 518 (518, 519) All; *The Court of Wards on behalf of the Rajah of Kantit* v. *Gaya Pershad*, (1878-80) 2 All 107 (109); *Amolak Chand* v. *Sharat Chandra*, (1911) 11 Ind Cas 943 (944): 16 Cal W N 49: 38 Cal 913; *Bhoneswar Ram* v. *Ram Khelawan Sahoo*, (1910) 5 Ind Cas 654 (658): 12 Cal L Jour 187; *Showdaminee Dossee* v. *Ram Roodro*, (1867) 8 Suth W R 367

O.41, R.20, Notes 11—12.

does not affect the correctness of this proposition which is accepted as settled Law by all the High Courts. But the powers under this rule should be exercised very cautiously inasmuch as a person in whose favour the lower Court has passed a decree against which an appeal is not filed within the period of limitation has a substantive right of a valuable kind which should not be lightly treated.[2] Where a respondent is added, not under R. 20, but under O. 1, R. 10 read with S. 107, the provisions of Limitation Act will apply.[3] But where a party is added in the exercise of the Court's inherent power to preserve the ends of justice from being defeated, it seems, no limitation will apply.[4]

12. **Addition of parties in second appeal.**—The rule requires that the proposed party respondent must have been a party in the suit in the Court from whose decree the appeal is preferred. Suppose a person was a party to the suit in the Court of first instance but was not a party in the *first appellate Court*, has the High Court in second appeal power to make him a respondent? On this question there is a conflict of decisions, the Allahabad High Court holding that he cannot be added as a respondent[1] and the High Courts of Calcutta,[2] Lahore,[3] Madras[4] and Patna[5] the Judicial Commissioner's Court of Oudh[6] and the Chief Court of lower Burma holding a contrary view.[7] It is submitted the Allahabad view is not correct. (*See* Notes 2 and 8, *supra* and also Note 11 to O. 1, R. 10.)

The High Court in second appeal can remand the case to the lower Court with a direction to it to add fresh parties.[8]

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(368); *Girish* v. *Sashi*, (1906) 33 Cal 329 (337); *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee*, (1898) 25 Cal 565 (568): 2 Cal W N 425: *Manikya Moyee* v. *Boroda Prosad Mookerjee*, (1883) 9 Cal 355 (362): 11 Cal L Rep 430: 7 Ind Jur 421; *Wazir Singh* v. *Janki Das*, 1926 Lah 679 (680): 97 Ind Cas 174; *Amar Singh* v. *Kanshi*, 1924 Lah 629 (629): 76 Ind Cas 285. See also *The Municipal Committee, Behra* v. *Shiv Ram*, 1923 Lah 503 (504): 75 Ind Cas 90; *Raushan* v. *Sheran*, (1920) 57 Ind Cas 259 (260): 2 Lah L Jour 5; *Shib Nath* v. *Alliance Bank of Simla, Ltd, Lahore*, (1914) 25 Ind Cas 480 (485): 110 Pun W R 1914: 215 Pun L R 1914: 8 Pun Re 1915; *Shahab Din* v. *Miran Baksh*, (1914) 25 Ind Cas 549 (551): 79 Pun Re 1914: 268 Pun L R 1914: 169 Pun W R 1914 [In this case, however, the appellant was held to be extremely negligent and the Court declined to add the new party after limitation]; *Deokaran* v. *Nathu*, 1921 Nag 12 (13): 4 Nag L J 138: 68 Ind Cas 852; *Gajraj Singh* v. *Gouri Shankar*, (1915) 27 Ind Cas 609 (609): 2 Oudh L J 20: 18 Oudh Cas 90; *Padarath* v. *Hitan Singh*, 1924 Pat 773 (774): 5 Pat L Tim 509: 1924 Pat H C C 249: 82 Ind Cas 600; *Maung An Gale* v. *Ma Min Dun*, 1921 U B 13 (14): 4 U B R 87: 66 Ind Cas 365; *Haji Yusif* v. *Ghulam Hussain Kassim*, (1912) 16 Ind Cas 771 (772): 6 Sind L R 74 (Note); *Yoosof Oosman Bros & Co* v. *Win Ne Ya*, (1921) 59 Ind Cas 798 (799): 10 L B R 191. See also cases cited in Note 3, foot-note (2).

(1-a) 1927 P C 252 (255): 27 Mad L W 1: 1928 Mad W N 20: 4 Oudh W N 1231: 54 Mad L Jour 88: 47 Cal L Jour 136: 32 Cal W N 281: 30 Bom L R 220: 107 Ind Cas 237: 6 Rang 29: 26 All L J 371 P C.

(2) *V P R Chockalingam* v. *Seethai Ache*, 1927 P C 252 (255): 27 Mad L W 1: 1928 Mad W N 20: 4 Oudh W N 1231: 54 Mad L Jour 88: 47 Cal L Jour 136: 32 Cal W N 281: 30 Bom L R 220: 107 Ind Cas 237: 6 Rang 29: 26 All L J 371 P C. See also Note 4, *supra*, foot-notes (3-a), (4) and (5).

(3) *Ranjit* v. *Sheo Prasad*, (1880) 2 All 487 (489, 492): 4 Ind Jur 641.

(4) See *Padarath Mahton* v. *Hitan Singh*, 1924 Pat 773 (774): 5 Pat L Tim 509: 1924 Pat H C C 249: 82 Ind Cas 600.

Note 12.

(1) *Pachkauri* v. *Ram Khelawan*, (1915) 26 Ind Cas 25 (25): 12 All L J 1277: 37 All 57; *Chunni Lall* v. *Lala Ram*, (1894) 16 All 5 (8): 1893 All W N 141.

(2) *Durga Charan* v. *Lakhi Narain*, (1918) 47 Ind Cas 917 (919) Cal.

(3) *Lachhman Das* v. *Baghu Ram*, 1927 Lah 189 (189): 100 Ind Cas 17.

(4) *Paya Matathil Appu* v. *Kovamel Amina*, (1896) 19 Mad 151 (152): 5 Mad L Jour 279.

(5) *Padarath* v. *Hitan Singh*, 1924 Pat 773 (774): 5 Pat L Tim 509: 1924 Pat H C C 249: 82 Ind Cas 600.

(6) *Raja Mohamed Kasim Hussain Khan* v. *Nanroz Ali*, (1903) 6 Oudh Cas 159 (165).

(7) *Yoosof Oosman Bros & Co* v. *Win Ne Ya*, (1921) 59 Ind Cas 798 (799): 10 L B R 191.

(8) *Pachkauri Rout* v. *Ram Khelawan Chaubey*, (1915) 26 Ind Cas 25 (25): 12 All L J 1277: 37 All 57; *Sri Raja Bomandevara* v. *Govindarajalu*, (1909) 4 Ind Cas 1132 (1132): 5 Mad L Tim 225 [Remand to trial Court].

Re-hearing on application of respondent against whom *ex parte* decree made.

R. **21**. [S. 560.] *Where* an appeal is heard *ex parte* and judgment is *pronounced* against the *respondent* he may apply to the Appellate Court[2] to re-hear the appeal; and, if he satisfies the Court that the notice[3] was not duly served or that he was prevented by sufficient cause[4] from *appearing*[6] when the appeal was called on for hearing, the Court *shall* re-hear the appeal on such terms as to costs or otherwise[9] as *it* thinks fit to impose upon him.

[1877—S. 560.]

Local Amendment.

NAGPUR.

(*a*) Existing R. 21 shall be *renumbered* as sub-R. (1); and

(*b*) after sub-R. (1) so *renumbered* the following shall be *inserted* as sub-R. (2), namely:—

> "(2) The provisions of section 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub-R. (1)."

Synopsis.

1. **Scope and applicability of the rule.**
2. **"He may apply to the appellate Court."**
3. **Notice.**
4. **"Sufficient cause."**
5. **Inherent power to order re-hearing—See S. 151, Note 2.**
6. **"Appearance."**
7. **Remedies in case of ex parte decree—Remedies whether concurrent—See O. 9, R. 13, Note 9 and S. 96, Note 12.**
8. **Rehearing pending an appeal from an ex parte decree—See O. 9, R. 13, Note 10 and S. 96, Note 12.**
9. **"On such terms as to costs or otherwise."**
10. **Limitation.**
11. **Appeal.**

1. **Scope and applicability of the rule.**—This rule applies also to appeals under the Bengal Rent Recovery Act, X of 1859.[1] (*See also* Notes under O. 9, R. 13.) The appellate Court has jurisdiction under this rule to entertain an application for re-hearing by a respondent notwithstanding the fact that another respondent had preferred a second appeal to the High Court which was dismissed under O. 41, R. 11.[2]

2. **"He may apply to the appellate Court".**—An application for re-hearing of an appeal heard and decreed *ex parte* by the High Court under this rule should be made to the same Bench which heard the appeal.[1]

3. **Notice.**—Where a guardian *ad litem* has been appointed by the Court, service of notice of the appeal on such guardian is sufficient service.[1]

4. **"Sufficient cause".**—A respondent, against whom an appeal is heard and decided *ex parte* is entitled to a re-hearing of the appeal provided he proves either that he had not been duly served, or that he was prevented

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Order 41, Rule 21—Note 1.

[1] *Hare Krishna Mahanti* v. *Bishnu Chandra Mahanti*, (1908) 35 Cal 799 (805): 7 Cal L Jour 426: 12 Cal W N 888.

[2] *Indu Meah* v. *Darbaksh Bhuiyan*, (1911) 10 Ind Cas 275 (276): 15 Cal W N 798: 14 Cal L Jour 42.

Note 2.

[1] *Ram Krishna* v. *Bhagwan*, (1915) 30 Ind Cas 27 (27) Cal.

Note 3.

[1] *Rasik Moral* v. *Kumar Jyotish Kantha Roy*, 1926 Cal 1106 (1107): 30 Cal W N 949: 97 Ind Cas 614.

by sufficient cause from appearing when the appeal was called on for hearing.[1] As to what constitutes sufficient cause, *see* O. 9, R. 9, Note 8, *ante* and the undermentioned cases.[2]

5. **Inherent power to order re-hearing.**—*See* S. 151, Note 2.

6. "**Appearance**".—*See* O. 3, R. 1 and the undermentioned case.[1]

7. **Remedies in case of ex parte decree—Remedies whether concurrent.**—*See* O. 9, R. 13, Note 9 and S. 96, Note 12.

8. **Rehearing pending an appeal from an ex parte decree** —*See* O. 9, R. 13, Note 10 and S. 96, Note 12.

9. "**On such terms as to costs or otherwise**".—The words "or otherwise" authorise the Court to impose terms other than those relating to costs. Hence an appellate Court may require the respondent to furnish security for the due performance of the decree that may be passed on re-hearing.[1]

10. **Limitation.**—The period of limitation for the re-hearing of an appeal heard *ex parte* is that prescribed by Art. 169 of the Limitation Act, *viz.*, 30 days from the date of the appellate decree or where notice of the appeal was not duly served, when the applicant has knowledge of the decree. *See also* the undermentioned cases.[1]

11. **Appeal.**—An appeal lies under O. 43, R. 1 (*e*) from an order refusing an application for re-hearing under this rule. But an application for re-hearing cross-objections decided *ex parte* cannot be treated as an application under this rule for the re-hearing of an appeal heard *ex parte*. Hence an order dismissing the application "for re-hearing the cross-objections heard *ex parte*" is not appealable but can be revised.[1] An appeal against an order of the lower appellate Court refusing to re-hear an appeal heard *ex parte* from a decree in a rent suit under the Bengal Tenancy Act valued at less than Rs. 100, is not maintainable as it is barred by S. 153 of that Act.[2]

Note 4.

[1] *Ananda Shaha* v. *Kema Bebee*, (1881) 6 Cal 548 (548); *Esab* v. *Krishna Narayan Dey*, (1882) 11 Cal L Rep 164 (165); *Mahomed Kalun* v. *Dinomoyee Dashya*, (1881) 8 Cal L Rep 112 (112); *Maung Shwe Hla* v. *Soolay Naidu*, 1924 Rang 336 (336): 3 Bur L Jour 101: 82 Ind Cas 812 [Unrebutted oath of the respondent that he was not served—Held, sufficient to reopen appeal]; *Miselbach*, In re, (1866) 6 Suth W R Mis 43 (43) [Court bound to enquire as to the truth of the allegations in the application].

[2] *The following have been held to amount to sufficient cause:*—*Goudini* v. *Shyam Lal*, 1921 All 264 (265): 19 All L J 547: 63 Ind Cas 737 [Inability of respondent's agent to attend and instruct her pleader]; *Kailash Chunder* v. *Ramanath*, (1898) 2 Cal W N 414 (414) [Pleader's clerk failing to inform party of date of hearing owing to illness]; *Mohendra* v. *Rakhit*, (1900) 4 Cal W N 35 (Notes) [Mistake of pleader's clerk].

The following have been held not to amount to sufficient cause:—*Baji Lal* v. *Nawal Singh*, (1917) 39 Ind Cas 686 (686): 15 All L J 418: 39 All 388 [Counsel unable to appear as the agent of the respondent had taken away the papers]; *Har Prasad* v. *Abdul Ruhaman*, 1905 All W N 44 (44) [Laches of pleader—Pleader refusing notice].

Note 6.

[1] *Sheo Churn* v. *Heera Lal*, (1882) 11 Cal L Rep 537 (539) [Pleader filing vakalat but absent on date of hearing—*Held*, there was no appearance and the decision *ex parte*].

Note 9.

[1] *Bawa Narain Singh* v. *Ganga Ram*, 1885 Pun Re No 70.

Note 10.

[1] *Venkobachar* v. *Raghavendrachar*, (1908) 18 Mad L Jour 96 (97, 98); *Balaji* v. *Sithabhoy*, (1896) 19 Mad 414 (415); *Daulat Rai* v. *Jagat Ram*, (1918) 47 Ind Cas 962 (962): 96 Pun Re 1918; *Sher* v. *Mahan Singh*, 1885 Pun Re No 66.

Note 11.

[1] *Muhamad Hussain* v. *Muhammad Usman*, (1919) 53 Ind Cas 833 (834): 52 Pun L R 1920: 87 Pun W R 1919.

[2] *Samed Sheikh* v. *Naba Nepal Ghose*, (1914) 23 Ind Cas 12 (13): 19 Cal L Jour 310: 19 Cal W N 359.

O.41, R.22.

Upon hearing respondent may object to decree as if he had preferred separate appeal.

R. **22.** [S. 561.] (1) Any respondent, though he may not have appealed *from* any part of the decree, may not only support the decree[2] on any of the grounds decided against him in the Court below, but take any *cross*-objection[3] to the decree which he could have taken by way of appeal,[5] provided he has filed *such* objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal,[19] or within such further time as the Appellate Court may see fit to allow.

Form of objection and provisions applicable thereto.

(2) Such *cross*-objection shall be in the form of a memorandum, and the provisions of *rule* (1), so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgment from the *party who may be affected by such objection* or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on *such party* or his pleader at the expense of the respondent.

(4) *Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.*[17]

(5) The provisions *relating to pauper appeals* shall, so far as they can be made applicable, apply to an objection under this rule.[12]

[1877—S. 561; 1859—S. 348.]

Synopsis.

1. Legislative changes.
1a. Applicability of the rule.
2. Respondent may support decree without filing cross-objections.
3. What objections can be raised by way of cross-objections and when.
4. Cross-objections against findings not included in decree.
5. "Which could have been taken by way of appeal."
6. Cross-objections to order of remand.
7. Cross-objections in second appeal.
8. Cross-objections in appeals from orders.
9. Cross-objections in Letters Patent Appeals.
10. Cross-objections in revision.
11. Who may file cross-objections.
12. Cross-objections by pauper respondent.

13. **Against whom cross-objections may be filed.**
14. **Cross-objections against co-respondent.**
15. **Omission to file cross-objections.**
16. **Grounds not raised in cross-objections not to be raised at the hearing.**
17. **Effect on cross-objections of withdrawal of appeal or its dismissal for default.**
18. **Effect, on cross-objections, of abatement of appeal.**
19. **Limitation for cross-objections.**
20. **Appeal filed out of time may be treated as cross-objections.**
21. **Court-fee on cross-objections.**
22. **Adding party for purposes of cross-objection.**
23. **Second appeal.**

1. Legislative changes.—

This rule corresponds to S. 561 of the Code of 1882. The chief changes introduced are:—

1. The words "upon the hearing" which occurred after the word "may" and before the words "not only support the decree" in sub-R. (1) have been omitted. *See* Note 17, *infra.*
2. The words "the party who may be affected by such objection" have been substituted for the words "the appellant" in sub-R. (3). *See* Note 13, *infra.*
3. Sub-R. (4) is new. *See* Note 17, *infra.*

1-a. Applicability of the rule.—The provisions of this rule apply also to appeals under the Chota Nagpur Tenancy Act, VI of 1908 from the decisions of the Deputy Commissioner or of a Revenue Officer. As regards the applicability of sub-R. (1) to proceedings under the Agra Tenancy Act, III of 1926, *see* List II, No. 16 of the Second Schedule of that Act.

2. Respondent may support decree without filing cross objections.—A respondent may support the decree appealed from, not only on any of the grounds decided in his favour[1] but also on grounds decided against him, and for this purpose, it is not necessary for him to file any cross-objections.[1-a]

Order 41, Rule 22—Note 2.

(1) See however *Ram Adhar* v. *Ram Shankar*, (1903) 26 All 215 (217): 1903 All W N 236.

(1-a) *Lala Gauri Sankar* v. *Janki Pershad*, (1890) 17 Cal 809 (813, 814): 17 Ind App 57: 5 Sar 518 P C; *Fatima Bibi* v. *Ram Narain Sahu*, (1919) 51 Ind Cas 646 (648): 16 All L J 587: 40 All 536; *Bhajan Lal* v. *Chahat Rai*, (1917) 39 Ind Cas 176 (176): 15 All L J 325 [Decree entirely in respondent's favour—He cannot take cross-objections—He can only support the decree by attacking any findings against him—If he files any objections, they are not cross-objections]; *Shankur Lal* v. *Madari Singh*, (1910) 7 Ind Cas 484 (484) All; *Ram Prasad* v. *Gokul Das*, 1898 All W N 109 (110); *Bhagwat Rai* v. *Deodat Rai*, 1887 All W N 44 (44): 9 All 398; *Bhagoji* v. *Bapuji*, (1889) 13 Bom 75 (77); *Imam Ali Patwari* v. *Arfatunissa*, (1913) 21 Ind Cas 87 (88): 18 Cal W N 693; *Iftikhar Ali* v. *Risalat Khan*, 1924 Lah 368 (369): 5 Lah L Jour 341: 76 Ind Cas 10 [Certificate under S 41 (3) of Punjab Courts Act is not necessary for attacking finding on custom in this manner]; *Partab Singh* v. *Nathu*, 1922 Lah 416 (416): 3 Lah 285: 69 Ind Cas 706 [Failure to object to the findings may preclude respondent from objecting in second appeal]; *Mahomed Ali* v. *Parmananda*, (1918) 45 Ind Cas 232 (233, 234): 48 Pun W R 1918: 125 Pun L R 1918; *Musst Parsani* v. *Mangal Singh*, (1917) 40 Ind Cas 237 (238): 103 Pun L R 1917: 85 Pun W R 1917; *Chuhar* v. *Bhag Mal*, (1911) 11 Ind Cas 41 (42): 144 Pun W R 1911: 202 Pun L R 1911 [Appellate Court not considering respondent's objections acts with material irregularity]; *Gauri Mal* v. *Nidha Mal*, 1888 Pun Re No 127; *Dharm Singh* v. *Attar Singh*, 1886 Pun Re No 59; *Balusami Ayyar* v. *Lakshmana Ayyar*, 1921 Mad 172 (174): 44 Mad 605: 41 Mad L Jour 109: 13 Mad L W 562: 1921 Mad W N 316: 63 Ind Cas 374 F B; *Sheo Charanlal* v. *Ramratan*, 1928 Nag 181 (182): 108 Ind Cas 801; *Mohammad Habibullah* v. *Wazir Hasan Khan*, (1919) 50 Ind Cas 869 (870): 22 Oudh Cas 29: 1 U P L R (O) 38; *Ram Sahu* v. *Gouri Shankar*, (1917) 39 Ind Cas 153 (153): 4 Oudh L J 101; *Raj Kumar Jagannatha Prasad Singh* v. *Mirza Ekbal Bahadur*, (1920) 55 Ind Cas 214 (217): 1 Pat L Tim 65: 5 Pat L Jour 239; *Raghunath Kurmi* v. *Deo Narain Rai*, (1919) 51 Ind Cas 981 (984): 1919 Pat H C C 393; *Murdin* v. *Asha Bi*, (1913) 20 Ind Cas 660 (661): 6 Bur L Tim 135; *U Lu Gale* v. *Mg Po Kin*, (1911) 12 Ind Cas 20 (21): 4 Bur L Tim 209; *Abinash Chandra Ghosh* v. *Narhari Mether*, 1930 Cal 165 (169): 50 Cal L Jour 260: 57 Cal 289: 123 Ind Cas 444. But see *Mansa Ram* v. *Mahomed Hussain*, 1928 All 624 (624): 9 L R All (Rev) 232 [This decision seems to be of doubtful correctness—In it no reference is made to R 22]; *Rulda Khan* v. *Mussammat Kandi*, 1897 Pun Re No 25 [Objection that plaintiff had no *locus standi* in a suit by a reversioner to set aside a sale by a widow where the sale was held to be for necessary purposes and the plaintiff had appealed against the decree cannot be allowed].

O.41, R.22, Notes 2—3.

There is a conflict of views as to whether this rule will enable a respondent to attack any portion of the decree passed *against* him so long as he does not ask for a variation of the decree. According to the High Courts of Calcutta,[2] Madras[3] and Lahore,[4] the respondent cannot do so. Thus the respondent cannot make out a case for a decree for the same amount by attacking the decree in respect of a right decided against him. The High Court of Patna[5] and the Judicial Commissioner's Court of Oudh[6] have, on the other hand held, that the expression "support the decree" does not merely mean support the *decision* but permits the respondent to show by reference to a ground decided against him, that the appellant has at least secured by the decree as much as, if not more than, he is entitled to.

A point taken in the lower Court but not decided by it may be urged in support of the decree under appeal.[7] But as a general rule, a respondent cannot take a point not taken by him in the lower Court.[8] Similarly, the rule does not apply to a finding which does not affect the point at issue as the respondent cannot support the decree with reference to such a finding.[9] An appellate Court will not of itself raise a point which the respondent does not raise.[10]

3. **What objections can be raised by way of cross-objections and when.**—The test to determine whether any particular objection can be taken by way of cross-objections under this rule is to see whether, if the respondent had *appealed* against that portion of the decree which is against him, he could have raised such objection in his memorandum of appeal. If he could, then he could also raise it by way of cross-objections. An objection as to any error, defect or irregularity in any order affecting the decision of the case, which may be taken in an appeal against the decree under S. 105 of the Code can, therefore, be taken by way of cross-objections also. Thus where an *ex parte*

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(2) *Shalieschandra* v. *Bechai*, 1925 Cal 94 (95): 40 Cal L Jour 67: 84 Ind Cas 124 [Suit partly decreed—Plaintiff appealing—Defendant cannot in resisting the appeal attack the frame of the suit]; *Gopal Ukera* v. *B N Ry Co, Ltd*, 1938 Cal 165 (169): 66 Cal L Jour 285. See also *Ishore Ghose* v. *James Hills, Manager of the Sari Indian Concern*, 1862-64 Suth W R 48: Marsh 151: 1 Hay 350: 1 Ind Jur O S 25 F B [However, this was a case under the Code of 1859 under which it was not necessary to *file* cross-objections in any case].

(3) *Sriranga Thathachariar* v. *Srinivasa Thathachariar*, 1927 Mad 801 (804): 53 Mad L Jour 186: 26 Mad L W 125: 39 Mad L Tim 284: 104 Ind Cas 472: 50 Mad 866 ["Decree" in R 22 does not refer to the *quantum* of the decree but to the *decision* of the lower Court]; *Gangama Naick* v. *Veerappa Chetty*, 1931 Mad 513 (517): 131 Ind Cas 883.

(4) *Kishan Kishore* v. *Jin Mahomed*, 1929 Lah 684 (686); *Rulda Khan* v. *Mussammat Kandi*, 1897 Pun Re No 25. But see *Mahomed Ali* v. *Parmanand*, (1918) 45 Ind Cas 232 (233, 234): 48 Pun W R 1918: 126 Pun L R 1918; *Padam Nath* v. *Kanshi Ram*, 1921 Lah 318 (319).

(5) *Gokul Krishna Banarji* v. *Secretary of State*, 1932 Pat 184 (188): 12 Pat L Tim 659: 137 Ind Cas 116.

(6) *Sarsuti Prasad* v. *Ehtisham Ali*, 1923 Oudh 123 (126, 129, 135): 25 Oudh Cas 349: 77 Ind Cas 310 [Respondent suggesting a different mode of taking accounts—*Held*, he was entitled to do so].

(7) *Sherish Chandra Roy* v. *Mungri Bewa*, (1905) 9 Cal W N 14 (18); *Ram Prasad Kalwar* v. *Ajanasia*, 1922 All 280 (280): 44 All 577: 68 Ind Cas 861; *Nidadavole Estate* v. *Vegasena Subbaraju*, (1905) 28 Mad 427 (435); *Fateh Nur* v. *Jiwan*, 1928 Lah 964 (965).

(8) *Prankrishnadas* v. *Protap Chandra Dalal*, (1917) 38 Ind Cas 536 (536): 21 Cal W N 423. But see *Deva Singh* v. *Lehna Singh*, (1915) 31 Ind Cas 740 (741): 8 Pun W R 1916: 44 Pun L R 1916: 45 Pun Re 1916; *Dilapat Singh* v. *Kashi Nath*, (1914) 24 Ind Cas 542 (545): 17 Oudh Cas 108 [When all facts are before appellate Court—Respondent can support lower Court's judgment even on ground not taken in Court below].

(9) *Sir Prodyot Kumar Tagore* v. *Bal Gobind Dichhit*, 1925 Cal 518 (520): 41 Cal L Jour 31: 86 Ind Cas 6.

(10) *Nagendra Nath Ghose* v. *Ram Bharosa Halnai*, (1914) 24 Ind Cas 68 (69, 70) Cal.

O.41, R.22, Note 3.

decree is passed against a defendant for a portion only of the claim made by the plaintiffs and the plaintiff appeals against the portion disallowed, the defendant respondent can file cross-objections in respect of the portion decreed and may therein contend that the order placing him *ex parte* in the suit was wrong.[1] It was held by the Oudh Chief Court in the undermentioned case[2] that in an appeal against a decree the respondent cannot raise, by way of cross-objections, the plea that an order granting a review of the judgment originally passed was wrong. The same Court has held in another case[2-a] that a respondent cannot, by way of cross-objections, attack a non-appealable order. It is submitted that the said decisions are not correct.

Where a party could not have appealed from a decree he cannot file any cross-objections in respect of it.[2-b] Thus where a decree is *wholly in favour of a party* he cannot file any cross-objections against it by way of criticism of the judgment, though he can *support the decree* on any of the grounds decided against him.[3] But where a decree is partly in favour of, and partly against a party, he can take any cross-objections to it which he could have taken by way of appeal.[4]

The cross-objections must be directed against the *particular decree* under appeal,[4-a] though they need not be confined to the particular portion of the decree appealed against but may refer to any part of the decree and it need not also be confined to the subject-matter of the appeal.[5] (*See also* Note 7, Pt. (3), *infra.*)

A respondent in an appeal under the Provincial Insolvency Act has a right to file a memorandum of objections.[6] Similarly, in an appeal under S. 48 of

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Note 3.

(1) *Bava Levvai Sahib* v. *Ameenammal*, 1924 Mad 107 (108): 45 Mad L Jour 805: 79 Ind Cas 968 [S 105 was however not adverted to in this case].

(2) *Beni Madho* v. *Gopinath*, 1928 Oudh 405 (405): 5 Oudh W N 713: 110 Ind Cas 702.

(2-a) *Raneswar Prasad Misra* v. *Industrial and Prudential Assurance*, 1927 Oudh 218 (219): 1 Luck Cas 24: 102 Ind Cas 467.

(2-b) *Kulai Kadar Pillai* v. *Visvanatha Pillai*, (1905) 28 Mad 229 (231): 15 Mad L Jour 212; *Babu Singh* v. *Godawari*, 1929 Nag 361 (362): 118 Ind Cas 867 [*Pro forma* respondent against whom nothing has been decided and who could not have filed an independent appeal cannot file cross-objections].

(3) *Bhajan Lal* v. *Chahat Rai*, (1917) 39 Ind Cas 176: 15 All L J 825; *Bhagwat Rai* v. *Deodat Rai*, 1887 All W N 44; *Jamaitunnissa* v. *Latfunissa*, (1885) 7 All 606 (610): 1885 All W N 89; *Balak* v. *Kausil*, (1882) 4 All 491 (492): 1882 All W N 124; *Chuhar* v. *Bhag Mal*, (1911) 11 Ind Cas 41 (42): 144 Pun W R 1911: 202 Pun L R 1911; *Sahdeo Narain* v. *Kusum Kumari*, 1922 Pat 483 (484): 1 Pat 258.

(4) *Mt Jantan* v. *Ahamad*, 1928 Lah 221 (224): 106 Ind Cas 817 [Appellate Court cannot deprive him of this right]; *Haji Ghulam Muhammad* v. *Kaka Ram*, 1897 Pun Re No 31; *Hunnoman* v. *Suddoo Lal*, 1864 Suth W R (Gap) 231 (232); *Dunichand* v. *Azim Khan*, (1911) 10 Ind Cas 207 (208): 181 Pun L R 1911: 180 Pun W R 1911: 11 Pun Re 1912 [Appellate Court has no power to reject cross-objections on the merits without hearing the respondent]; *Rangila Mal* v. *Pheru*, (1914) 23 Ind Cas 410 (411): 1914 Pun L R 93: 1914 Pun W R 87; *Okhetoonissa* v. *Koochil Sirdar*, (1865) 2 Suth W R 45 (45) [Case under Code of 1859].

(4-a) *Govindasami Naidu* v. *Uchappa Goundan*, 1922 Mad 413 (415): 1922 Mad W N 477: 70 Ind Cas 579 [One judgment and two decrees in first appeal—Second appeal against one decree—Respondents cannot object to other decree under O 41, R 22]; *Fitz Holmes* v. *Waryam Singh*, 1923 Lah 514 (515): 75 Ind Cas 419; *Mt Umma-kulsum* v. *Ghulam Rasul Khan*, 1929 Sind 32 (36): 114 Ind Cas 101.

(5) *The Deputy Collector, Madura Division* v. *Muthirula Mudali*, (1918) 48 Ind Cas 1003 (1005): 35 Mad L Jour 83: 1918 Mad W N 458: 24 Mad L Tim 83: 8 Mad L W 271; *Haji Gulam Mahomed* v. *Kaka Ram*, 1897 Pun Re No 31; *Kamat* v. *Kamat*, (1884) 8 Bom 368 (370): 8 Ind Jur 687. But see *Ayilu Reddi* v. *Venkata Reddi*, 1931 Mad 133 (134, 135): 1930 Mad W N 1236: 130 Ind Cas 657 [Appeal in lower Court was dismissed for default and on that ground cross-objections were also dismissed. The cross-objector appealed. *Held*, that the opposite party could not attack the dismissal of his appeal in lower Court for default].

(6) *Alagappa* v. *Chockalingam*, (1918) 48 Ind Cas 203 (209, 211): 41 Mad 904: 35 Mad L Jour 236: 8 Mad L W 240: 24 Mad L Tim 137: 1918 Mad W N 688 F B.

O.41, R.22, Notes. 3—7.

Bombay Act, IV of 1898 form the award of the Collector under the Land Acquisition Act, the respondent is entitled to file cross-objections.[7] But having regard to S. 76 of the Madras Rent Recovery Act, VIII of 1865, no memorandum of objections lies against the findings of the Court of first instance in cases under that Act.[8] The cross-objections under this rule can be filed only in a *pending* appeal and not after the appeal has been decided.[9]

4. **Cross-objections against findings not included in decree.**—*See* Note 3.

5. **"Which could have been taken by way of appeal".**—*See* Note 3, *ante.*

6. **Cross-objections to order of remand.**—Under S. 105, sub-S. (2) where a party who is aggrieved by an order of remand for which an appeal lies, does not appeal against it, he will be precluded from disputing its correctness, in an appeal from the decree after remand. It follows that he cannot, by way of cross-objections, attack such an order in an appeal by the other party from the decree. The decision in the case cited below[1] was under the Code of 1859 and is, in view of S. 105, sub-S. (2), no longer good law.

7. **Cross-objections in second appeal.**—Cross-objections may be filed in second appeals as well as in first appeals.[1] (*Vide* O. 42, R. 1.) But the grounds taken in cross-objections filed in second appeals must comply with the provisions of S. 100 as the respondent can only take such cross-objections as he could have taken by way of appeal.[2]

A files a suit against *B*. It is partly decreed in favour of *A* and partly dismissed. Both *A* and *B* file separate appeals. *A's* appeal is allowed partially and *B's* appeal is dismissed *in toto*. *A*, thereupon files a second appeal. *B* does not file any appeal, but only files cross-objections in *A's* second appeal. He can, by means of such cross-objections, merely attack whatever may be unfavourable to him in the decree in *A's appeal to the lower appellate Court,* because cross-objections must relate to the *particular decree* from which the appeal has been preferred. (*See* Note 3, above.) It is not open to *B* to attack the decree passed in his appeal to the lower Court by means of cross-objections in the appeal preferred against another decree of that Court.[3] Nor can he attack the decree

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[7] *Raghunath Das* v. *Secretary of State,* (1905) 29 Bom 514 (527): 7 Bom L R 569.

[8] *Raja Parthasarathi Appa Rao* v. *Chevendra Chinna Sundara Ramayya,* (1904) 27 Mad 543 (545, 546).

[9] *Parbhu Dayal* v. *Murlidhar,* 1924 All 867 (868): 22 All L J 365: 5 L R All (Civ) 298: 78 Ind Cas 677; *Hemraj* v. *Bibi Kuar,* (1917) 89 Ind Cas 947 (948) All; *Asghar Ali* v. *Riayat Husain,* 1882 All W N 29 (29); *Kajah Abdool Gunnu* v. *Gour Monee Debia,* (1868) 9 Suth W R 375 (376); *Hardhan Mahto* v. *Gokul Mahto,* 1924 Pat 775 (776): 5 Pat L Tim 411: 76 Ind Cas 257.

Note 6.

[1] *Kishen Chunder* v. *Sreeshtee Dhur,* (1867) 8 Suth W R 208 (209).

Note 7.

[1] *Kausalia* v. *Gulab Kuar,* (1899) 21 All 297 (300): 1899 All W N 72. *But under the Code of 1859, there was a conflict of decisions on this point. As the matter is now made clear by O 42, R 2, the following decisions under the Code of 1859 are only of academic interest:— Narayana Ayyar* v. *Lakshmi Ammal,* (1866-67) 3 Mad H C R 216 (216); *Ishore Ghose* v. *James Hills,* 1862 Suth W R 48 (49): Marsh 151: 1 Hay 850: 1 Ind Jur O S 25 F B [Cross-objections allowed in second appeal]; *Makudu Ravullun* v. *Mastan Sahib,* (1862-63) 1 Mad H C R 102 (102) [Cross-objections not allowed in second appeal].

[2] *Sheikh Mubarak Ali* v. *Musammat Raiquaya Bibi,* (1904) 7 Oudh Cas 49 (50).

[3] *Debichand* v. *Parbhu Lal,* 1926 All 582 (584): 24 All L J 694: 96 Ind Cas 67; *Govindaswami Naidu* v. *Uchappa Goundar,* 1922 Mad 413 (415): 1922 Mad W N 477: 70 Ind Cas 579; *Sant Ram* v. *Ram Manorath,* 1929 Oudh 41

O.41, R.22, Notes 7—11.

of the *first Court* in such circumstances,[4] unless the first Court's decree is incorporated in the decree of the first appellate Court.[5]

8. **Cross-objections in appeals from orders.**— Cross-objections can be taken also in appeals from orders.[1] *See* O. 43, R. 2.

9. **Cross-objections in Letters Patent Appeals.**—It has been held by the High Courts of Allahabad[1] and Calcutta[2] that this rule does not apply to appeals under the Letters Patent. But a Full Bench of the Madras High Court has held that, in view of the Privy Council decision in *Sabitri* v. *Savi*[3] this view is wrong and that this order applies also to Letters Patent Appeals.[4] It is submitted that the Madras view is correct.

10. **Cross-objections in revision.**—This rule does not apply to Civil revision petitions.[1] But the High Court's powers of revision may be exercised even without any application by an aggrieved party; and when a case is already before it, and the necessary parties are also before it, it has ample powers to entertain any questions that may be raised by the respondent.[2]

11. **Who may file cross-objections.**—As has been seen in Note 3, *ante* this rule provides that any respondent may take any cross-objection to the decree which he could have taken by way of appeal. It follows that a person cannot file cross-objections unless he *is a respondent* to the appeal;[1] and unless he could have taken such an objection by way of an appeal.[2]

Does the mere fact that a respondent has filed an appeal against the same decree, preclude him from taking cross-objections against it in the appeal

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(42): 111 Ind Cas 843; *Miran Baksh* v. *Bairang Bahadur Singh*, (1907) 10 Oudh Cas 214 (216). See also *Ganga Prasad* v. *Gajadhar Prasad*, (1878-80) 2 All 651 (654) [In this case both appeals to the lower Court were dismissed—*Held*, that in second appeal by one party, other could not object to dismissal of his (latter's) appeal].

(4) *Edith Susan Mukherjee* v. *George Alfred*, 1907 Pun W R 52. See also *Debi Chand* v. *Parbhu Lal*, 1926 All 582 (584): 24 All L J 694: 96 Ind Cas 67.

(5) *Hardhan Mahto* v. *Gokul Mahto*, 1924 Pat 775 (776): 5 Pat L Tim 411: 76 Ind Cas 257 [This has been dissented from in 1926 All 582 —But the fact that the appellate Court's decree incorporated the decree of the first Court was apparently not brought to the notice of their Lordships of the Allahabad High Court].

Note 8.

(1) *Kausalia* v. *Gulab Kuar*, (1899) 21 All 297 (300): 1899 All W N 72; *Sellammal* v. *Velappa Naicker*, (1908) 18 Mad L Jour 157 (157): 8 Mad L Tim 248. But see *Kamekhaprasad Mookerjee* v. *Larmour*, 1863 Suth W R (Gap) 86 (89) F B [A case under the Code of 1859].

Note 9.

(1) *Ganga Ram* v. *Basant Singh*, (1930) 124 Ind Cas 763: 1930 Notes 16-c: 1930 All L J 1089; *Purna Kuar* v. *Mangat Rai*, 1922 All 55 (55): 70 Ind Cas 488; *Kausalia* v. *Gulab Kuar*, (1899) 21 All 297 (300): 1899 All W N 72.

(2) *Brojendra Chandra Sarma* v. *Prosanna Kumar Dhar*, (1921) 59 Ind Cas 589 (591): 32 Cal L Jour 48: 24 Cal W N 1016.

(3) 1921 P C 80 (82, 83): 60 Ind Cas 274: 48 Cal 481: 19 All L J 281: 23 Bom L R 681: 33 Cal L Jour 307: 40 Mad L Jour 308: 14 Mad L W 362: 1921 Mad W N 159: 48 Ind App 76 P C.

(4) *Venkatesham Chetty* v. *Mottichand Gulabchand*, 1926 Mad 316 (318, 319): 50 Mad L L Jour 190: 93 Ind Cas 293: 49 Mad 291: 24 Mad L W 571 F B [Overruling 1925 Mad 725].

Note 10.

(1) *Gurditta* v. *Deru*, (1912) 14 Ind Cas 562 (563): 150 Pun W R 1912: 160 Pun L R 1912 [Contra 17 Mad L Jour 62 (63)]; *Pattammal* v. *Krishnaswami Ayyar*, 1928 Mad 794 (796): 112 Ind Cas 231.

(2) *Pattammal* v. *Krishnaswami Ayyar*, 1928 Mad 794 (796): 112 Ind Cas 231; *Krishna Ayyangar* v. *Appana Ayyangar*, (1907) 17 Mad L Jour 62 (63).

Note 11.

(1) *Vathiar Venkatachariar* v. *Ponappa Ayyangar*, (1918) 45 Ind Cas 959 (961): 7 Mad L W 614; *Bipro Prosad Mytee* v. *Must Kanye Deyee*, (1864) 1 Suth W R 341 (342). See also *Sreemuthy Khermukuree Dossee* v. *Nilambur Mandal*, (1865) 2 Suth W R 227 (228). See also *Sabetoollah Meah* v. *Rohim Dewan*, (1868) 9 Suth W R 273 (273).

(2) *Babusingh* v. *Godawari*, 1929 Nag 361 (362): 118 Ind Cas 867; *Srinivasa Ayyangar* v. *Thiruvengadathiayyangar*, (1913) 23 Ind Cas 264 (268): 38 Mad 556: 25 Mad L Jour 644: 15 Mad L Tim 307: 1913 Mad W N 1034: 1914 Mad W N 282 [In this case the decree was held to affect the respondent adversely, although another person was also similarly affected].

O. 41, R. 22, Notes 11—14.

filed by the opposite party? The answer to the question depends upon the further question whether the appeal so filed by the respondent had been decided, at the time of the hearing of the cross-objections. If it had been decided, then he cannot be heard on his cross-objections under this rule.[3] He would, in fact, be barred by the principle of *res judicata*.[3-a] But where his appeal had not been decided on the date of the hearing of the cross-objections, he is entitled to be heard on his objections.[4] In this view, the decision of the Lahore High Court in the undermentioned case[5] where it was held broadly that a respondent who has preferred an appeal cannot file cross-objections under R. 22, seems to state the proposition too widely.

12. **Cross-objections by pauper respondent.**—Sub-R. (5) expressly provides for the filing of cross-objections in *forma pauperis*.[1] This supersedes the following decisions under the previous Codes.[2]

13. **Against whom cross-objections may be filed.**—The principle that no decree can be passed against a person who is not a party to the proceedings applies to cross-objections also; and hence cross-objections cannot be allowed against a person who is not a party to the appeal.[1] But in the undermentioned case[2] where it was impossible to give relief against the appellant without giving relief against the absent party also, the Bombay High Court held that the decision on the respondent's cross-objections bound the non-party also, as, otherwise, in all such cases coming under O. 41, R. 4, one of several defeated parties can appeal on behalf of all and defeat the respondent's rights under this rule. It is submitted that this decision is not correct. The appellate Court has power to add parties to the appeal under R. 20 above whenever it considers it necessary to do so and the difficulty mentioned by the Bombay High Court can thus be obviated. (*See* O. 41, R. 20 and the notes thereunder and also O. 1, R. 10 and S. 151.)

14. **Cross-objections against co-respondent.**—It has been held by the

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(3) *Sourindra Nath Basu* v. *Nirmal Chandra Banerjee*, 1928 Cal 882 (885): 32 Cal W N 863; *Parbhu* v. *Murti*, 1924 All 867 (868): 22 All L J 365: 5 L R All (Civ) 298: 78 Ind Cas 677; *Ramji Das* v. *Ajudhia*, (1903) 25 All 628 (629): 1903 All W N 160 (160). See also *Hoolas* v. *Sufeehun*, (1867) 8 Suth W R 379 (380) [But where the respondent's appeal is rejected on ground of its not having been presented by the proper person the respondent will not be precluded from filing cross-objections in the opposite party's appeal].

(3-a) See *Allah Baksh* v. *Nur Baksh*, (1918) 44 Ind Cas 812 (813): 20 Pun Re 1918.

(4) *Abdul Rahim* v. *Raghbipchand*, 1929 Lah 161 (163): 112 Ind Cas 689; *Kanhaiya Lal* v. *Azmatunnissa*, 1924 All 840 (840): 78 Ind Cas 877.

(5) *Mt Tehl Kaur* v. *Amar Nath*, 1925 Lah 2 (5): 17 Pun W R 1923: 79 Ind Cas 670.

Note 12.

(1) *Gobinda Rani Dasi* v. *Radha Ballabh Das*, (1910) 7 Ind Cas 118 (122): 12 Cal L Jour 173: 15 Cal W N 205; *Po Hlaing* v. *Ma O*, (1907-1908) 4 L B R 262 (263).

(2) *Babji Hari* v. *Rajaram Ballal*, (1875-77) 1 Bom 75 (79); *Brojeshwari* v. *Guroo Churn*, (1885) 11 Cal 735 (737); *Rashmonee Dossee* v. *Chowdhry Jhunmojoy Mullik*, (1868) 9 Suth W R 356 (356, 357); *Narayana* v. *Krishna*, (1885) 8 Mad 214 (217); *Raja Ratan Singh* v. *Rani Beni Bai*, (1905) 1 Nag L R 83 (85).

Note 13.

(1) *Bisheshar Rai* v. *Tapeshuri Lal*, 1886 All W N 88 (88); *Rajendra Nath Chatterjee* v. *Moheshala Debi*, 1926 Cal 533 (535): 91 Ind Cas 649: 53 Cal 270; *Moizunnissa* v. *Moorare*, (1874) 22 Suth W R 314 (315); *Prankishore* v. *Mahomed Ameer*, (1874) 21 Suth W R 338 (339); *Lalchand* v. *Kudnoo Koonwar*, (1867) 7 Suth W R 532 (533); *Hossein* v. *Shaikh Baroo*, (1866) 5 Suth W R 49 (50); *Illahi Baksh* v. *Jawinda Mal*, (1920) 54 Ind Cas 971 (973): 38 Pun W R 1920: 1 Lah 396; *Bakshi Bindeshwari Prasad* v. *Dhenendra Das*, (1917) 39 Ind Cas 662 (663): 2 Pat L Jour 162.

(2) *Babaji Dhondshet* v. *Collector of Salt Revenue*, (1887) 11 Bom 596 (598).

O.41, R.22, Note 14.

High Courts of Allahabad,[1] Bombay,[2] Calcutta[3] and Patna[4] and the Judicial Commissioner's Court of Upper Burma[5] that as a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellants, and it is only by way of exception to this general rule that one respondent may urge cross-objections as against the other respondents, the exception holding good among other cases, in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. Thus when the questions raised by the cross-objections are common both to the appellant and co-respondent the cross-objections may be entertained as against both.[6] *P* sues *Q* and *R* for Rs. 10,000 alleged to be his share of the profits of certain lands. A decree is passed against *Q* and *R* for Rs. 7,000. *Q* appeals from the decree making *P* and *R* respondents. In such a case, *P* may prefer cross-objections not only against *Q* but also against *R* with reference to the Rs. 3,000 in respect of which his claim was dismissed by the lower Court.[7] Similarly in suits for dissolution of partnership and for accounts, accounts are taken as between all the partners and not as between the plaintiff on the one hand and the defendants on the other. Hence the appeal of one of the partners opens out the whole case and cross-objections can be urged not only against the appellant but also against co-respondents.[8] According to the High Court of Madras cross-objections may be allowed to be taken against co-respondents in *all* cases.[9] Opinion is divided in Lahore, Nagpur and Oudh; some cases favouring the view first mentioned above[10] and

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Note 14.

(1) *Abdul Ghani* v. *Muhammad*, (1906) 28 All 95 (97): 2 All L J 667: 1905 All W N 200; *Bankey Lal* v. *Natha Ram*, 1929 All 195 (196): 107 Ind Cas 569: *Fatima Bibi* v. *Ram Narain Sahu*, (1919) 51 Ind Cas 646 (648): 16 All L J 587: 40 All 536; *Kallu* v. *Manni*, (1901) 23 All 93 (94): 1900 All W N 212. See however *E I Ry Co* v. *Janki Prasad*, 1924 All 605 (608): 5 L R All (Civ) 586: 80 Ind Cas 737 [In this case it was held that the respondent can be transposed as appellant].

(2) *Lakshman* v. *Bhikchand*, 1930 Bom 1 (5): 31 Bom L R 1179: 122 Ind Cas 848; *Nersey Virji* v. *Alfred H Harisson*, (1913) 21 Ind Cas 7 (8): 15 Bom L R 781: 37 Bom 511; *Ambulal* v. *Bapu Bhai*, 1896 Bom P J 742; *Ganesh Pandurang* v. *Gangadhar*, (1869) 6 Bom H C R 244.

(3) *Co-operative Hindustan Bank, Ltd* v. *Surendra Nath De*, 1932 Cal 524 (527): 36 Cal W N 268: 59 Cal 667: 138 Ind Cas 852; *Shib Chnuder Kar* v. *Dulcken*, (1918) 48 Ind Cas 78 (81, 82): 28 Cal L Jour 123; *Mathura Mohan Saha* v. *Ramkumar Saha*, (1916) 35 Ind Cas 805 (320): 23 Cal L Jour 26: 20 Cal W N 370: 43 Cal 790; *Jadu Nandan Prasad Singh* v. *Koer Kallyan Singh*, (1912) 13 Ind Cas 653 (654): 15 Cal L Jour 61: 16 Cal W N 612; *Shabiuddin* v. *Demoorat*, (1903) 30 Cal 655 (658); *Bishun Churn* v. *Jogendra Nath*, (1899) 26 Cal 114 (121, 122); *Anwar Jan* v. *Azmut Ali*, (1871) 15 Suth W R 26 (26); *Aumto Doss Sein* v. *Ram Jay Sein*, (1869) 11 Suth W R 435 (436); *Goonomonee Dossia* v. *Parbutty Dossia*, (1868) 10 Suth W R 326 (328); *Muhboob Ali* v. *Zur Banoo Bibee*, (1868) 9 Suth W R 78 (79); *Lalchand* v. *Mussamat Kudmoo Koonwar*, (1867) 7 Suth W R 532 (533); *Gudadhur* v. *Mun Mohinee*, (1867) 7 Suth W R 366 (366); *Greesh Chunder* v. *Gour Mohun*, (1867) 7 Suth W R 49 (49); *Tarucknath Roy* v. *Tuboorunnissa*, (1867) 7 Suth W R 39; *Anund* v. *Mohesh*, (1864) 1 Suth W R 229 (230); *Burroda Sundari* v. *Nobogopal*, 1864 Suth W R (Gap) 294 (295); *Ram Lal Mookerjee* v. *Musst Tara Soondaree Debia*, 1864 Suth W R (Gap) 3.

(4) *Gopal Misser* v. *Partap Mandal*, 1924 Pat 200 (203): 4 Pat L Tim 652: 72 Ind Cas 643; *Official Assignee* v. *Charles Joseph Smith*, (1920) 56 Ind Cas 262 (266): 1920 Pat 161: 5 Pat L Jour 328: 1 Pat L Tim 484; *Balku Bhagat* v. *Aghori Mandal*, (1917) 38 Ind Cas 641 (642) Pat.

(5) *Nga Tin* v. *Nga Saw*, (1915) 29 Ind Cas 610 (611): (1915) 11 U B R 58.

(6) *Bhuban Mohan Ghose* v. *Co-operative Hindustan Bank, Ltd*, 1925 Cal 973 (977): 29 Cal W N 784: 88 Ind Cas 866; *Abdul Ghani* v. *Muhammad Fasih*, (1906) 28 All 95 (97, 98): 2 All L J 667: 1905 All W N 200.

(7) *Abdul Ghani* v. *Abdul Muhammad*, (1906) 28 All 95 (97, 98): 2 All L J 667: 1905 All W N 200.

(8) *Balgobind* v. *Ram Sarup*, (1914) 26 Ind Cas 83 (83): 1 All L J 892: 36 All 505.

(9) *Ponnusami Asari* v. *Palaniandi*, (1920) 56 Ind Cas 612 (613): 11 Mad L W 602: 27 Mad L Tim 266; *Munisami* v. *Abbu*, (1915) 27 Ind Cas 323 (325): 1915 Mad W N 45: 27 Mad L Jour 740: 38 Mad 705; *Ramchand* v. *Rikhabadas*, (1910) 6 Ind Cas 430 (431): 6 Nag L R 50; *Kadari Bhavanlu* v. *Kokanada Narayanasami*, (1909) 11 Ind Cas 1072 (1072): 6 Mad L Tim 324; *Krishna Ayyangar* v. *Appanna Ayyangar*, (1906) 17 Mad L Jour 62 (63); *Kulaikada Pillai* v. *Visvanatha Pillai*, (1905) 28 Mad 229 (235): 15 Mad L Jour 212; *Timmayya Made* v. *Lakshmana Bakta*, (1884) 7 Mad 215 (219): 8 Ind Jur 78.

(10) *Sant Ram* v. *Kedar Nath*, (1920) 56 Ind

O.41, R.22, Notes 14—15.

others following the Madras view.[11]

15. **Omission to file cross-objections.**—A party in whose favour a decree has been passed has a substantive right of a valuable kind which should not be lightly interfered with.[1] Hence, as an ordinary rule, in the absence of a cross appeal or cross-objections by a respondent, the appellate Court has no power to disturb the decree of the lower Court as far as it is in the appellant's favour[2] and cannot grant any relief to the respondent except in so far as such relief is incidental to the relief granted to the appellant.[3] This rule, however, is only a general rule and the power of the appellate Court to pass any order or decree that may be necessary in the interests of justice is now expressly saved by O. 41, R. 33[4] and was recognised by the following decisions[5] under the former Code. The general rule mentioned above applies also

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Cas 469 (474): 2 Lah L Jour 747; *Husaina* v. *Sahib Nur,* (1910) 7 Ind Cas 505 (526): 86 Pun W R 1910: 213 Pun L R 1910; *Sher Singh* v. *Kabula Singh,* 1887 Pun Re No 7; *Ram Ratan Haralal* v. *Hiralal,* (1901) 14 C P L R 46 (48); *Asaram Sukal* v. *Ganapathi Singh and Balakrishna,* (1896) 9 C P L R 62 (64); *Qara Mahomed Shaban* v. *Bazar Ara Begum,* 1923 Oudh 108 (109): 25 Oudh Cas 280: 70 Ind Cas 79; *Sheikh Mahomed Muzaffar Ali* v. *Bhagwati Prasad Singh,* 1921 Oudh 176 (185): 8 Oudh L J 356: 66 Ind Cas 642; *Saiyid Muhammad* v. *Jawad Hussain,* (1919) 53 Ind Cas 659 (660): 6 Oudh L J 495; *Sajjad Gasan* v. *Bakar Ali,* (1908) 11 Oudh Cas 93 (94).

[11] *Chhaju* v. *Qutab Din,* 1928 Lah 39 (40): 69 Ind Cas 830: 5 Lah L Jour 92; *Ramchand* v. *Rikhabdass,* (1910) 6 Ind Cas 430 (431): 6 Nag L R 50; *Jagannath* v. *Hanuman Singh,* (1919) 54 Ind Cas 332 (333): 6 Oudh L J 544: 2 U P L R (Oudh) 27.

Note 15.

[1] *Chockalingam Chetty* v. *Sethai Ache,* 1927 P C 252 (255): 27 Mad L W 1: 1928 Mad W N 20: 4 Oudh W N 1231: 54 Mad L Jour 88: 47 Cal L Jour 136: 32 Cal W N 281: 30 Bom L R 220: 107 Ind Cas 237: 6 Rang 29: 26 All L J 371 P C.

[2] *Appee* v. *Heera,* (1870) 2 N W P H C R 44; *Hem Chunder* v. *Ahmed Reza,* 1863 Marsh 332; *Maung So Min* v. *Maung Taik,* 1897-1901 U B R, Vol II, 306; *Gauri Mal* v. *Nidha Mal,* 1888 Pun Re No 127; *Guman Singh* v. *Bhujhawan Singh,* 1881 All W N 88 (89); *Durga Prasad* v. *Khairati,* (1875-78) 1 All 545 (547): 2 Ind Jur 681; *Cheda Lal* v. *Badullah,* (1889) 11 All 35 (38): 1888 All W N 284: 13 Ind Jur 190; *Nyan Chandra* v. *Narayan,* (1880) 4 Bom 298 (294); *Ram Manohar Prasad* v. *Mahomed Alam,* (1920) 57 Ind Cas 555 (556): 23 Oudh Cas 110; *Shailesh* v. *Bechai,* 1925 Cal 94 (95): 40 Cal L Jour 67: 84 Ind Cas 124; *Padam Nath* v. *Kanshi Ram,* 1921 Lah 318 (319); *Mahomed Ali* v. *Parmanand,* (1918) 45 Ind Cas 232 (233, 234): 48 Pun W R 1918: 125 Pun L R 1918; *Gopal Chandra Das* v. *Nadir Chandra Das,* (1918) 46 Ind Cas 142 (144): 22 Cal W N 526; *Nobin Chandra Barua* v. *Chandra Madhab Barua,* (1916) 36 Ind Cas 1 (2): 20 Mad L Tim 430: 21 Cal W N 97: 14 All L J 1199: 18 Bom L R 1022: 31 Mad L Jour 886: 24 Cal L Jour 509: (1916) 2 Mad W N 565: 44 Cal 1: 5 Mad L W 452: 1916 P C 148 P C; *Muhammad Ismail* v. *Gauri Prasad,* (1916) 34 Ind Cas 916 (918): 24 Pun Re 1916; *Abjal* v. *Intu,* (1916) 32 Ind Cas 494 (495): 22 Cal L Jour 394: 20 Cal W N 542; *Maung Chit Pu* v. *Maung Pyaung,* (1917) 39 Ind Cas 380 (381): (1916) 2 U B R 144: 11 Bur L Tim 19; *Chidambara Mudaliar* v. *Krishnaswami Pillai,* (1915) 28 Ind Cas 221 (228): 28 Mad L Jour 285: 2 Mad L W 241: 39 Mad 365; *Rakhmabai* v. *Dhanaraj,* 1921 Nag 102 (103): 64 Ind Cas 311; *Baldeo Singh* v. *Keola,* 1899 All W N 125 (125); *Sooonduree* v. *Gobind Monee,* (1875) 24 Suth W R 179 (181); *Rangam Lal* v. *Jhandu,* (1912) 34 All 32: 8 All L J 1111: 11 Ind Cas 640.

[3] *Seth Bindrabandas* v. *Moti Lal,* (1907) 3 Nag L R 85 (89) [*Held,* in this case, the relief claimed by the respondent was not incidental to the relief granted to the appellant and hence could not be granted]; *Ram Dika* v. *Mohkam,* 1892 Pun Re No 46; *Lohre* v. *Sita,* (1908) 30 All 48 (49): 1908 All W N 4: 4 All L J 772: 3 Mad L Tim 176; *Kulai Kada* v. *Viswanatha,* (1905) 28 Mad 229 (232): 15 Mad L Jour 212; *Casper* v. *Kishori Lal,* (1896) 23 Cal 922 (929): 1 Cal W N 12: 7 Sar 81 P C; *Soma Balla Chariar* v. *Thiruvenkatachariar,* (1912) 15 Ind Cas 409 (412) Mad [One respondent filing objections—Basis of claim common to all respondents—Claim allowed as to all]. *Section 348 of the Code of 1859 did not expressly require the respondent to file any written objections to the decree if he meant to attack the same in the appeal of the opposite party. But the practice under that Code also was to insist on written objections being filed before the hearing.* See *the following cases:*—*Hoolas Kooeree* v. *Safeehun,* (1867) 8 Suth W R 379 (380) [Application to file cross-appeal rejected because written memorandum of its grounds had not been filed in accordance with the Court's rule of practice]. See also *Ramjee Das* v. *Choohur,* 1870 Pun Re No 78; In the matter of the petition of *Madhobee Dossee,* (1866) 6 Suth W R Mis 102 (102): Benv L R Sup Vol 585 [No objection to respondent filing notice with the Registrar]. But see *Mudhoo Mokee Dabee* v. *Gunga Govind Mundle,* 1864 Suth W R (Gap) 299 (300) [Written notice not necessary].

[4] *Kidar* v. *Ganesh,* (1917) 42 Ind Cas 411 (412): 4 Oudh L J 532; *Balram* v. *Baldeo,* (1917) 42 Ind Cas 443 (446): 168 Pun W R 1917; *Nagalla Kotayya* v. *Nagalla Mallayya,* (1910) 8 Ind Cas 337 (338): 1910 Mad W N 719: 9 Mad L Tim 39. See also *Mahomed Hasan* v. *Lauti Ram,* 1927 All 453 (454): 49 All 224: 97 Ind Cas 65. See also *Mahomed Hasan* v. *Lauti Ram,* 1926 Jour 162 (1).

[5] *Soiru Padmanabh Rangappa* v. *Narayana Rao bin Vithalrao,* (1894) 18 Bom 520 (521, 522) [*A* v. *B* and *C*—Suit decreed against *B*, dismissed against *C*—Appeal by *B* against *A* and *C*—Appellate Court can vary decree both against *B* and *C* making each liable to extent of half]; *Upendra Lal Mukerjee* v. *Girindranath Mukerjee,* (1898) 25 Cal 565 (568): 2 Cal W N 425 [Suit by *A* for contribution against *B* and *C*—Suit dismissed against *B* and decreed against *C*—*C* appealing against *A*—*A* not appealing against *B*—Appellate Court may add *B* as respondent

O.41, R.22, Notes 15—17.

in cases where the decree of the lower Court is such that a remand by the appellate Court is necessary.[5-a] It follows from what has been said above that the appellate Court cannot as a general rule dispose of the appeal on a point not raised by either party.[6] (*See* however O. 41, R. 2). Where, however, the case is such that the respondent could not have filed an appeal or cross-objections, the appellate Court can grant him the necessary relief without any cross-objections. Thus where the suit in the first Court was for either of two reliefs in the alternative and the first Court passed a decree granting him one of the reliefs, the plaintiff having got what he asked for, can neither appeal nor file cross-objections. But if on the appeal of the opposite party, the appellate Court considers that the plaintiff was not entitled to the relief granted by the decree it may, while setting aside the decree of the lower Court, pass a decree in favour of the plaintiff granting him the other relief.[7] Similarly, where the trial Court has not dealt with the respondent's claim to set off at all, the absence of cross-objections by the respondent is no bar to the entertainment of the point in appeal.[8]

16. **Grounds not raised in cross-objections not to be raised at the hearing**.—The respondent cannot urge at the hearing of the appeal, grounds not set forth in the memorandum of objections, except with the permission of the Court.[1] (*See* O. 41, R. 2.)

17. **Effect of cross-objections of withdrawal of appeal or its dismissal for default**.—S. 561 of the former Code provided that a respondent may, *upon the hearing*, take any objection to the decree which he could have taken by way of appeal, if he had filed cross-objections. Hence, it was held that if the appeal was withdrawn before the hearing, the respondent could not prosecute his cross-objections[1] but that once the hearing had commenced the appellant could not withdraw the appeal so as to prevent the respondent from urging his cross-objections.[2] Similarly it was held that if the appeal was

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and pass decree against him, setting aside decree against C]; *Rup Jaun Bibi* v. *Abdul Kadir Bhuyan*, (1904) 31 Cal 643 (645): 8 Cal W N 496 F B. See also *Gungaram* v. *Junmajoy*, (1878) 1 Cal L Rep 144 (146).

(5-a) *Agilul Hossain* v. *Dino Nath Dutt*, (1907) 34 Cal 996 (998); *Rangam Lal* v. *Jandhu*, (1911) 11 Ind Cas 640 (641): 8 All L J 1111: 34 All 82 F B. But compare *Bikramajit* v. *Husaini Begam*, (1881) 3 All 643 (646) [In this case *Stuart C J* took the opposite view but *Oldfield, J* took the view stated above].

(6) *Sir Prodyat Kumar* v. *Bal Govinda*, 1925 Cal 518 (520): 41 Cal L Jour 31: 86 Ind Cas 6; *Ritoraj* v. *Cojagur*, (1871) 15 Suth W R 227 (227).

(7) *Kuppuswami Chetty* v. *Samudra Vijia Nainar*, (1913) 18 Mad L Jour 586 (587): 4 Mad L Tim 266.

(8) *The Ahmedabad etc Spinning and Weaving Co* v. *Lakshmi Shankar*, (1904) 30 Bom 173 (189): 7 Bom L R 246.

Note 16.

(1) *Nadirshaw Hormash* v. *Pirojshaw Ratanji Ratnagar*, (1913) 19 Ind Cas 98 (113): 15 Bom L R 130.

Note 17.

(1) *Jaffar Hussain* v. *Ranjit Singh*, (1895) 17 All 518 (519): 1895 All W N 115; *Thakur Rai* v. *Gulzar Ram*, 1893 All W N 68 (69); *Maktab Beg* v. *Hassan Ali*, (1886) 8 All 551 (552): 1886 All W N 220; *Bahadoor Singh* v. *Bhagwan Das*, (1866) 1 Agra 23; *Surbhai Dayalji* v. *Raghunathji*, (1873) 10 Bom H C R 397; *Poresh Narain* v. *Watson*, (1875) 23 Suth W R 229 (229); *Shamacharn* v. *Radha Kristo*, (1870) 14 Suth W R 210 (210); *Ram Pershad* v. *Bharosa Kunwar*, (1868) 9 Suth W R 328 (328); *Raman Nair* v. *Narantha Kunhambu Nair*, (1909) 4 Ind Cas 1076 (1077): 6 Mad L Tim 346. *The following cases dealing with the question of whether in such cases the Court might treat the cross-objections as an appeal and dispose of it as such are only of academic interest now in view of the clear provisions of sub-R. (4) of R 22:—* *Chudasama Mahabhai* v. *Mahant Iswargar*, (1892) 16 Bom 249 (253); *Har Goivndas* v. *Jadavahoo*, (1899) 23 Bom 692 (695): 1 Bom L R 768; *Gour Hari* v. *Prannath*, (1883) 9 Cal 738 (740): 12 Cal L Rep 395. See also *Corporation of Calcutta* v. *Anderson*, (1884) 10 Cal 445 (479, 480).

(2) *Kalyan Singh* v. *Rahmu*, (1901) 23 All 130 (133); *Dhondi Jagannath* v. *The Collector of Salt Revenue and the Secretary of State for India*, (1885) 9 Bom 28 (30); *Gokalchand* v. *Pala Mal*, 1906 Pun L R 24; *Venkataramanayya* v. *Kuppi*, (1866-67) 3 Mad H C R 302 (303).

O.41, R.22, Note 17. dismissed for default the cross-objections could not be heard.[3] Under the present rule the words "upon the hearing" in sub-R. (1) have been omitted and sub-R. (4) has been added, making it clear that the withdrawal of an appeal[4] or the dismissal of an appeal for default[5] does not affect the hearing of the respondent on his cross-objections.

Dismissal of appeal as time barred.—Under the former Code it was held by the Allahabad High Court that the entertainment of the cross-objections was contingent and dependent upon the hearing of the appeal and when the appeal was dismissed as being time-barred, the cross-objections could not be heard.[6] The same view has been held under the present Code also by the High Courts of Lahore[7] and Madras[8] notwithstanding the omission in sub-R. (1) of the word "upon the hearing" which occurred in the former section.

Dismissal of appeal for failure to pay Court-fees—Effect.—Under the former Code, where an appeal was dismissed for failure to pay Court-fees, it was held that there being no "hearing" of the appeal, the cross-objections could not be heard.[9] Even under the present Code it has been held by the Lahore[10] and Rangoon[11] High Courts and the Nagpur Judicial Commissioner's Court[12] that R. 22 (4) should be interpreted strictly and that, on the dismissal of an appeal without a hearing on account of the appellant's failure to pay the requisite Court-fees, the cross-objection cannot be heard. But it has been held by the High Court of Madras[13] that the dismissal of an appeal for failure to pay Court-fees is only a *dismissal for default* and does not affect the maintainability of the cross-objections.

Dismissal of appeal for failure to furnish security for costs.—It has been held by the Patna High Court that the dismissal of an appeal for failure

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(3) *Buroda Kant* v. *Pearee Mohun,* (1875) 23 Suth W R 57; *Muthu Payal* v. *Nagalingam,* (1910) 6 Ind Cas 309: 1910 Mad W N 144: 8 Mad L Tim 53: 20 Mad L Jour 878.

(4) *Bhimasena Rao* v. *Venugopal,* 1925 Mad 725 (725): 48 Mad L Jour 384: 21 Mad L W 672: 1925 Mad W N 190: 88 Ind Cas 443: 48 Mad 681; *Murugappa Ohettiar* v. *Ponnuswami Pillai,* 1921 Mad 405 (405, 406): 44 Mad 828: 41 Mad L Jour 304: 13 Mad L W 705: 1921 Mad W N 438: 62 Ind Cas 757; *Venkataperumal Pillai* v. *Marapudi Venkataswami Naidu,* (1920) 54 Ind Cas 506 (506): 10 Mad L W 605; *Venkatasubbamma* v. *Ramanadhayya,* (1932) 139 Ind Cas 457 (458): 1932 Mad 722: 1932 Mad W N 949: 36 Mad L W 604: 55 Mad 975: 63 Mad L Jour 845. But if the appeal itself is not validly filed then the memorandum of objection should not be heard.

(5) *Murugappa Ohettiar* v. *Ponnuswami Pillai,* 1921 Mad 405 (405, 406): 44 Mad 828: 41 Mad L Jour 304: 13 Mad L W 705: 1921 Mad W N 438: 62 Ind Cas 757; *Raman* v. *Raman,* (1911) 9 Ind Cas 572: 9 Mad L Tim 217. But contra *Subadra Kuar* v. *Bireshwar Parsad,* (1914) 25 Ind Cas 916 (917): 1 Oudh L J 485 [This case is bad law as it is opposed to the plain language of the rule].

(6) *Ramjiwan* v. *Ohand Mal,* (1888) 10 All 587 (601): 1888 All W N 258.

(7) *Jai Gopal Singh* v. *Muna Lal,* 1924 Lah 43 (43): 4 Lah 140: 5 Lah L Jour 345: 73 Ind Cas 655.

(8) *Alagappa Ohettiar* v. *Ohokkalingam Ohetty,* (1918) 46 Ind Cas 208 (211, 212): 41 Mad 904: 35 Mad L Jour 236: 8 Mad L W 240: 24 Mad L Tim 187: 1918 Mad W N 688 F B; *Kanirkamanna Imath Narayana* v. *Mayosad Kanirkamana Ismath Prasad,* (1910) 8 Ind Cas 140 (141): 8 Mad L Tim 447. Contra *Devi Bhashyam* v. *Padinti Venkataramania,* (1916) 32 Ind Cas 579 (579): 3 Mad L W 109: 19 Mad L Tim 86 [Per Abdul Rahim, J (Ayling, J dissenting)]. See aso *Venkadu* v. *Receiver of Nidadavole,* (1915) 30 Ind Cas 832 (832): 1915 Mad W N 792.

(9) *Shah Alam* v. *Mahmud,* 1889 Pun Re No 2.

(10) *Lajpati Rai* v. *Lachman Das,* (1921) 59 Ind Cas 795 (795): 46 Pun W R 1921: 149 Pun L R 1920; *Dunichand* v. *Azim Khan,* (1911) 10 Ind Cas 207 (209): 131 Pun L R 1911: 180 Pun W R 1911: 11 Pun Re 1912.

(11) *U Shin* v. *Maung Tha Gywe,* 1931 Rang 38 (39): 8 Rang 538: 129 Ind Cas 500.

(12) *Ajmeer Singh* v. *Ram Singh,* 1932 Nag 41 (41, 42): 28 Nag L R 25: 137 Ind Cas 156.

(13) *Ayilu Reddi* v. *Venkata Reddi,* 1931 Mad 133 (134): 1930 Mad W N 1286: 130 Ind Cas 657.

to furnish security for costs is a dismissal for default and the respondent is entitled to have his cross-objections heard and disposed of on the merits notwithstanding such dismissal.[14] But the Oudh Court has taken a contrary view.[15]

Dismissal of appeal after hearing does not affect cross-objections.—The respondent is entitled to have his cross-objections heard and disposed of on the merits notwithstanding that the appeal is rejected on the ground that no appeal lies, because in such a case the appeal does not fail for an extraneous reason but fails *after hearing*.[16] Similarly where an appeal is dismissed for failure to join the necessary parties, after hearing the appeal on the question of non-joinder, the cross-objections may be heard.[17]

18. **Effect, on cross-objections, of abatement of appeal**.—Cross-objections cannot be heard when the appeal has *abated*.[1] The reason is that there is no dismissal for default or withdrawal of the appeal in such a case.

19. **Limitation for cross-objections**.—Cross-objections must be filed within one month from the date of the service of notice of the date fixed for hearing the appeal.[1] Otherwise they cannot be heard.[2] The appellate Court has no power to hear the appeal before the expiry of this period of one month so as to deprive the respondent of his right of filing cross-objections.[3] Where a respondent in a High Court appeal was merely served with a notice of the appeal in the usual form fixing a period of 25 days for *appearance* but was not served with any notice fixing the date of hearing, a memorandum of cross-objections though filed long after one month from the receipt of the former notice, is not out of time.[4] A transferee from a respondent is bound by the same period of limitation as would have applied to his transferor and cannot file any cross-objections after the expiry of that period.[5] It has been held that the notice referred to in the rule means only the notice of the *original*

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(14) *Sheo Baksh Singh* v. *Takur Dayal*, (1919) 50 Ind Cas 729 (730): 4 Pat L Jour 164.

(15) *Qara Mahomed Shahan* v. *Bazar Ara Begum*, 1928 Oudh 108 (108, 109): 25 Oudh Cas 280: 70 Ind Cas 79.

(16) *Shankar Lal* v. *Sarup Lal*, (1912) 13 Ind Cas 19 (19): 8 All L J 1297: 34 All 140; *Kamat* v. *Kamat*, (1884) 8 Bom 368 (370): 8 Ind Jur 687; *Nanak Baksh* v. *Wazir Singh*, (1909) 4 Ind Cas 625 (626): 67 Pun W R 1909. But compare *Balwant Singh* v. *Ram Das*, 1908 Pun Re No 28: 41 Pun W R 1908: 141 Pun L R 1908.

(17) *Kombi Achen* v. *Kochunni*, (1898) 21 Mad 352 (358).

Note 18.

(1) *Mulchand Ganga Bishen* v. *Downie & Co, Ltd*, 1928 Lah 596 (597): 110 Ind Cas 910 [Except for cases provided in sub-R (4) cross-objections share the fate of appeal]; *Karm Chand* v. *Lehna*, (1912) 15 Ind Cas 708 (709): 204 Pun L R 1912: 257 Pun W R 1912: 1 Pun L R 1912 Sup; *Murugappa Chettiar* v. *Ponnuswami Pillai*, 1921 Mad 405 (405, 406): 44 Mad 828: 41 Mad L Jour 304: 13 Mad L W 705: 1921 Mad W N 438: 62 Ind Cas 757.

Note 19.

(1) *Thakoor Das* v. *Gopee*, (1871) 15 Suth W R 18 [Under the Code of 1859, there was no period of limitation]; *Dori Lal* v. *Narain Das*, 1883 All W N 237 (237) [Under the Code of 1877, and under that of 1882 prior to amendment in 1888, the cross-objections were to be filed seven days prior to the date of the hearing—*See* the following cases]; *Sundaram* v. *Aunangar*, (1890) 13 Mad 492 (494) [S 561 as amended by Act VII of 1888 allows one month].

(2) *Lekhraj* v. *Hamid Khan*, 1894 All W N 2 (2). See *Dinkar Parsharam* v. *Vinayak Mokeshwar*, (1887) 11 Bom 698 (700) [Purpose of the rule is to give timely intimation of the proposed objections to the appellant].

(3) *Sundaram* v. *Aunangar*, (1890) 13 Mad 492 (493); *Kidar Nath* v. *Hira Lal*, (1902) 5 Oudh Cas 235 (237); *Shankar Lal* v. *Bankey Behari Singh*, (1917) 38 Ind Cas 522 (523): 1 Pat L W 680: 1917 Pat H C C 103; *Chinnama Shetti* v. *Krishnayya Chetty*, (1915) 30 Ind Cas 832 (832): 29 Mad L Jour 182 [That the month is February does not affect the calculation].

(4) *Ramayya* v. *Nagaratnamma*, 1926 Mad 283 (284): 50 Mad L Jour 112: 22 Mad L W 792.

(5) *Parsotam Ram* v. *Mangal Ram*, 1932 All 45 (47): 1931 All L J 606: 135 Ind Cas 254.

O.41, R.22, Notes 19—21.

day fixed, and the fact that a subsequent notice is given of a postponed date does not give the respondent a fresh opportunity of filing a memorandum of cross-objections.[6]

When the period of one month expires on a holiday the cross-objections may be filed on the re-opening day.[7] (*See* S. 4 of the Limitation Act). The appellate Court may, in its discretion, extend the period within which the cross-objections are to be filed,[8] and this may be done even after the objections have been filed.[9] The extension of time may also be implied from the circumstances of the case.[10]

Sub-R. (1) of this rule prescribes the period of limitation only for filing *cross-objections.* Limitation for filing a cross-appeal is governed by the Limitation Act.[11]

Cross-objections in forma pauperis.—Art. 170 of the Limitation Act does not apply to cross-objections in *forma pauperis* and such cross-objections may be filed within the period indicated in R. 22.[12]

20. **Appeal filed out of time may be treated as cross-objections.**—An appeal filed beyond the period of limitation may be treated as cross-objections under this rule.[1]

21. **Court-fee on cross-objections.**—Under S. 16 of the Court Fees Act the Court fee payable on a memorandum of cross-objections was the difference between the fee paid on the memorandum of appeal and that payable on it if it included the subject-matter of the cross-objections.[1] A memorandum of cross-objections is now chargeable with Court-fee under Art. 1. Sch. I of the Court Fees Act.[2] That section has now been repealed and even where the

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(6) *Jagannath* v. *Ramkishen,* (1894) 7 C P L R 85 (87). See also *Deo Kishen* v. *Maheshar Sahai,* (1882) 4 All 248 (249): 1882 All W N 82 F B [Case under Code of 1882, prior to amendment made in 1888 by which the present rule as to limitation was introduced]. But see *Dalichand* v. *Jeyram,* 1887 Bom P J 177 [Case prior to 1888 when the section required cross-objections to be filed seven clear days before the day fixed for hearing]; *Dinkar Parshoram* v. *Vinayak Moreshwar,* (1887) 11 Bom 698 (700) [Day fixed for hearing includes day to which hearing may be adjourned].

(7) *Baghelin* v. *Mathura Prasad,* (1882) 4 All 430 (434): 1882 All W N 71. But see *Dhani Ram* v. *Punnia,* 1883 All W N 229 (229).

(8) *Kulai Kadar Pillai* v. *Viswanatha Pillai,* (1905) 28 Mad 229 (235): 15 Mad L Jour 212; *Kuksa* v. *Dajiba Bhau,* 1922 Nag 213 (216): 5 Nag L J 192: 66 Ind Cas 217; *Sulleman* v. *Joosub,* (1890) 14 Bom 111 (112) [Where respondent in order to save costs delayed instructing counsel within the prescribed period to draw up objections to the decree until they had received the paper-books from the appellants, the Court declined to extend time]. *The following decisions prior to* 1888 *have been superseded. Amendments made in* 1888 *and repeated in the present Code:*—*Masiti Begam* v. *Wilayati Begam,* (1882) 2 All W N 213 (213); *Kally Prosunno Biswas* v. *Mungala Dassee,* (1883) 9 Cal 631 (632); *Degambar Mozumdar* v. *Kallynath Roy,* (1881) 7 Cal 654 (659): 9 Cal L Rep 265.

(9) *Vellatappa Pillai* v. *Maung Po Hmyin,* (1917) 39 Ind Cas 125 (125) Rang.

(10) *Hardeo Prasad* v. *Ali Hassan,* (1902) 22 All W N 74 (74).

(11) In the matter of the petition of *Mirza Himmat Bahadur,* (1866) 5 Suth W R 91 (93): Beng L R Sup Vol 429.

(12) *Ohander Kala Kuar* v. *Dulhin Raja Kuar,* 1929 Pat 31 (32): 7 Pat 827: 10 Pat L Tim 387: 119 Ind Cas 900.

Note 20.

(1) *Bhagat Ram* v. *Raghbar Dial,* 1925 Lah 57 (57): 79 Ind Cas 182; *Bawa Singh* v. *Thakur Singh,* 1922 Lah 423 (424): 67 Ind Cas 478.

Note 21.

(1) *Lakhan* v. *Ram Kishen,* (1918) 43 Ind Cas 179 (179): 15 All L J 886: 40 All 93; *Secretary of State for India* v. *Digambar Nanda,* (1918) 45 Ind Cas 939 (941): 27 Cal L Jour 443: 46 Cal 160 [No excuse merely because appellant has paid more than adequate Court-fee on the appeal]; *Saideo Narain* v. *Ramayan Tewari,* (1919) 52 Ind Cas 1002 (1002) Pat [Where object of cross-objection is to have a declaration in respect to a mortgage set aside proper value of cross-objection for Court-fees is the value of the mortgage].

(2) See *Mahomed Hussain* v. *Syed Jahan Begam,* (1899) 2 Oudh Cas 87 (90); *Bissonath* v. *Madhubmonee,* (1871) 15 Suth W R 511 (512).

appeal wherein the cross-objections are filed, falls within the scope of Sch. II, Art. 17, it is only Art. 1, Sch. I that applies to the cross-objections inasmuch as Sch. II, Art. 17 refers only to *suits* and *memorandum of appeals.* In such cases, the valuation placed by the respondent on his cross-objections must be accepted if not unreasonable.[3]

Where the decree is entirely in respondent's favour and he files objections against the findings but supporting the decree, the objections are not cross-objections and are not liable to stamp duty under Sch. I, Art. 1.[4]

Cross-objections as to costs.—In *Kamal Kumare* v. *Rangpur Bank*[5] the Calcutta High Court has held that a memorandum of cross-objections as to costs alone requires to be stamped only as a petition under Sch. 2, Art. 1 and not *ad valorem* under Art. 1, Sch. I, the reason given being that costs do not form the subject-matter of dispute within the meaning of Art. 1 of Sch. I. The Patna High Court has, on the other hand, held that even if the cross-objections are as to costs only an *ad valorem* Court-fee should be paid.[6]

Under the repealed S. 16 of the Court Fees Act, it was enough if the Court-fee on cross-objections was paid at any time *before the hearing.*[7] But now, S. 6 of the Court Fees Act applies to the case and the Court fees should be paid at the time of *filing the cross-objections.*

It has been held by the High Court of Allahabad that S. 12 of the Court Fees Act does not apply to cross-objections.[8]

22. Adding party for purposes of cross-objection.—It has been seen in the Notes under O. 41, R. 20 that since the Privy Council decision in *Chokkalingam* v. *Seethai,* 1927 P.C. 252, the mere fact that the presence of a party before the Court is necessary for the complete disposal of the appeal or cross-objections is not enough to make him "interested" in the result of the appeal within the meaning of R. 20 unless he stands to be prejudiced by the determination of the appeal as framed, behind his back. Hence, a party cannot be added as a respondent to an appeal under R. 20 merely for the purpose of filing cross-objections against him.[1] As to the Court's power

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(3) *Sri Rajeo Lochan* v. *Mahanat Ram Manohar,* 1923 Oudh 44 (44): 25 Oudh Cas 275: 70 Ind Cas 286; *Daroga Raut* v. *Parma Kuer,* (1918) 45 Ind Cas 568 (568): 3 Pat L J 197: 4 Pat L W 368.

(4) *Bhajan Lal* v. *Chahat Rai,* (1917) 39 Ind Cas 176 (176): 15 All L J 825; *Ram Prasad Kalwar* v. *Mt Ajanasia,* 1922 All 280 (280): 44 All 577: 68 Ind Cas 861; *Sahdeo Narain Deo* v. *Kusum Kumari,* 1922 Pat 483 (484): 1 Pat 258.

(5) 1921 Cal 55 (58): 25 Cal W N 934. See also *Hassan Bano* v. *Nizamuddin,* (1893) 13 All W N 55 (56) [Decision under the repealed S 16 of the Court Fees Act].

(6) *Kamakhya Narain Singh* v. *Ramraj Singh,* 1929 Pat 286 (287): 10 Pat L Tim 224: 8 Pat 543: 117 Ind Cas 166.

(7) See *Kumaraswami Pillai* v. *Udayarnadan,* (1909) 2 Ind Cas 345 (346): 32 Mad 170: 18 Mad L Jour 490; *Hassan Bano* v. *Nizamuddin,* (1893) 13 All W N 55 (56); *Reference under Court Fees Act,* (1901) 25 Mad 24 (26). See *Hoolas Kooeree* v. *Sufeehun,* (1867) 8 Suth W R 379 (380) [Case before the Court Fees Act]; *Jagabandhu* v. *Chowdhry Shama Charan,* (1905) 2 Cal L Jour 68 (Note) [But in the case of a cross *appeal* Court-fee was to be paid at the time of filing].

(8) *Hassan Bano* v. *Nizamuddin,* 1893 All W N 55 (55).

Note 22.

(1) *Rajendra Nath Chatterjee* v. *Mokeshata Debi,* 1926 Cal 533 (535): 91 Ind Cas 649: 53 Cal 270; *Venkata Narasimha Rao* v. *Krishnabayamma,* 1929 Mad 479 (480): 120 Ind Cas 369: 1929 Mad W N 381. See also *Babaji Dhondshet* v. *Collector of Salt and Revenue,* (1887) 11 Bom 596 (598). *In so far as the following decisions lay down the contrary proposition they should be regarded as obsolete:*—*Upendra Lal Mukerjee* v. *Girindranath Mukherjee,* (1898) 25 Cal 565 (568): 2 Cal W N 425; *Anand Chunder* v. *Mohesh Chunder,* (1864) 1

O.41, R.22, Notes 22—23.

to add parties to an appeal apart from the provisions of R. 20 *see* Notes under R. 20. Assuming such power exists the Court will not direct the addition of a party who is an unnecessary party for the appeal merely for the purpose of enabling a respondent to file cross-objections against him.[2]

23. **Second appeal.**—A decree of an appellate Court disallowing the cross-objections of a respondent is a "decree passed in appeal" within the meaning of S. 100 and a second appeal lies therefrom.[1] But where the cross-objections are rejected in *limine*[2] as for instance, on the ground of the respondent's failure to pay the deficit Court-fees within the time ordered,[3] the order does not amount to a decree and hence is not subject to a second appeal.

O.41, R.23.

Remand of case by Appellate Court.

R. **23.** [S. 562.] *Where* the Court from whose decree an appeal is *preferred* has disposed of the suit[5] upon a preliminary point[3] *and* the decree is reversed[7] in appeal, the Appellate Court may, if it thinks fit, by order remand the case,[8] and may further direct what issue or issues shall be tried in *the* case[9] so remanded, *and shall send* a copy of *its judgment and* order to the Court *from* whose decree the appeal is *preferred*, with directions to re-admit the suit under its original number in the register *of civil suits*, and proceed to determine the suit; *and the evidence (if any)* recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

[1877—S. 562; 1859—S. 351].

Local Amendment.

MADRAS.

Substitute the following for R. 23:—

"23. Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the appellate Court, in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case, the appellate Court may by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

Suth W R 229 (230); *Ponnuswami v. Palaniandi*, (1920) 56 Ind Cas 612 (613, 614): 11 Mad L W 602: 27 Mad L Tim 266; *Reballa Babu Reddi v. Dodla Rami Reddi*, (1915) 31 Ind Cas 978 (979) Mad; *Kuksa v. Dajiba Bhan*, 1922 Nag 213 (215, 216): 5 Nag L J 192: 66 Ind Cas 217.

(2) *Valliammai Achi v. Nataraja Pillai*, (1912) 13 Ind Cas 906 (906): 11 Mad L Tim 157: 1912 Mad W N 198 [Following 18 Ind Cas 653 Cal].

Note 23.

(1) *Ganapati v. Sitharama*, (1887) 10 Mad 292 (295).

(2) *Allah Bakhsh v. Nur Baksh*, (1918) 44 Ind Cas 812 (812): 20 Pun Re 1918.

(3) *Ghasiram v. Jhingwa*, (1908) 4 Nag L R 168 (175).

Synopsis.

1. Legislative changes.
2. Distinction between Rr. 23 and 25.
3. "Preliminary point," meaning of.
4. Where Court decides on all the issues.
5. Entire suit must have been disposed of.
6. Order returning or rejecting plaint whether disposal on preliminary point.
7. Decision of lower Court must be reversed.
8. "The appellate Court may, if it thinks fit, by order remand the case."
9. "And may direct what issue or issues shall be tried in the case."
10. Inherent power of remand.
11. Grounds of remand.
12. Wrong onus of proof.
13. Exclusion of evidence.
14. Basing decision on inadmissible evidence.
15. New plea is not a ground of remand.
16. Remand in cases under special and local laws.
17. Remand in appeal from ex parte decree.
18. Remand in appeal from order refusing to set aside ex parte decree.
19. Remand by consent.
20. Remand in second appeal.
21. Appeal against an order of remand under this rule.
22. Appeal from order of remand under inherent power.
23. Letters Patent Appeal.
24. Privy Council Appeal.
25. Powers of High Court in appeal from order of remand.
26. To what Court remand could be made.
27. Effect of order of remand.
28. Effect of improper order of remand.
29. Matters decided by order of remand, finality of.
30. Jurisdiction after remand depends upon the order of remand.
31. Right of parties after remand. See Notes 28, 30 and 33.
32. Procedure after remand.
33. Refund of Court-fee on remand.
34. Costs.
35. Revision.

Decision on a question of law decided by order of remand—Whether can be re-opened. See Note 29.

Powers and duties of succeeding Judge regarding remanded case. See Note 29, Pt. (2).

Transfer of case after remand. See Note 30, Pt. (2).

1. Legislative changes.—

The words "and the evidence . . . . . remand" at the end of the rule are new.

Before S. 562 was amended by Act VII of 1888, the section only applied where the lower Court had disposed of the suit on a preliminary point "so as to exclude any evidence of fact which appears to the appellate Court essential to the determination of the rights of the parties". The words were omitted by Act VII of 1888, which also substituted the words "to determine the suit on the merits" for the words "investigate the suit on the merits" which occurred originally.

2. Distinction between Rr. 23 and 25.—This rule empowers the appellate Court to remand the case only when the lower Court has disposed of the suit upon a *preliminary point*. If the trial Court decides the suit on the *merits*, it is not open to the appellate Court to order a remand under this rule. It may, however, act under Rr. 24 or 25, *infra*.[1]

The following are the points of distinction between Rr. 23 and 25, *infra*.

(1) Where an order of remand is made under this rule, the *whole case* goes back for decision to the lower Court (except on the

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Order 41, Rule 23—Note 2.

(1) *Nural Gun* v. *Kazamini*, 1923 Cal 323 (324): 66 Ind Cas 922; *Kanchan Modi* v. *Baij Nath*, (1892) 19 Cal 336 (338).

point on which the appellate Court has reversed the finding of the lower Court). Whereas in the case of an order under R. 25, the case is retained on the file of the appellate Court and only *issues are remitted* to the lower Court for findings.[1-a]

(2) An order of remand under this rule is appealable but not an order under R. 25.

(3) An order of remand under this rule is a *final* order which cannot be reconsidered by the Court which passed it except on review: whereas an order under R. 25 is an *interlocutory* order which, it is open to the Court, to reconsider.[2]

3. **"Preliminary point," meaning of.**—A point can be said to be a preliminary point within the meaning of this rule, only where it is such that the decision thereon in a particular way is sufficient to dispose of the whole suit, without the necessity for a decision on the *other* points in the case.[1] The point may be one of fact or of law. Thus a suit will be held to be disposed of on a preliminary point if it is disposed of on any of the following grounds:—

(1) that the suit is barred by *res judicata*.[2]

(2) that the suit is barred by limitation[3] or by any other rule of law.[4]

(3) that the document on which the suit is based is inadmissible in evidence,[5]

(4) that the plaintiff is estopped from proving his case,[6]

[1-a] *Srimati Bhaba Sundari Devi* v. *Aditya Nath Chaudhuri*, 1927 Cal 401 (402): 45 Cal L Jour 194: 102 Ind Cas 884. See also *Nachiappa Chettiar* v. *Sabir Khan*, 1925 Rang 303 (303): 4 Bur L Jour 135: 92 Ind Cas 370 [The word "remand" should be used only when a case is returned for decision].

[2] *Kuar Nageshar Sahai* v. *Kuar Mata Prasad*, 1922 Oudh 236 (248): 9 Oudh L J 235: 25 Oudh Cas 189: 69 Ind Cas 730. *See also Note* 23, *point* 2.

Note 3.

[1] *Salim Sheikh* v. *Nazir Khan*, (1908) 8 Cal L Jour 159 (160, 161); *Rachu Gir* v. *Raghunath Gir*, (1917) 41 Ind Cas 202 (203): 2 Pat L Jour 398: 2 Pat L W 23; *Muhammad Allahdad* v. *Muhammad*, (1888) 10 All 289 (322, 323, 324, 343); *Sheoambar* v. *Lallu*, (1887) 9 All 26 (Note) 30: 1886 All W N 284; *Mata Din* v. *Jamna Das*, (1905) 27 All 691 (694): 1905 All W N 159: 2 All L J 685; *Parma Nand* v. *Thikhu*, (1915) 30 Ind Cas 817 (817): 121 Pun W R 1915: 57 Pun L R 1916; *Abdul Gafar* v. *Muhammad Ziauddin*, 1908 Pun Re No 2: 12 Pun W R 1908: 96 Pun L R 1908 F B; *Ramchandra* v. *Hazi Kassim*, (1893) 16 Mad 207 (210); *Malayath Veethil Raman* v. *Krishnan Nambudripad*, 1922 Mad 505 (508): 45 Mad 900: 16 Mad L W 425: 43 Mad L Jour 354: 1922 Mad W N 589: 31 Mad L Tim 208: 69 Ind Cas 828 F B; *Alagammal* v. *Sadasiva*, 1930 Mad 1017 (1018): 60 Mad L Jour 72: 1930 Mad W N 1021: 32 Mad L W 843: 129 Ind Cas 47; *Kakamma* v. *Chandrasekara*, 1929 Mad 205 (207): 119 Ind Cas 705; *Devorampoodi Venkamma* v. *Goparju Perraju*, 1928 Mad 991 (991, 992): 1928 Mad W N 164: 112 Ind Cas 1; *Jainul Abideen Markayar* v. *Habibulla Sahib*, 1928 Mad 430 (432): 27 Mad L W 483: 109 Ind Cas 130; *Seenayya* v. *Mangamma*, 1927 Mad 1159 (1160): 99 Ind Cas 974; *Janki* v. *Nandram*, (1889) 11 All 194 (223): 1889 All W N 80: 13 Ind Jur 347 F B; *Kamta* v. *Parbhu Dayal*, (1917) 37 Ind Cas 383 (383): 15 All L J 30: 39 All 165; *Farzand Ali* v. *Ekadashi*, 1923 Oudh 177 (179): 26 Oudh Cas 10: 10 Oudh L J 36: 73 Ind Cas 591.

[2] *Tarakant* v. *Puddomoney*, (1866) 5 Suth W R 63 (66): 10 Moo Ind App 476 P C; *Ramaswami Pillai* v. *Narayanaswami Pillai*, 1925 Mad 483 (484): 48 Mad L Jour 100: 21 Mad L W 318: 1925 Mad W N 82: 86 Ind Cas 540.

[3] *Tarakant* v. *Puddomoney*, (1866) 5 Suth W R 63 (66): 10 Moo Ind App 476 P C; *Baranagore Jute Factory* v. *Rajkumar Rai*, (1909) 1 Ind Cas 785 (787): 13 Cal W N 724; *Musst Kurumoonissa Bibi* v. *Gooroo Pershad Shah*, (1867) 7 Suth W R 331 (331).

[4] *Sabir Khan* v. *Ram Lukhee Chowdhrain*, (1868) 10 Suth W R 438 (439) [Suit under S 230 of Act VIII of 1859—Suit dismissed on a point not arising under the Act—Appellate Court setting aside decree may remand].

[5] *Agar Chand* v. *Balak Rai*, 1887 All W N 21 (21); *Tricambji Dambji & Co* v. *Verji Kanji*, 1923 Bom 142 (145): 24 Bom L R 820: 67 Ind Cas 965; *Thompson* v. *Jehangir Hormasji*, (1866-67) 3 Bom H C R (O C) 66; *Sher Mohammad* v. *Mian Ahmad*, 1927 Lah 592 (593): 103 Ind Cas 298.

[6] *Narayanasami Iyer* v. *Venkatarama Aiyer*, 1926 Mad 808 (808): 50 Mad L Jour 511: 23 Mad L W 749: 95 Ind Cas 264: 1926 Mad W N 315.

(5) that the plaintiff has no cause of action,[7]

(6) that the suit is bad for a defect in the description of the defendant,[8]

(7) that the matter is concluded by a valid award,[9]

(8) that the case raised at the hearing is different from that raised in the plaint,[10]

(9) that the suit has abated.[11]

There is a conflict of opinion, however, as to whether the point should be one not relating to the *merits* of the case. It has been held in one class of cases that a point is not a preliminary point where it relates to the *merits* of the case, although its decision may dispense with the necessity for a decision on the other points in the case.[12] Thus according to this view a suit cannot be said to have been disposed of on a preliminary point in the following cases:—

(1) Where, in a suit for ejectment and damages, the Court finds that the plaintiff has failed to establish the title alleged by him and dismisses the suit.[13]

(2) Where, in a suit for mesne profits, the Court finds that the defendant was not in possession during the period in question and dismisses the suit.[14]

(3) *See also* the undermentioned cases.[15]

According to another class of cases a point may be a preliminary point although it *relates to the merits* of the case. Thus, according to these decisions a preliminary point means some point either collateral to the merits which precluded their determination altogether, or some particular question which,

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(7) *Kanakammal* v. *Rangachariar*, (1897) 20 Mad 25 (27): 6 Mad L Jour 259. See also *Sheoambar Singh* v. *Lallu Singh*, (1887) 9 All 26 (30) (Note) [Point that the suit is a bit of wanton litigation and that there is nothing tangible upon which the claim is based is preliminary point]. See also *Surendranath Maity* v. *Susil Kumar Chakrabarty*, 1931 Cal 604 (606): 35 Cal W N 775: 1931 Cr C 756: 134 Ind Cas 1063: 33 Cr L Jour 38: 59 Cal 68 [Application for prosecution under Criminal Procedure Code, S 476—Court rejecting application without going to the merits on the ground that there was an ulterior motive behind the application—Point was a preliminary point].

(8) *Agent, Bengal Nagpur Railway* v. *Beharilal Dutt*, 1925 Cal 716 (717): 29 Cal W N 614: 52 Cal 783: 90 Ind Cas 426.

(9) *Krishnan Chetty* v. *Muthu Palandi*, (1889) 22 Mad 172 (173).

(10) *Fakir Apa* v. *Rayapa*, 1884 Bom P J 128 (128) [Suit dismissed without trial on merits on the ground that case raised by plaintiff at hearing was different from that raised in his plaint].

(11) See *Baifull* v. *Adesang*, (1901) 3 Bom L R 736 (738): 26 Bom 203 [Lower appellate Court holding that the appeal had abated].

(12) *Mana Vikrama, Zamorin of Calicut* v. *Karnavan Gopalan Nair*, (1907) 30 Mad 203 (206); *Kuppelan* v. *Kunjuvalli*, (1911) 9 Ind Cas 790 (790): (1911) 2 Mad W N 199: 9 Mad L Tim 373: *Abdul Karim* v. *Fayez Buksh*, (1911) 9 Ind Cas 224 (224, 225): 15 Cal W N 575 [*Per* Chitty, J—Coxe, J contra]; *Telu Ram* v. *Lachhi Ram*, 1905 Pun L R No 49; *Ali Muhammad* v. *Raia Ram*, 1903 Pun L R 157; *Nand Lal* v. *Gurditta Mal*, 1902 Pun Re No 99: 141 Pun L R 1902; *Khalas* v. *Kalyan Singh*, 1887 Pun Re No 109; *Athappa Chetty* v. *Ramanathan Chetty*, (1919) 53 Ind Cas 417 (419): 10 Mad L W 359: 37 Mad L Jour 536.

(13) *Debi* v. *Bunyad Ali*, 1905 All W N 157 (157).

(14) *Chuni Lal* v. *Mohiji*, (1897) 1 Cal W N 340 (340).

(15) *Gopal Chunder* v. *Joggodumba*, (1868) 10 Suth W R 411 (411) [Suit for rent—Question of plaintiff's title is not a preliminary question]; *Ponangi Venkatasubbarayudu* v. *Sree Raja Lakshmi Venkata Narasimha Rao*, (1921) 60 Ind Cas 609 (609): 12 Mad L W 667 [Appellate Court deciding that plaintiff was entitled to the right claimed by him and remanding for decision on other issues—Remand not under R 23]; *Mubarak Ali* v. *Musammat Rukaya Bibi*, (1901) 4 Oudh Cas 23 (24) [Suit by daughter for her share under Mahomedan Law—Trial Court holding that by custom she was excluded from inheritance and dismissing suit—Appellate Court reversing decision cannot remand as trial Court's decision was not on a preliminary point].

O.41,R. 23, Note 3.

though relating to the merits, precluded their general determination.[16] Thus, according to this view, in a suit for damages for breach of contract, the question as to the *factum* of contract is a preliminary point although it relates to the merit of the case.[17] Similarly, in a suit based on an award, the question of the validity of the award has been held to be a preliminary point.[18] So also the question of the validity of the contract on which the suit is based.[19] *See also* the following cases for other instances.[20]

The question whether a point is a preliminary one does not depend upon the degree of *importance* which it may assume during the hearing of the case.[21] Nor is it necessary that the suit should have been *dismissed* as a result of the finding on the preliminary point. A suit may also be *decreed* on a preliminary point. Thus where a decree is passed, not after trial on all the issues but on the basis of an award[22] or on the consent of the parties[23] or on the basis of a commissioner's report,[24] the suit may be said to be disposed of on a preliminary point. *See also* the undermentioned cases.[25]

Where the points left undecided in a suit are such that they would have arisen only after the suit is *disposed of,* it cannot be said to have been decided on a preliminary point.[26] Thus in a suit for possession and mesne profits in which a question of mesne profits would arise after the decree for possession

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(16) *Fernandez* v. *Sylvester,* 1921 Mad 118 (118, 119): 13 Mad L W 54: 61 Ind Cas 829; *Ramachandra* v. *Hazi Kassim,* (1893) 16 Mad 207 (210); *Govind Rao Sonu Ghatate* v. *Supajee,* (1899) 12 C P L R 45 (47); *Abdul Gafar* v. *Ziauddin,* 1908 Pun Re No 2: 12 Pun W R 1908: 96 Pun L R 1908 F B. See also *Alagammal* v. *Sadasiva,* 1930 Mad 1017 (1018): 60 Mad L Jour 72: 1930 Mad W N 1021: 32 Mad L W 843: 129 Ind Cas 47.

(17) *Fernandez* v. *Sylvester Souza,* 1921 Mad 118 (118, 119): 13 Mad L W 54: 61 Ind Cas 829.

(18) *Mata Din* v. *Jamna Das,* (1905) 27 All 691 (694): 1905 All W N 159: 2 All L J 685.

(19) *Meghan Dube* v. *Pran Singh,* (1908) 30 All 63 (66): 5 All L J 14: 1908 All W N 10. See also *Muhand Rachu Gir* v. *Mahant Raghunath Gir,* (1917) 41 Ind Cas 202 (203): 2 Pat L W 23: 2 Pat L Jour 398 [Suit based on lease—Dismissed on the ground that lease was obtained by undue influence—Other issues not considered—Appellate Court reversing decree, can remand].

(20) *Seenayya Reddi* v. *Mangamma,* 1927 Mad 1159 (1160): 99 Ind Cas 974 [Suit for maintenance—Suit dismissed on the ground that plaintiff was not entitled to maintenance—Other issues not decided—Disposal is on a preliminary point]; *Jiwa Singh* v. *Khazana,* 1908 Pun Re No 56: 161 Pun L R 1908: 107 Pun W R 1908 [Suit by reversioner, to set aside a sale by a proprietor—Suit dismissed on the ground that plaintiff had no *locus standi* to sue as the vendor had adopted a son—Dismissal is on a preliminary point]; *Parmanand* v. *Thikhu,* (1916) 30 Ind Cas 817 (817): 121 Pun W R 1915: 57 Pun L R 1916 [Redemption suit—Defendant's plea that there was a sale in his favour is a preliminary point]; *E I Ry Co* v. *Piyare Lal Sohan Lal,* 1928 Lah 774 (775): 112 Ind Cas 736 [Suit for compensation for non-delivery against railway—Trial Court dismissing suit for want of proof of 'wilful neglect' leaving undecided question of damages—Lower Appellate Court holding that 'wilful neglect' was proved and remanding on question of damages—Remand is under O 41, R 23].

(21) *Seenayya* v. *Mangammal,* 1927 Mad 1159 (1159): 99 Ind Cas 974.

(22) *Rahim Baksh* v. *Ram Nath,* (1905) 2 All L J 477 (479): 1905 All W N 164. See also *Mahabir Prasad* v. *Mahadeo Dat,* (1891) 13 All 386 (388, 389): 1891 All W N 143 [Case decided according to deposition of referee appointed by agreement of both parties].

(23) *Zahirulsaid Alvi* v. *R S Seth Lachmi Narayan,* 1931 P C 107 (109): 35 Cal W N 612: 60 Mad L Jour 648: 131 Ind Cas 316: 33 Mad L W 723: 14 Nag L J 71: 27 Nag L R 139: 33 Bom L R 925: 1931 Mad W N 748 P C.

(24) *Islam Fatima* v. *Zainuddin,* (1917) 39 Ind Cas 951 (951) All [In this case it was held that it was a little difficult to apply the provisions of R 23 after a preliminary decree had been passed, but that they were applicable so far as they could be reasonably applied—Compare *Subba Goundan* v. *Krishnamachari,* 1922 Mad 112 (113)].

(25) *Alagammal* v. *Sadasiva,* 1930 Mad 1017 (1018): 60 Mad L Jour 72: 1930 Mad W N 1021: 32 Mad L W 843: 129 Ind Cas 47; *Ram Jewan* v. *Radha Pershad,* (1871) 16 Suth W R 109 (110) [Suit decreed by lower Court on a certain view of law—Decision set aside—Case remanded]; *Bhavan Lallu* v. *Umar Mahomed,* 1927 Bom 129 (129): 51 Bom 43: 29 Bom L R 97: 100 Ind Cas 1004.

(26) See *Raghunath Das* v. *Jhari Singh,* (1918) 45 Ind Cas 100 (100): 3 Pat L Jour 99 [Suit for possession—Dismissal by trial Court—Appeal—Decree reversed—Remand for ascertaining mesne profits—Appeal lies as from decree and not order of remand]; *Umrao Ali Khan* v. *Abdul Subhan Khan,* (1908) 5 All L J 545 (546): 1908 All W N 40 [Appellate Court sending down case for partition by metes and bounds—Appeal lies as from decree and not as from order of remand]. Compare however *Alagammal* v. *Sadasiva,* 1930 Mad 1017 (1018): 60 Mad L Jour 72: 1930 Mad W N 1021: 32 Mad L W 843: 129 Ind Cas 47 [Suit for possession—Defendant claiming right to redeem—Trial Court finding against him and

O. 41, R. 23 Notes 3—4.

is passed, the dismissal of the suit on the ground that the plaintiff was not entitled-to-possession, is not a decision on a preliminary point.[27]

4. Where Court decides on all the issues.—Where the Court has adjudicated on *all* the issues involved, the disposal cannot be said to be on a preliminary point[1] merely because one of the issues is of a preliminary nature and the suit has been dismissed on the basis of the decision thereon[2] or because it has decided the case with reference to the admissions made by both the parties without taking other evidence,[3] or because other points which might have arisen

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decreeing unconditional possession—Appellate Court holding that defendant was entitled to redeem and remanding for finding the amount payable by the defendant for redemption—*Held* that R 28 covered the case]. Compare also *Islam Fatima* v. *Zainuddin*, (1917) 39 Ind Cas 951 (951) All [Where it was held that it was a little difficult to apply R 23 to a case where a preliminary decree had been passed but that the provisions should be applied, so far as it was reasonable to do so, to a case where a *final* decree had been erroneously passed on the basis of the report of a commissioner who had been superseded].

(27) *Subbe Goundan* v. *Krishnamachari*, 1922 Mad 112 (113, 114): 1922 Mad W N 269: 15 Mad L W 537: 42 Mad L Jour 372: 45 Mad 449: 30 Mad L Tim 217: 68 Ind Cas 869.

Note 4.

(1) *Shyam Behari Mal* v. *Maha Prasad*, 1930 All 180 (183): 1930 All L J 99: 123 Ind Cas 324; *Sheoji Kedar* v. *Bamanachari*, (1929) 119 Ind Cas 2: 1929 Notes 12 (*a*) All; *Lakhan Singh* v. *Babu Ram*, 1926 All 65 (65, 66): 23 All L J 880: 88 Ind Cas 1021; *Kallu* v. *Bhagirath Lal*, (1917) 40 Ind Cas 58 (59) All; *Jagannath* v. *Bhawani*, (1904) 27 All 167 (168, 169): 1904 All W N 208; *Rameshur Singh* v. *Sheodin*, (1890) 12 All 510 (513): 1890 All W N 188 F B; *Damodar Das* v. *Khwaja Mir Muhammad*, 1881 All W N 147 (148); *Narayan Bhut* v. *Akkubhai*, (1916) 33 Ind Cas 576 (577): 18 Bom L R 27; *Paramchand* v. *Nirvani*, (1899) 1 Bom L R 72 (73); *Bai Shri* v. *Magan Lal*, (1895) 19 Bom 303 (306); *Banka Behari* v. *Birendra Nath*, 1927 Cal 850 (851): 103 Ind Cas 864: 55 Cal 219: 47 Cal L Jour 69; *Injad Ali* v. *Mohini*, 1924 Cal 148 (150): 27 Cal W N 1025: 80 Ind Cas 623; *Nurul Guni* v. *Kazamaini Mutwalli*, 1923 Cal 323 (324): 66 Ind Cas 922: *Radha* v. *Kamal*, 1922 Cal 456 (457): 35 Cal L Jour 345: 70 Ind Cas 547; *Amrita Kal Mandal* v. *Bhutnath Mandal*, (1917) 41 Ind Cas 735 (736) Cal; *Satish Chandra Bose* v. *Takur Das Mandal*, (1917) 39 Ind Cas 886 (887): 25 Cal L Jour 473; *Rani Dasi* v. *Asutosh Roy*, (1910) 6 Ind Cas 206 (207): 15 Cal L Jour 310: *Sonaulla* v. *Beakul*, (1908) 7 Cal L Jour 379 (380); *Ambika Churn Das* v. *Kala Chandra Das*, (1906) 10 Cal W N 422 (423); *Ram Dao Mandal* v. *Indromoni Dasi*, (1898) 3 Cal W N 325 (328); *Narain Pal* v. *Kali Kishore*, (1897) 1 Cal W N 29 (30) (Notes); *Kanchan* v. *Baij Nath*, (1892) 19 Cal 336 (338); *Abrahim* v. *Abrahim*, (1881) 17 Cal 168 (171); *Goluck* v. *Puresh*, (1876) 25 Suth W R Cr 284 (285): *Magaram Ojha* v. *Nilmoney Singh*, (1874) 21 Suth W R 326 (326): (1873) 13 Beng L R 198; *Brindabun* v. *Bisona*, (1870) 13 Suth W R 107 (107, 108): 13 Beng L R 200 (Note): *Mahesh Chandra* v. *Madhub Chandra*, (1869) 10 Suth W R Cr 388 (388): 2 Beng L R S N 13 (*b*); *Ram Payara Mal Mul Chand* v. *Sant Ram*, (1932) 33 Pun L R 487 (488): 1932 Lah 443: 139 Ind Cas 126; *Sultani Ram* v. *Munna Lal*, 1930 Lah 181 (182): 123 Ind Cas 542; *Ram Lal* v. *Bhudo Mal*, 1927 Lah 618 (619): 103 Ind Cas 537; *Narain Das* v. *Narain Das*, 1927 Lah 42 (43): 98 Ind Cas 906; *Bichha Ram* v. *Jhandu Mal*, 1926 Jour 148 (4): 96 Ind Cas 786; *Nandlal* v. *Baijnath*, 1926 Lah 537 (538): 95 Ind Cas 169; *Mayaram* v. *Tulsi Ram*, 1926 Lah 184 (185): 91 Ind Cas 351; *Miran* v. *Chandan*, 1923 Lah 171 (172): 70 Ind Cas 1008; *Kania Lal* v. *Narain Singh*, (1919) 50 Ind Cas 299 (300): 1918 Pun W R 177; *Loku Ram* v. *Nirsi Das*, 1904 Pun L R 57; *K V Sundara Rama Ayyar* v. *Sathianathan*, 1927 Mad 1190 (1190): 1927 Mad W N 286: 102 Ind Cas 28; *Venkatarama Ayyar* v. *Sundaram Ayyar*, 1926 Jour 102 (2): 1926 Mad W N 48: 92 Ind Cas 1045; *Aduri Chelmaya* v. *Aduri Lakshmi Devamma*, 1925 Mad 171 (171): 79 Ind Cas 857; *Pericherla Suryanarayana Raju* v. *Ganapathi Raju*, 1923 Mad 113 (113): 16 Mad L W 593: 30 Mad L Tim 314: 70 Ind Cas 655; *Subbe Goundan* v. *Krishnamachari*, 1922 Mad 112 (113): 1922 Mad W N 269: 15 Mad L W 537: 42 Mad L Jour 372: 45 Mad 449: 30 Mad L Tim 217: 68 Ind Cas 869; *Muthurakku Maniagaran* v. *Rakkappa*, (1914) 22 Ind Cas 9 (10): 14 Mad L Tim 591: 1913 Mad W N 1047: 26 Mad L Jour 66; *Arumugam Chetty* v. *Raja Jagaveera Rama*, (1905) 28 Mad 444 (447): 15 Mad L Jour 292; *Manager of the Court of Wards* v. *Ramasami Reddi*, (1905) 28 Mad 437 (439, 440): 15 Mad L Jour 236: *Mallikarjuna* v. *Pathaneni*, (1896) 19 Mad 479 (481); *Kelu Mulacheri* v. *Chendu*, (1896) 19 Mad 157 (159); *Sobharam* v. *Ramprasad*, 1929 Nag 63 (63): 117 Ind Cas 280: 26 Nag L R 44; *Farzand Ali* v. *Ekadashi*, 1923 Oudh 177 (179): 26 Oudh Cas 10: 10 Oudh L Jour 36: 73 Ind Cas 591; *Chaudhary* v. *Mithu Rai*, 1927 Pat 296 (297): 6 Pat 380: 103 Ind Cas 722 [The decision in 52 Ind Cas 125 is, in so far as it is against this decision cannot be accepted as correct]; *Balaram Manjhi* v. *Jagannath Manjhi*, 1925 Pat 760 (761): 92 Ind Cas 684; *Ganpat* v. *Raj Kumar*, 1922 Pat 575 (577): 1 Pat 639: 67 Ind Cas 494; *Brij Mohan Pathak* v. *Deo Bhojan Pathak*, (1920) 55 Ind Cas 484 (485): 1 Pat L Tim 509; *Ashrof Ali* v. *Mahomed Morden*, 1924 Rang 177 (177): 1 Rang 656: 79 Ind Cas 482; *Ma Ma* v. *Maung Shan*, 1897-1901 U B R 307.

(2) *Hafiz Abdul Rahim* v. *Hari Raj Singh*, (1900) 22 All 405 (407): 1900 All W N 157: *Ismail Khan* v. *Haricharan*, (1905) 9 Cal W N 60 (69); *Syud Hussun Ali Chowdhury* v. *Manoowar Ali*, (1874) 21 Suth W R 413 (*a*) (413): *Karteenarain Chowdhry* v. *Perthenarain Chowdhury*, (1864) 1 Suth W R 32 (32); *Munisami Naicken* v. *Munisami Naicken*, 1923 Mad 227 (228): 16 Mad L W 979: 1923 Mad W N 11: 76 Ind Cas 1041; *Ajodhya Singh* v. *Khusro Begum*, 1924 Oudh 97 (98): 74 Ind Cas 582; *Mohammad Hasan* v. *The Deputy Commissioner, Bahraich*, (1906) 9 Oudh Cas 362 (364).

(3) *Thogarchedu Kakamma* v. *Thogarchedu Chandrasekara*, 1929 Mad 205 (207): 119 Ind Cas 705 [Compare *Mahabir* v. *Mahadeo*, 13 All 386 (388, 389) where it was held that R 23 applied to a case which had been decided in accordance with the deposition of a referee appointed by agreement of both the parties under the provisions of the Oaths Act].

O.41, R.23, Notes 4—5.

if the suit had been differently framed or if an amendment of the plaint had been allowed, have not been decided.[4] Hence, where the appellate Court allows an amendment of the plaint[5] or directs the addition of certain parties[6] and remands the suit, the remand is not under this rule.

But the mere fact that the Court has *recorded evidence on all the issues* does not make its decision other than a disposal on a preliminary point if it has, in fact, decided the suit with reference to its finding on a preliminary issue without deciding the other issues in the case.[7]

5. **Entire suit must have been disposed of on a preliminary point.**—In order to attract the application of this rule the *entire* suit must have been disposed of on a preliminary point and not only a *portion* of it.[1] *A* sues *B* for an injunction restraining *B* from interfering with *A's* enjoyment of his lands and for a declaration of his right of easement over *B's* land. The Court decrees the claim for injunction but dismisses the suit so far as the claim for easement is concerned on the ground that, on the face of the plaint, the statement of the easement claimed is so inadequate and unsatisfactory that it is impossible to enter into the question thereby raised. In such a case, only a *portion* of the suit having been disposed of on a preliminary point, this rule does not apply.[2] Similarly

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(4) *Vaithilingam Pillai* v. *Kandaswami Pillai*, 1931 Mad 1 (2): 33 Mad L W 210: 60 Mad L Jour 713: 132 Ind Cas 311.

(5) *Muppavarapu Venkata Radhakrishna Rao* v. *Venthurumilli Venkata Rao*, 1925 Mad 229 (229): 47 Mad L Jour 552: 20 Mad L W 711: 35 Mad L Tim 135: 1924 Mad W N 922: 84 Ind Cas 965: 48 Mad 713; *Mahmud Shah* v. *Talab Hussain Shah*, 1924 Lah 245 (246): 73 Ind Cas 915; *Karuppanna Pillai* v. *Ethumalai Pillai*, 1927 Mad 859 (860): 103 Ind Cas 670; *Farzand Ali* v. *Yusuf Ali*, (1878-80) 2 All 669 (670, 671): 5 Ind Jur 268; *Krishnayya Navada* v. *Panchu*, (1894) 17 Mad 187 (188).

(6) *Ma Me Mya* v. *Ma Min Zan*, 1925 Rang 320 (320): 4 Bur L Jur 159: 3 Rang 490: 92 Ind Cas 368; *Ganesh Bhikaji* v. *Bhikaji Krishna*, (1886) 10 Bom 398 (400); *Anatha Bandhu* v. *Aisali*, 1926 Cal 1076 (1077): 43 Cal L Jour 601: 97 Ind Cas 188; *Tohra* v. *Zabeeda*, (1910) 7 Ind Cas 75 (78, 79): 12 Cal L Jour 368; *Upendra Chandra* v. *Shaik Sabhan*, (1911) 11 Ind Cas 183 (184): 15 Cal L Jour 6; *Uzir Ali* v. *Savai*, (1916) 32 Ind Cas 791 (793): 20 Cal W N 547: 43 Cal 938; *Jeshan Kar* v. *Bai Divali*, (1920) 57 Ind Cas 525 (525, 526): 22 Bom L R 771; *Keshav Mahadev Damle* v. *Pandurang Waman Tilak*, (1899) 1 Bom L R 29 (31); *Bando Daji Joshi* v. *Bhasker Mahadeo Ghugardhare*, (1899) 1 Bom L R 369 (369). See also *Amir Beg* v. *Zainulabdin*, 1881 All W N 49 (50); *Khondkar Kefaetoollah* v. *Mahomed Kabel*, (1868) 9 Suth W R (Cr) 345 (346).

In this view the following decisions seem to be erroneous.—*Mahomed Shafi* v. *Fatehgar*, 1927 Lah 196 (197): 100 Ind Cas 49; *Debi Prasad* v. *Mt Bhago*, 1924 Lah 33 (34): 5 Lah L Jour 187: 74 Ind Cas 682 [Death of one defendant brought to the notice of the Court, but Court continuing suit and passing decree without legal representative, *held*, that lower Court must be taken to have disposed of case on a preliminary point. Remand under O 41, R 23 ordered for retrial after bringing the legal representatives on record].

(7) *Meghan Dube* v. *Pran Singh*, (1908) 30 All 63 (66): 5 All L J 14: 1908 All W N 10; *Mata Din* v. *Jamna Das*, (1905) 27 All 691 (694): 1905 All W N 159: 2 All L J 685; *Nawahu Ram* v. *Relu Mal*, 1907 Pun W R 27; *Venganayyan* v. *Ramasami Ayyan*, (1895) 19 Mad 422 (423): 4 Mad L Jour 263; *Ramachandra* v. *Hazi Kazim*, (1893) 16 Mad 207 (209, 210).

Under S 562 of the Code of 1882 prior to its amendment by Act VII of 1888, a suit could not be remanded if the lower Court had recorded evidence on all the issues. The following cases bearing upon the section as it stood prior to the amendment are only of academic interest now:—*Ram Narain* v. *Bhawani Din*, (1887) 9 All 29 (Note): 1882 All W N 104; *Amma* v. *Kunhunni*, (1886) 9 Mad 855 (856); *Mahammad Allahdad* v. *Muhammad Ismail*, (1888) 10 All 289 (322); *Durga* v. *Haidar Ali*, (1884) 7 All 167 (170): 1884 All W N 315; *Muzhar* v. *Bodha*, (1895) 17 All 112 (116): 22 Ind App 1: 5 Mad L Jour 20: 6 Sar 580 P C; *Gopal Chunder Gooho* v. *Juggodumba Doosia*, (1868) 10 Suth W R (Cr) 411 (411); *Joog Maya* v. *Ram Chunder*, (1868) 10 Suth W R (Cr) 378 (378); *Ramjoy* v. *Nundomoyee*, (1868) 10 Suth W R (Cr) 374 (374); *Lala Shoobh Narain* v. *Nursingh Narain*, (1873) 20 Suth W R (Cr) 148 (149); *Ramakooer* v. *Bhugwan Lal*, (1874) 22 Suth W R (Cr) 224 (225); *Oomrao* v. *Raghunath*, 1882 All W N 5 (5); *Hira Singh* v. *Umrao Singh*, 1882 All W N 45 (45); *Jamna Prasad* v. *Radha Kishen*, (1908) 11 Oudh Cas 169 (170).

Note 5.

(1) *Kamaluddin* v. *Ata Hussain*, 1892 All W N 11 (12): *Mt Gendo* v. *Radhe Mohan*, 1932 Lah 219 (220): 33 Pun L R 54: 136 Ind Cas 559; *Nandlal* v. *Gurditta Mal*, 1902 Pun Re No 99: 141 Pun L R 1902. See also *Jawahir Lal* v. *Fateh Mahton*, 1926 Pat 514 (515): 1926 Pat H C C 279: 97 Ind Cas 1: 8 Pat L Tim 9 [Suit for rent for several years—Suit disposed of on a preliminary ground with reference to the claim for one year—*Held* that R 23 did not apply]. See however *Harchand and Dayaram* v. *Makund Ram Sukal*, (1899) 12 C P L R 119 (122) [If the decided and the undecided matter could be kept apart, then a remand under S 562 is not absolutely prohibited].

(2) *Bunwari Lal* v. *Samman Lal*, (1889) 11 All 488 (489): 1889 A W N 188.

O.41,R.23,
Note 5.

where several questions have been raised and decided, the suit cannot be said to be disposed of on a preliminary point merely because one or more of the *issues* have not been decided on the merits but have been disposed of on a preliminary point.[3] Thus in a suit for recovery of arrears of rent and for ejectment from certain plots of land, one of the questions was as to the amount payable by the plaintiff as the value of improvements effected by the defendant on the plaintiff's land. The trial Court held that the plaintiff should pay Rs. 10,000 as decided in a prior litigation between the parties. On appeal the appellate Court held that the prior decision was not *res judicata* and remanded the case to assess the then value of the improvements. *Held* that this rule did not apply to the case as the decision of only *one of the issues in the case* and not of the whole suit was based on a preliminary point.[4] In this view the undermentioned decision[5] of the Patna High Court, seems to be open ground that it was submitted too late and had thereafter disposed of the suit on the merits. The appellate Court remanded the case under this rule on the ground that the *suit* had been disposed of on a preliminary point, though as a matter of fact only the question *as to the award* was disposed of on a preliminary point.

Where a suit has not been disposed of on a preliminary point in the sense described above, no remand can be made under this rule.[6] Thus no remand can be made under this rule merely because:—

(1) The lower Court has omitted to decide one or more issues or the appellate Court requires certain additional issues to be tried.[7]

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(3) See *Vemi Reddi* v. *Nallappa Reddi*, (1920) 57 Ind Cas 800 (802): 11 Mad L W 611.

(4) *Mt Gendo* v. *Radhe Mohan*, 1932 Lah 219 (220): 33 Pun L R 54: 136 Ind Cas 559.

(5) *Radha Kant* v. *Jaladhar*, (1917) 37 Ind Cas 844 (846) Pat.

(6) *Kalu* v. *Narayan*, 1927 Bom 111 (112): 29 Bom L R 56: 100 Ind Cas 578; *Savitri* v. *Ramji*, (1890) 14 Bom 232 (234); *Mokund Lal* v. *Hur Bullabh*, (1882) 12 Cal L Rep 136 (138); *Ram Chander Goopta* v. *Bhagessur Surma*, 1864 Suth W R (Gap) 357 (358); *Mt Gendo* v. *Radhe Mohan*, 1932 Lah 219 (220): 33 Pun L R 54: 136 Ind Cas 559; *Rahimuddin* v. *Mannu Lal*, 1930 Lah 639 (640); *Miran Baksh* v. *Chanan Din*, 1923 Lah 171 (172): 70 Ind Cas 1008; *Ram Singh* v. *Kundan Singh*, (1916) 36 Ind Cas 211 (211): 103 Pun L R 1916: 96 Pun W R 1916; *Telu Ram* v. *Lachhi Ram*, 1905 Pun L R 49; *Mehur Khan* v. *Ram Nath*, 1900 Pun L R 314; *Senab Gul* v. *Sahib Gul*, 1890 Pun Re No 63; *Gobind Pershad* v. *The Murree Brewery Co*, 1885 Pun Re No 47; *Palani* v. *Rangiadas*, (1909) 1 Ind Cas 746 (746): 32 Mad 83: 4 Mad L Tim 479; *Subba Sastri* v. *Balachandra Sastri*, (1895) 18 Mad 421 (422); *Muniappah Naidu* v. *Ayyaswamy*, (1869-70) 5 Mad H C R 313 (315); *Din Dayal* v. *Ram Sewak*, 1927 Oudh 591 (591): 101 Ind Cas 89.

(7) *Lakhan Singh* v. *Babu Ram*, 1926 All 65 (65, 66): 23 All L J 880: 88 Ind Cas 1021; *Kasturi* v. *Panna Lal*, (1916) 36 Ind Cas 245 (249): 14 All L J 754: 38 All 520; *Majirajba* v. *Maganlal*, (1895) 19 Bom 303 (306); *Bepin Behari Dey* v. *Midnapore Zemindary Co, Ltd*, 1928 Notes 68 (*f*): 110 Ind Cas 444; *Mansurali Sarkar* v. *Jamiran Bewa*, 1926 Cal 976 (977): 95 Ind Cas 203: 44 Cal L Jour 101; *Hira Lal Pal* v. *Elbar*, (1916) 32 Ind Cas 866 (868): 20 Cal W N 43; *Rakhit Mahanta* v. *Puddo Bauri*, (1905) 9 Cal W N 54 (56); *Fuzeelun Bibi* v. *Omdah Bibi*, (1868) 10 Suth W R (Cr) 469 (471); *Sultani Ram* v. *Munna Lal*, 1930 Lah 181 (182): 123 Ind Cas 542; *Muhamad Ali* v. *Jalal Din*, 1926 Jour 142 (1): 96 Ind Cas 44; *Hari Ram* v. *Firm of Buta Shah Lachmi Das*, 1925 Lah 480 (480): 7 Lah L Jour 351: 26 Pun L R 629; *Lalli* v. *Sain Ditta*, (1919) 51 Ind Cas 239 (240): 27 Pun Re 1919; *Ram Singh* v. *Kudan Singh*, (1916) 36 Ind Cas 211 (211): 103 Pun L R 1916: 96 Pun W R 1916; *Miraj-ud-din* v. *Karim Baksh*, 1902 Pun Re No 43: 35 Pun L R 1902; *Guruswami Pillai* v. *Veerabadhra Thavalkaran*, 1926 Mad 695 (697): 23 Mad L W 540: 95 Ind Cas 325; *Chelmayya* v. *Lakshmi Devamma*, 1925 Mad 171 (171): 79 Ind Cas 857; *Koru Kutty* v. *Valikathodiyil Hammad*, 1925 Mad 169 (170): 78 Ind Cas 1; *Malyandi Goundan* v. *Bomman Poosari*, 1923 Mad 331 (331): 17 Mad L W 159: 71 Ind Cas 204. See *Sobharam* v. *Ram Pershad*, 1929 Nag 63 (63): 117 Ind Cas 280: 26 Nag L J 44; *Dhirajsingh* v. *Mt Kalo*, (1893) 6 C P L R 77 (77, 78) [Deciding a question of fact on insufficient grounds and disposing of a suit on a preliminary point are not convertible terms]; *Haradhan Mandal Modak* v. *Iswardas Marwari*, (1917) 38 Ind Cas 797 (798): 2 Pat L Jour 61: 3 Pat L W 258; *Annaji Ramchandra* v. *Thakubai Dattatraya*, 1929 Bom 175 (176): 31 Bom L R 208: 53 Bom 355: 118 Ind Cas 790; *Balku Bhagat* v. *Aghori Mandal*, (1917) 38 Ind Cas 641 (642) Pat.

O. 41, R. 23, Notes 5—6.

(2) The lower Court has wrongly rejected certain evidence[8] or the taking of additional evidence is found to be necessary.[9]

(3) The lower Court has not recorded the evidence properly.[10]

(4) The lower Court admitted inadmissible evidence.[11]

(5) The appellate Court is dissatisfied with the decision of the lower Court[12] or

(6) The suit was not properly tried.[13]

As to the inherent power of the Court to remand in such cases, *see* Note 10, *infra*.

6. **Order returning or rejecting plaint whether disposal on preliminary point.**—It has been held in some cases that an order returning a plaint for presentation to the proper Court under O. 7, R. 10 is not a disposal of the suit on a preliminary point within the meaning of O. 41, R. 23.[1] Similarly it has been held in some cases that the rejection of a plaint under O. 7, R. 11 does not amount to a disposal of the suit on a preliminary point.[2] The rationale of these cases would seem to be that a suit cannot be said to be disposed of when the decision, in no way affects the *rights* of the parties.[3]

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(8) *Jadu Nath* v. *Hari Pada*, (1897) 1 Cal W N 80 (80) (Notes). See also *Shadden* v. *Finley*, (1867) 7 Suth W R 313 (313); *Fida Abbas* v. *Rahim Baksh*, (1918) 45 Ind Cas 832 (832): 5 Oudh L Jour 139; *Rochiram Gianchand* v. *Firm of Kalachand Deumal*, 1929 Sind 159 (160): 116 Ind Cas 586; *Dhondo* v. *Panha Lal*, (1899) 1 Bom L R 110 (112).

(9) *Ram Sarup Sahu* v. *Ratan Sen Singh*, (1916) 35 Ind Cas 239 (240) All; *Haripada Saha* v. *Debnath Mandal*, 1928 Cal 749 (750): 110 Ind Cas 427. See *Mahendra Kumar* v. *Narayani*, 1926 Cal 912 (912): 95 Ind Cas 170; *Sadak Ali* v. *Safar Ali Sufani*, (1920) 56 Ind Cas 984 (985) Cal; *Subhadra Sundari* v. *Karimulla Bepari*, (1917) 38 Ind Cas 196 (196) Cal; *Raghu Nandan Jha* v. *Jalpa Pattap*, (1899) 3 Cal W N 748 (750); *Mahesh Chunder* v. *Madhub Chunder*, (1868) 10 Suth W R 388 (388): 2 Beng L R (S N) 13; *Kalee Sunkar* v. *Kisto Doolal*, 1864 Suth W R (Gap) 296 (297); *Jebun Kissen Roy and Ramjoy Roy* v. *Dwarkanath Roy Chowdhry*, 1864 Suth W R 363 (364).

(10) *Ram Gopal Dey* v. *Raghu Nath Ghoshal*, (1905) 2 Cal L Jour 496 (497) [Deposition not bearing the usual certificate]; *Mohesh Chunder* v. *Madhab Chunder*, (1870) 13 Suth W R 85 (87); *Bhagwan Das* v. *Jiwan*, 1896 Pun Re No 45.

(11) *Pragada Krishnamma Naidu* v. *Vajja Akula Naidu*, (1895) 5 Mad L Jour 82 (84).

(12) See *Mohamed Ashan* v. *Mahomed Yasin*, (1868) 9 Suth W R 106 (107); *Pirbhu Dial* v. *Yakub Ali Khan*, 1901 All W N 141 (141); *Muhamad Mujibar Rahman* v. *Sheikh Isab Surati*, 1928 Cal 546 (547): 32 Cal W N 867: 49 Cal L Jour 1; *Gunpat Rao Banka Puri* v. *Raj Kumar Singh*, 1922 Pat 575 (577): 1 Pat 639: 67 Ind Cas 494; *Umbika* v. *Ramdhun*, (1869) 11 Suth W R 35 (86).

(13) *Jageshar Jha* v. *Mahtap Singh*, 1926 Pat 516 (516): 1926 Pat H C C 302: 96 Ind Cas 440: 7 Pat L Tim 811; *Pericherla Suryanarayana Raju* v. *Ganapathi Raju*, 1923 Mad 113 (113): 16 Mad L W 593: 30 Mad L Tim 314: 70 Ind Cas 655; *Futtehoollah* v. *Oomdanissa*, (1870) 14 Suth W R 69 (70) [Issues not properly settled by lower Court—No remand to be ordered under R 23]; *Bibi Kulsoominnissa* v. *Ram Prasad*, 1922 All 226 (228): 20 All L J 321: 67 Ind Cas 713: 44 All 492.

Note 6.

(1) *Sri Lal* v. *Kishen Lal*, 1891 All W N 165 (166); *Jahan Khan* v. *Chanda Singh*, 1896 Pun Re No 59; *Paidapati Venkatanarasu* v. *Vikram Kotayya*, 1926 Mad 900 (900, 901): 51 Mad L Jour 119: 1926 Mad W N 613: 24 Mad L W 630: 97 Ind Cas 790; *Thoppukattu Ramaya Goundan* v. *R Sadagopachariar*, (1916) 32 Ind Cas 759 (760): 1915 Mad W N 784; *Braja Lal Mitra* v. *Upendra Krishna Mitra*, (1907) 6 Cal L Jour 214 (216).

(2) *Cotton Trading Syndicate Commission Agency, Bombay* v. *Malawa Mal Shiv Ram Das*, 1931 Lah 497 (497): 131 Ind Cas 750: 32 Pun L R 409. Confirming *Cotton Trading Syndicate* v. *Malawa Mal*, 1929 Lah 83 (84): 108 Ind Cas 597 and following *Tirath Singh* v. *Ramchand*, 26 Ind Cas 519 (519): 133 Pun L R 1915: 85 Pun W R 1915.

(3) See *Wahidunnissa* v. *Kundanlal*, (1913) 20 Ind Cas 145 (145): 11 All L J 615: 35 All 427 [Order of dismissal of a suit for non-appearance of parties—Order set aside by appellate Court—First Court directed to hear the case—Not a remand order—No appeal]. See also *Lachminarain* v. *Darbari Lal*, (1916) 33 Ind Cas 737 (737): 38 All 357: 14 All L J 347.

See also S 13 of the Court Fees Act which seems to treat rejection of plaint or memo. of appeal as distinct from disposal on preliminary point within O 41, R 23. *Baranogore Jute Factory* v. *Raj Kumar Rai*, (1909) 1 Ind Cas 785 (786, 787): 13 Cal W N 724 [Case dismissed as barred by limitation, *after* it was registered—Disposal is on preliminary point within R 23. If it had been rejected on *presentation* without being admitted, there might be some force in the argument that the order of remand of the appellate Court was only order admitting plaint and hence not appealable].

(*See* S. 2 (2), Notes 6 and 13.) But in the cases cited below[4] it has been held that even when a plaint is rejected the suit can be said to be disposed of on a preliminary point. These cases proceed on the ground that as the rejection of the plaint precludes the Court from deciding the points arising in the case, the suit may be regarded as disposed of on a preliminary point.

7. **Decision of lower Court must be reversed.**—No remand can be ordered under this rule unless the decision of the lower Court on the preliminary point is *reversed* in appeal.[1] The decision of the lower Court must be definitely reversed. Where such is not the case, it is not a good ground for ordering a remand under this rule, that the lower Court has decided the issue on a wrong view as to the burden of proof,[2] or that the appellate Court is not able, on the materials before it, to agree with the findings of the lower Court[3] or that the appellate Court considers that the lower Court's finding is not supportable on the ground given by that Court but might be supported on another ground which requires investigation.[4] But where the finding of the lower Court on the preliminary point is definitely reversed by the appellate Court, the suit may be remanded under this rule notwithstanding that the decision of the appellate Court is made subject to a finding of fact which is left to be determined by the lower Court.[5] Where the intention to reverse the decree is clear, the remand is not vitiated by the mere absence of a formal order setting aside the decree.[6] Where the lower Court has decided the suit on several preliminary points, the appellate Court should reverse the decision on all of them before remanding under this rule.[7]

Under this rule, it *is not competent to the appellate Court to affirm the decision of the lower Court* regarding one part of the suit and remand the suit regarding the other part, because, otherwise there would be two final judgments in the same case—a thing opposed to the provisions of the Code and because there is only a partial reversal of the lower Court's decree.[8] The rule

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(4) *Ram Prasad* v. *S M Sachi Dassi,* (1902) 6 Cal W N 585 (587); *Brommo Moyee Debia Chowdhrain* v. *Koomodinee Kant Banerjee Chowdhury,* (1872) 17 Suth W R 466 (467); *Gobind* v. *Baliram,* 1930 Nag 295 (296): 127 Ind Cas 352; *Kanakamma* v. *Rangachari,* (1897) 20 Mad 25 (29): 6 Mad L Jour 259 [Suit dismissed without entering into merits on the ground that plaintiff had no cause of action—Disposal is on preliminary point].

Note 7.

(1) *Dattaji Rao* v. *Nilkanth Rao,* (1915) 28 Ind Cas 485 (486): 17 Bom L R 187: 39 Bom 852; *Maya Ram* v. *Tulsi Ram,* 1926 Lah 184 (185): 91 Ind Cas 351; *Umar Din* v. *Umar Hayat,* 1927 Lah 886 (886): 103 Ind Cas 119 [R 23 did not apply because the appellate Court did not give its decision on the two issues that had been decided by the lower Court]. See also *Kebul Kishen* v. *Ambala,* (1867) 7 Suth W R 326 (327); *Bonamalee* v. *Shoroop,* (1870) 14 Suth W R 60 (60).

(2) *Habibulla* v. *Lalta Prasad,* (1912) 17 Ind Cas 94 (94): 10 All L J 190: 34 All 612.

(3) *Srinivasa Raghava* v. *Srinivasa Raghava,* 1928 Mad 1200 (1200): 110 Ind Cas 692.

(4) *Ram Lal* v. *Tirbeni Sahai,* (1913) 26 Ind Cas 454 (455) All. See also *Bulaki Singh* v. *Jaikishen,* (1875) 7 N W P 203 [Trial Court holding on one ground that suit was not maintainable and dismissing same—Appellate Court holding that suit was not barred on that ground but was barred on another ground—*Held,* remand was not proper].

(5) *Tricamji Dambji and Co* v. *Virji Kanji,* 1923 Bom 142 (145): 24 Bom L R 820: 67 Ind Cas 965.

(6) *Lal Ram Saran Lal* v. *Nem Narain Singh,* (1902) 6 Cal W N 326 (327).

(7) *Agent, Bengal Nagpur Railway* v. *Behari Lal,* 1925 Cal 716 (720): 29 Cal W N 614: 52 Cal 783: 90 Ind Cas 426; *Raisingi* v. *Balvantrao,* (1887) 11 Bom 663 (665).

(8) *Mahesh Prasad* v. *Ranjar Singh,* (1905) 27 All 163 (165): 1904 All W N 202: 1 All L J 503; *Ganu Ananteshat* v. *Ganu Mahadev,* (1907) 9 Bom L R 966 (967); *Madhub Chunder* v. *Ram Dyal,* (1867) 8 Suth W R 303 (303); *Kapuria* v. *Mangal,* 1908 Pun W R 149; *Khan Mahomed* v. *Jalal-ud-din,* 1892 Pun Re No 3; *Manga* v. *Musst Gurjan,* 1877 Pun Re No 82.

contemplates that the whole case, except as to the preliminary point, is remanded to the lower Court. Hence where the appellate Court not only reverses the decision of the lower Court on the preliminary point but also *gives its findings on other issues* in the case excepting one, it should not remand the case under this rule for the decision of that single issue but may remit it to the lower Court for a finding under R. 25.[9]

8. **"The appellate Court may, if it thinks fit, by order remand the case".**—These words show that the appellate Court is not *bound* to remand a suit under R. 23 merely because the circumstances of a case fall within the provisions of the rule: it may either do so or proceed under R. 24 or R. 25.[1] The question is one of discretion.[2]

9. **"And may direct what issue or issues shall be tried in the case".**—This rule does not enable the appellate Court, while remanding the suit for trial *de novo* to direct that one of the essential issues in the case should be omitted[1]: for the rule contemplates that the whole suit except with reference to the preliminary point should be remanded to the lower Court. But if any limits are imposed by the appellate Court in remanding a case, the lower Court has no power to travel beyond those limits. (*See* Note 30, Point 4.) In an old case decided under the Code of 1859 it was held that an appellate Court cannot remand a case for re-trial with instructions to *frame* new issues.[2] *See also* Note 27.

10. **Inherent power of remand.**—It is now settled law in all the High Courts except the Allahabad High Court that in cases not falling within the scope of O. 41, R. 23 an appellate Court has an inherent power *ex debito justitiae* to remand a case for re-trial.[1] In the Allahabad High Court, the

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[9] *Kallu* v. *Bagirath Lal*, (1917) 40 Ind Cas 58 (59) All.

Note 8.

[1] *Ramyad Misra* v. *Thakur Misra*, 1899 All W N 2 (3); *Ghanshyamdas* v. *Hardei*, (1916) 32 Ind Cas 380 (386): 2 Oudh L J 562; *Gopi Mal* v. *Ishar Das*, (1918) 46 Ind Cas 554 (554): 58 Pun L R 1918: 134 Pun W R 1918; *Bandi Subbayya* v. *Madalapalli Subbanna*, (1878-80) 3 Mad 96 (98): 5 Ind Jur 192. See also *Somu Ayyar* v. *Chellia Pillai*, 1929 Mad 718 (720): 1929 Mad W N 74: 30 Mad L W 230: 119 Ind Cas 43.

[2] See *Abdullah Khan* v. *Muhammad Maqbul Hussain*, 1923 All 603 (604): 45 All 565: 21 All L J 538: 4 L R All (Civ) 260: 74 Ind Cas 822 [In this case the remand was held to be unfair to the parties].

Note 9.

[1] *Sadak Ali* v. *Safar Ali*, (1920) 56 Ind Cas 984 (985) Cal. See also *Paricharla* v. *Ganapathy*, 1923 Mad 113 (113): 16 Mad L W 593: 30 Mad L Tim 314: 70 Ind Cas 655.

[2] *Chunder Nath* v. *Ramanath*, (1864) 1 Suth W R 69 (70).

Note 10.

[1] *Narottam Rajaram* v. *Mohanlal*, (1912) 17 Ind Cas 891 (892): 14 Bom L R 1154: 37 Bom 289; *Jethalal Girdhar* v. *Varaj Lal*, 1922 Bom 267 (270): 46 Bom 184: 23 Bom L R 769: 63 Ind Cas 478; *Umesh Narain Chowdhury* v. *Secretary of State*, 1925 Cal 1157 (1159): 87 Ind Cas 575; *Jnanendra Mohan Bhadhury* v. *Profullananda Goswami*, 1928 Cal 812 (814): 32 Cal W N 101: 106 Ind Cas 542; *Agent, B N Railway* v. *Behari Lal*, 1925 Cal 716 (717): 29 Cal W N 614: 52 Cal 783: 90 Ind Cas 426; *Bisai Nath* v. *Tara Nath*, 1923 Cal 385 (386): 72 Ind Cas 588; *Sashi Mukhi* v. *Abinash*, 1922 Cal 279 (279): 80 Ind Cas 172; *Atul Chandra Seal* v. *Sheikh Kobadali*, (1921) 64 Ind Cas 436 (437) Cal; *Radha Kanta* v. *Prakash Chandra*, (1921) 64 Ind Cas 599 (601) Cal; *Misri* v. *Vishnu Nath*, (1919) 52 Ind Cas 985 (986): 29 Cal L Jour 419; *Bejoy Krishna* v. *Jibon Krishna*, (1918) 46 Ind Cas 333 (334): 27 Cal L Jour 596; *Ghaznavi* v. *Allahabad Bank*, (1917) 41 Ind Cas 598 (600): 21 Cal W N 877: 26 Cal L Jour 49: 44 Cal 929 F B; *Susthir Bala Dut* v. *Chandra Kumar* alias *Akhoy Kumar Battacharjee*, (1916) 36 Ind Cas 813 (813) Cal; *Ross* v. *Scriven*, (1916) 34 Ind Cas 235 (243): 20 Cal W N 1192: 43 Cal 1001; *Meah Uzir Ali* v. *Savai*, (1916) 32 Ind Cas 791 (792, 793): 20 Cal W N 547: 43 Cal 938; *Manmatha Nath* v. *Krishna Parmada*, (1916) 32 Ind Cas 906 (907) Cal; *Upendra Chandra* v. *Shaikh Sobhan*, (1911) 11 Ind Cas 183 (183): 15 Cal L Jour 6; *Tohra Bibi* v. *Zabeda*, (1910) 7 Ind Cas 75 (78, 79): 12 Cal L Jour 368; *Dhaniram* v. *Bhagirath*, (1895) 22 Cal 692 (713); *Thakur Shere Bahadur* v. *Thakurain Dariao Kuar*, (1878) 3 Cal 645 (653): 3 Sar 769: 3 Suther 472: 2 Ind Jour 67: R & J 47 P C; *Harnam* v. *Indar*, 1932 Lah 811 (811): 33 Pun L R 285: 138 Ind Cas 202; *Parmanand* v. *Bashir Ahmad*, 1930 Lah 224 (225): 31 Pun L R 50: 11 Lah L Jour 507: 122 Ind Cas 473; *Mt Sahibji* v. *Mohammad Sarwai Khan*, 1926 Lah 116 (116): 9 Lah

O. 41, R. 23, Note 10.

point is unsettled.[2] Under the previous Code there was a section, *viz.*, S. 564 which prohibited the appellate Court from making a remand except as provided by S. 562 (O. 41, R. 23).[3] This section was found to be extremely embarrassing in practice as for instance, when the appellate Court felt a remand to be urgently needed in view of the amendment of the plaint or the addition of new parties. The repeal of this section in the present Code leaves the way open for remand in such cases,[4] although the Legislature has thought it safer not to formally enact that the appellate Court has power, in cases not covered by R. 23 to remand.[5]

But the inherent power of remand should not be exercised except when it is clearly necessary for the ends of justice to do so.[6] When there is any

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L Jour 543: 106 Ind Cas 842: 29 Pun L R 300; *Bahal* v. *Swain*, 1927 Lah 480 (481): 9 Lah L Jour 268: 103 Ind Cas 854: 28 Pun L R 679; *Bhup Singh* v. *Prem Singh*, 1924 Lah 362 (363): 5 Lah L Jour 384: 76 Ind Cas 496: *Mt Umri* v. *Shah Mahomed*, 1924 Lah 36 (37): 5 Lah L Jour 269: 74 Ind Cas 497; *Thirukaval Chetty* v. *Karia Goundan*, 1930 Mad 72 (73): 119 Ind Cas 466; *Balla Mallayya* v. *Peddi Veerayya*, 1927 Mad 335 (336): 52 Mad L Jour 90: 25 Mad L W 198: 38 Mad L Tim 15: 100 Ind Cas 135; *Subbe Goundan* v. *Krishnamachari*, 1922 Mad 112 (114): 1922 Mad W N 269: 15 Mad L W 537: 42 Mad L Jour 372: 45 Mad 449: 30 Mad L Tim 217: 68 Ind Cas 869; *Venkata Subbarayudu* v. *Zamindar of Nuzvid*, (1921) 60 Ind Cas 609 (609): 12 Mad L W 667; *Ananthappa* v. *Ramanathan*, (1919) 53 Ind Cas 417 (419): 10 Mad L W 359: 37 Mad L Jour 536; *Antoni* v. *Ramakrishnayyu*, (1916) 81 Ind Cas 263 (263): 2 Mad L W 1034; *Jambalayya* v. *Rajamma*, (1912) 15 Ind Cas 859 (860): 1912 Mad W N 1000: 24 Mad L Jour 512: 36 Mad 492; *Kuppelan* v. *K N Kunjuvalli*, (1911) 9 Ind Cas 790 (790): (1911) 1 Mad W N 199: 9 Mad L Tim 373; *Muniappa Naidu* v. *M Ayyaswami Mudali*, (1869-70) 5 Mad H C R 313 (315); *Ram Dutta Shankarlal* v. *Punamchand*, 1927 Nag 192 (192): 101 Ind Cas 281; *Vithoba* v. *Waman*, (1917) 42 Ind Cas 304 (304) Nag; *Sheik Farzand Ali* v. *Ekadashi*, 1923 Oudh 177 (179): 26 Oudh Cas 10: 10 Oudh L J 36: 73 Ind Cas 591; *Ram Sewak* v. *Musammat Ram Dei*, (1908) 11 Oudh Cas 264 (266); *Brijmohan Pathak* v. *Deobhanjan Pathak*, (1920) 58 Ind Cas 664 (664): 5 Pat L Jour 146; *Bibi Aziz Fatima* v. *Syed Shah Khairat Ahmed*, (1920) 58 Ind Cas 444 (445); 2 U P L R (Pat) 48: 1920 Pat H C C 222; *Musst Suritra Kuar* v. *Bam Kair*, (1920) 57 Ind Cas 561 (563): 5 Pat L Jour 410: 1 Pat L Tim 702: 1921 Pat H C C 17; *Bishnu Dutt* v. *Ramji*, (1920) 56 Ind Cas 834 (837): 2 U P L R (Pat) 136; *Raghunandan* v. *Jadunandan*, (1918) 43 Ind Cas 959 (960): 3 Pat L Jour 253: 4 Pat L W 450; *Ashrof* v. *Mordan*, 1924 Rang 177 (178): 1 Rang 656: 79 Ind Cas 482; *Krishna Sahoo* v. *Maung Po Than*, 1930 Rang 188 (189): 127 Ind Cas 598. See also *Sher Khan* v. *Bahadur Singh*, 1904 Pun Re No 91: 5 Pun L R 1905; *Gokul Prasad* v. *Ram Kumar*, 1922 All 254 (256): 44 All 176: 64 Ind Cas 878: 19 All L J 971 [High Court as highest appellate Court has wider powers of remand, in virtue of its powers of superintendence, than District Courts]; *Promodini Chowdhurani* v. *Banga Chandra Datta*, (1911) 9 Ind Cas 306 (307) Cal; *Nabin Chandra Triputi* v. *Pran Krishna Dey*, (1913) 20 Ind Cas 39 (40): 18 Cal L Jour 613: 41 Cal 108.

(2) *Umme Khair* v. *Aziz Ali*, 1922 All 47 (48): 80 Ind Cas 183 [Inherent power exists]; *Durgo Dihal* v. *Anoraji*, (1894) 17 All 29 (31, 32, 33): 1894 All W N 190 [Inherent power exists]; *Gokul Prasad* v. *Ram Kumar*, 1922 All 254 (256): 44 All 176: 64 Ind Cas 878: 19 All L J 971 [The question is unsettled]; *Habib Bakhsh* v. *Baldeo Prasad*, (1901) 23 All 167 (173): 1901 All W N 39 [Though case not covered by O 41, R 23, appellate Court can remand in order to give effect to other provisions of the Code, *e.g.*, when plaint is ordered to be amended or when new parties are added—But there is no power *ex debito justitiae* to order remand]. See now the amendment by the Allahabad High Court to O. 43, R. 1 (*u*).

(3) *Ganga Prasad* v. *Lal Bahadur*, (1895) 17 All 117 (120): 1895 All W N 21; *Nanabhai Narotamdas* v. *Ramshet Govind Shet*, (1869) 6 Bom H C R A C 156; *Mudun Mohun Poddar* v. *Bhoggomanto Poddar*, (1882) 8 Cal 923 (926); *Lala Shoobh Narain* v. *Narsingh Narain*, (1873) 20 Suth W R 148 (149); *Aziman* v. *Bhuria*, 1908 Pun Re No 138: 213 Pun W R 1908; *Dhanulal* v. *Nathuram*, (1890) 3 C P L R 131 (132).

(4) *Narottam Rajaram* v. *Mohan Lal*, (1912) 17 Ind Cas 891 (892): 14 Bom L R 1154: 37 Bom 289.

(5) *See* Notes on clauses, report of the Select Committee.

(6) *Sasi Mukhi Dasi* v. *Abinash Chandra Holder*, 1922 Cal 279 (279): 80 Ind Cas 172; *Rai Bishun Dutt* v. *Ramji Prosad*, (1920) 56 Ind Cas 834 (837): 2 U P L R (Pat) 136; *Bejoy Krishna* v. *Jiban Krishna Ganguly*, (1918) 46 Ind Cas 333 (334): 27 Cal L Jour 596; *Radha Kant Das Nanak* v. *Prakash Chandra Dutt*, (1921) 64 Ind Cas 599 (601) Cal; *Raghunandan Singh* v. *Jadunandan Singh*, (1918) 43 Ind Cas 959 (960): 3 Pat L Jour 253: 4 Pat L W 450; *Ghuznavi* v. *Allahabad Bank*, (1917) 41 Ind Cas 598 (600): 21 Cal W N 877: 26 Cal L Jour 49: 44 Cal 929; *Sobharam* v. *Ramprasad*, 1929 Nag 63 (64): 117 Ind Cas 280: 26 Nag L R 44; *Mt Sahibji* v. *Mohammad Sarwar Khan*, 1928 Lah 116 (116): 9 Lah L Jour 543: 106 Ind Cas 842: 29 Pun L R 300; *Ram Payara Mal Mulchand* v. *Sant Ram*, 1932 Lah 443 (443): 33 Pun L R 487: 139 Ind Cas 126; *Mani Mohan* v. *Ram Taran*, (1916) 33 Ind Cas 329 (330): 43 Cal 148; *Keonaram Mandal* v. *Asimaddi Malla Karikar*, (1918) 43 Ind Cas 815 (816) Cal; *Doorga Prasad Singh* v. *Doorga Konwari*, (1879) 4 Cal 190 (204, 205): 3 Cal L Rep 31: 5 Ind App 149: 3 Sar 827: 3 Suth 540: 2 Ind Jur 650: 2 Shome L R 21 P C; *Gangaram* v. *Sitaram*, (1902) 6 Cal W N 698 (702) [Suit for mesne profits for three years by one brother against another for enjoying certain lands including plaintiff's share in them—Court instead of deciding the amount of mesne profits, deciding that enjoyment of whole property should be given to the plaintiff for the next three years.

specific provision of the Code which would meet the necessities of the case[7] or when the circumstances are such that the appellate Court can itself dispose of the case[8] (*see* O. 41, Rr. 24 to 29) no remand should be ordered. A remand should not generally speaking be ordered when the defect in the proceedings has been due to the negligence or default of the party who asks for remand.[9]

See the amendment of this rule by the Madras High Court.

11. **Grounds of remand.**—Subject to the general principles stated in Note 10 *supra* Courts have an inherent power of remand in the following, among other cases:—

(1) When the appellate Court directs an amendment of the plaint,[1] or the addition of fresh parties.[2]

On appeal to Privy Council, their Lordships refused to remand the case, as substantial justice was done to the parties though somewhat in a rough way]. See *Narottam Rajaram* v. *Mohanlal Kahandas*, (1912) 17 Ind Cas 891 (892): 14 Bom L R 1154: 37 Bom 289.

(7) *Ghuznavi* v. *The Allahabad Bank, Ltd*, (1917) 41 Ind Cas 598 (600, 601, 602, 604, 605): 21 Cal W N 877: 26 Cal L Jour 49: 44 Cal 929; *Mallappa* v. *Alagiri*, 1931 Mad 791 (792): 60 Mad L Jour 475: 1931 Mad W N 710: 133 Ind Cas 205; *Radha Kanta* v. *Prakash Chandra*, (1921) 64 Ind Cas 599 (601) Cal; *Ma On Meo* v. *Ma Pa*, (1920) 56 Ind Cas 255 (256): 3 U B R 198; *Rajani Kant Saha* v. *Rajendra Kumar Bose*, 1925 Cal 274 (275): 82 Ind Cas 663; *Nand Lal* v. *Baij Nath*, 1926 Lah 537 (538): 95 Ind Cas 169. [Case not to be remanded when appellate Court can follow the procedure laid down in Rr 24 to 29 of O 41]; *Maharaja of Bobbili* v. *Zamindar of Salur*, (1919) 49 Ind Cas 750 (750) Mad [Case should not be remanded when appellate Court may follow the procedure laid down in Rr 24 to 29]; *Kachi Raghuramiah* v. *Vajjala Mahalakshamma*, (1909) 4 Ind Cas 1062 (1062): 6 Mad L Tim 273; *Mafizuddin Bepari* v. *Jalaluddin*, 1928 Cal 748 (748): 110 Ind Cas 448; *Seshan Pattar* v. *Seshan Pattar*, (1900) 23 Mad 447 (448); *Ahmad Bakhsh* v. *Saira Bibi*, (1912) 15 Ind Cas 3 (5) All; *Huromohan Mookerjee* v. *Ranee Lalun*, (1864) 1 Suth W R 6 (7) [Remand not allowable merely because Judge wanted further evidence]. See also *Narayan Bhat Bhimbhat Joshi* v. *Akkubai Manohar Bhat Joshi*, (1916) 33 Ind Cas 576 (577): 18 Bom L R 27; *Nundkumar Banerjee* v. *Barry*, 1 Hay 260: Marsh 121.

(8) *Narayanbhat Bhimbhat Joshi* v. *Akkubai Manoharbhat Joshi*, (1916) 33 Ind Cas 576 (577): 18 Bom L R 27; *Narottam Rajaram* v. *Mohanlal*, (1912) 17 Ind Cas 891 (892): 14 Bom L R 1154: 37 Bom 289; *Rupa Shah* v. *Irshad Ali*, (1912) 16 Ind Cas 847 (848): 180 Pun L R 1912: 234 Pun W R 1912; *Tilloomal Jessomal* v. *Harbhagwandas*, 1924 Sind 134 (136): 76 Ind Cas 309: 18 Sind L R 306; *Maharaja of Bobbili* v. *Zamindar of Salur*, (1919) 49 Ind Cas 750 (750) Mad; *Subbe Goundan* v. *Krishnamachari*, 1922 Mad 112 (114): 1922 Mad W N 269: 15 Mad L W 537: 42 Mad L Jour 372: 45 Mad 449: 30 Mad L Tim 217: 68 Ind Cas 869; *Priya Nath Manna* v. *Official Trustee of Bengal*, 1928 Cal 43 (44): 105 Ind Cas 133; *Jagannath* v. *Maruti*, (1916) 36 Ind Cas 241 (242, 243): 12 Nag L R 126; *Shiam* v. *Banarsi*, 1922 All 192 (193): 20 All L J 258: 66 Ind Cas 866 [Appellate Court cannot after finding on facts remand the case to the lower Court to pass a decree in accordance with that finding].

(9) *Jatindra Mohan Chakravarthi* v. *Bijoy Chand Mahatab*, 1924 Cal 396 (397): 71 Ind Cas 284; *Ramachandra Bahadur* v. *Abeda Khatun*, (1919) 53 Ind Cas 562 (563) Cal; *Nobbo Lal* v. *Odharanee*, (1865) 3 Suth W R 5 (6); *Bishen Dutt* v. *Ramji Prasad*, (1920) 56 Ind Cas 834 (838): 2 U P L R (Pat) 136; *Mewa Lal* v. *Behari Lal*, (1870) 14 Suth W R 195 (196) [Deliberate undervaluation—Remand refused] *Angopura* v. *Meah Bibi*, (1868) 10 Suth W R 207 (207) [Suit undervalued case not remanded]; *Ghulam Abbas* v. *Sultanshah*, 1929 Lah 444 (446): 30 Pun L R 98: 116 Ind Cas 180; *Ram* v. *Gaman Ram*, 1923 Lah 645 (646): 82 Ind Cas 91 [Remand in order to enable plaintiff (appellant) to ascertain whether or not a demand was made within three years of the institution of the suit which would save limitation was refused]; *Secretary of State for India* v. *Ananda Mohan Roy*, 1921 Cal 661 (667): 34 Cal L Jour 205: 66 Ind Cas 287 [Prolonged trial—Remand merely for enquiring if there is any evidence is improper].

Note 11.

(1) *Sheo Prasad* v. *Nawal Kishore*, (1929) 116 Ind Cas 871: 27 All L J 487: 1929 Notes 9 (*f*) [Plaintiff was ordered to pay the costs incurred till then]; *Venkata Radhakrishna Rao* v. *Venkata Rao*, 1925 Mad 229 (229): 47 Mad L Jour 552: 20 Mad L W 711: 35 Mad L Tim 135: 1924 Mad W N 922: 84 Ind Cas 965: 48 Mad 713; *Antoni* v. *Ramakrishnayya*, (1915) 31 Ind Cas 263 (263): 2 Mad L W 1034; *Manmatha Nath Bose* v. *Krishna Pramada Dasi*, (1916) 32 Ind Cas 906 (907) Cal; *Vaithilingam Pillai* v. *Kandasami Pillai*, 1931 Mad 1 (2): 33 Mad L W 210: 60 Mad L Jour 713: 132 Ind Cas 311 [In this case, an amendment altering the fundamental character of the suit was refused to be allowed].

(2) *Antoni Juas Prabhu* v. *Ramakrishnayya*, (1915) 31 Ind Cas 263 (263): 2 Mad L W 1034; *Mihin Lal* v. *Intiaz Ali*, (1896) 18 All 332 (333): 1896 All W N 91; *Jeshankar* v. *Bai Divaji*, (1920) 57 Ind Cas 525 (525): 22 Bom L R 771; *Uzir Ali* v. *Savai Behara*, (1916) 32 Ind Cas 791 (793): 20 Cal W N 547: 43 Cal 938; *Jadab* v. *Anath*, (1910) 5 Ind Cas 998 (999): 37 Cal 171; *Upendra Chandra* v. *Shaik Sabhan*, (1911) 11 Ind Cas 183 (184): 15 Cal L Jour 6; *Tohra Bibi* v. *Zabedhakhatoon*, (1910) 7 Ind Cas 75 (78, 79): 12 Cal L Jour 368; *Anath Bandhu Dutta* v. *Aisali Namadas*, 1926 Cal 1076 (1077): 43 Cal L Jour 601: 97 Ind Cas 188.

(2) When the appellate Court finds that the suit is bad for misjoinder of parties and causes of action. In such a case the appellate Court may remand the case and direct the lower Court to return the plaint for amendment.[3]

(3) When the lower Court has dismissed a suit on the ground that the suit has been brought in the name of the wrong person as plaintiff[4] or defendant.[5]

(4) When the lower Court has misunderstood the whole case[6] and when the suit has been disposed of on an erroneous issue.[7]

(5) When the lower Court has failed to determine material issues in the case.[8]

(6) Where a suit has been dismissed for default instead of being tried on the merits as it ought to have been.[9]

For other instances, see the following cases.[10]

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(3) *Rajit Ram* v. *Katesar Nath*, (1896) 18 All 396 (399): 1896 All W N 102; *Lingammal* v. *Chinna*, (1883) 6 Mad 239 (245): 7 Ind Jur 244; *Salima Bibi* v. *Shaikh Muhammad*, (1896) 18 All 131 (141): 1896 All W N 2. But see *Mithai* v. *Hasan Ali*, 1930 All 863 (864): 128 Ind Cas 827 [When the lower Court has tried the suit and dismissed it on the merits, it would be unfair to the defendants to direct a remand on the ground of misjoinder].

(4) *Habib Baksh* v. *Baldeo Prasad*, (1901) 23 All 167 (173): 1901 All W N 39; *Thakur Raghunathji* v. *Shah Lal Chand*, (1897) 19 All 330 (331): 1897 All W N 75.

(5) *Agent, Bengal Nagpur Railway* v. *Behari Lal*, 1925 Cal 716 (717): 29 Cal W N 614: 52 Cal 783: 90 Ind Cas 426.

(6) *Chunder Monee* v. *Modhoo Dey*, (1875) 23 Suth W R 166 (167); *Hurish* v. *Hurish*, (1876) 25 Suth W R 325 (326); *Raghuraj Singh* v. *Mt Majid-un-nissa*, 1925 Oudh 692 (692): 87 Ind Cas 950; *Bhawan* v. *Madan Mohan Lal*, (1916) 35 Ind Cas 41 (42): 14 All L J 734: 38 All 533; *Brij Indar Singh* v. *Kanshi Ram*, 1917 P C 156: 42 Ind Cas 43 (48, 49): 33 Mad L Jour 486: 22 Mad L Tim 362: 6 Mad L W 592: 126 Pun W R 1917: 15 All L J 777: 19 Bom L R 866: 3 Pat L W 313: 26 Cal L Jour 572: 104 Pun Re 1917: 1917 Mad W N 811: 22 Cal W N 169: 127 Pun L R 1917: 45 Cal 94: 44 Ind App 218 P C; *Juggurnath* v. *Rajah Chutter Narain*, (1871) 17 Suth W R 409 (410); *Luchman* v. *Jogul Kishore*, (1868) 3 Agra 99.

(7) *Guru Prasad* v. *Ras Mohan*, (1878) 1 Cal L Rep 431 (433).

(8) *Bhup Singh* v. *Prem Singh*, 1924 Lah 362 (363): 5 Lah L Jour 384: 76 Ind Cas 496; *Nichhabhai Pragji* v. *Isse Khan*, (1864-66) 2 Bom H C R 297; *Mora Joshi* v. *Ramchandra*, (1891) 15 Bom 24 (26); *Ishan Chandra Banerjee* v. *Hrishikesh Biswas*, (1917) 42 Ind Cas 550 (552) Cal; *Muhammad* v. *Ibrahim*, (1866-68) 3 Bom H C R A C 160; *Ajuram* v. *Kusaji*, (1866-67) 4 Bom H C R A C 43; *Sheo* v. *Bechun*, (1874) 22 Suth W R 31 (32); *Karri Bapanna* v. *Sunkari Yerramma*, 1923 Mad 718 (718): 45 Mad L Jour 824: 18 Mad L W 49: 1923 Mad W N 452: 74 Ind Cas 218: 33 Mad L Tim 46; *Radha Kishen* v. *Bakhtawar Lal*, (1866) 1 Agra Rev 1; *Luchee Ram* v. *Mahant Ram*, (1866) 1 Agra 10.

(9) *Patinhare* v. *Vellur Krishnan*, (1903) 26 Mad 267 (268); *Badam* v. *Nathu*, (1903) 25 All 194 (195): 1903 All W N 6. But see *Amrito Lal Mukerjee* v. *Ram Chandra Roy*, (1902) 29 Cal 60 (62) [No appeal being open from an order of dismissal for default the appellate Court has no power of remand in such a case].

(10) *Jetha Lal* v. *Varaj Lal*, 1922 Bom 267 (270): 46 Bom 184: 23 Bom L R 769: 63 Ind Cas 478 [Erroneous refusal to grant adjournment —Case remanded]. *Vemula Jambalaya* v. *Iskala Rajamma*, (1912) 15 Ind Cas 859 (860): (1912) 1 Mad W N 1000: 24 Mad L Jour 512: 36 Mad 492 [No regular hearing of the matter by the trial Court—Evidence on which disposal was made was not placed on record—Procedure irregular that order for complete retrial was thought to be required]; *Ahmad Mirza Khan* v. *Hira Lal*, 1899 Pun Re No 23 [Suit on bond executed by defendant—Trial Court finding that defendant was not minor and guardian *ad litem* was not necessary—Case tried on other issues and suit dismissed—Appeal—Appellate Court finding that defendant was minor and remanding case for trial after appointing guardian *ad litem*—*Held*, that under S 444 [O 32, R 5 (2)] appellate Court might set aside the proceedings and remand]; *Shib Pershad Pattuck* v. *Nubo Kishen Mookerjee*, (1872) 17 Suth W R 446 (447) [Case remanded where suit was decided without the plaintiff being given fair opportunity of knowing the line of defence he had to meet]; *Lochun Singh* v. *Het Narain Singh*, (1875) 24 Suth W R 232 (232) [On account of the inefficiency of the legal advisor of the plaintiff, witnesses were not properly examined and oral evidence fell short of the requirements of S 63 of Evidence Act—Case remanded]; *Jogeshur* v. *Doolun Rae*, (1870) 2 N W P 183 [Suit decided without framing any issues—Case remanded]; See *Brojo Nath Sen* v. *Soorja Kant Sen*, (1876) 25 Suth W R 276 [Mere occasional obscurity in judgment of lower Court is not a proper ground for remand]; *Narpat Rai* v. *Devi Das*, (1912) 14 Ind Cas 379 (380): 17 Pun W R 1912: 240 Pun L R 1912 [Order passed on an application, without hearing objection of other party]; *Thakur Shere Bahadur Singh* v. *Thakurain Dariao Kuar*, (1877-78) 3 Cal 645 (653): 3 Sar 769: 3 Suther 472: 2 Ind Jur 67: R & J 47 P C [Lower Court had not considered the evidence on certain point—Privy Council, because of its imperfect acquaintance with the facts of the case, preferred to remand the whole case to framing issues itself].

O. 41, R. 23, Notes 12—14.

12. **Wrong onus of proof.**—Where the trial Court has thrown the burden of proof on the wrong party, the appellate Court may if necessary, remand the case for re-trial.[1] But where the error in casting the burden of proof has not affected the evidence produced on either side and both parties have given all the evidence that they had, the question of burden of proof becomes immaterial and no remand can be ordered merely because the lower Court has wrongly cast the onus of proof.[2]

13. **Exclusion of evidence.**—An erroneous exclusion of evidence by the lower Court may be a good ground for remand under the inherent power of the Court.[1] Similarly the failure to give a party an opportunity to produce evidence will be a good ground for remand.[2] So also, where the appellate Court is unable, on the materials before it, to decide the case, it may remand the case for retrial after taking fresh evidence.[3]

14. **Basing decision on inadmissible evidence.**—Where the lower Court's judgment is vitiated by the admission of inadmissible evidence, the case may be remanded for re-trial under the inherent power of the Court.[1] But a remand is not necessary if the finding of the lower Court is amply supported by the other evidence in the case.[2]

Note 12.

[1] *Partap Narain Singh* v. *Ram Kumar Singh*, 1926 All 453 (454): 24 All L J 513: 94 Ind Cas 944; *Sohna Mal* v. *Budh Mal*, 1927 Lah 148 (149): 99 Ind Cas 4; *Modadugu Perayya* v. *Peroli Vaikayamma*, 1924 Mad 770 (771): 34 Mad L Tim 201: 47 Mad L Jour 14: 19 Mad L W 627: 79 Ind Cas 899; *Gobind Ram* v. *Suraj Kuar*, (1914) 24 Ind Cas 470 (472): 131 Pun L R 1914: 114 Pun W R 1914; *Ram Rao* v. *Kuttiya Goundan*, (1916) 34 Ind Cas 294 (297): 3 Mad L W 331: 19 Mad L Tim 275: 30 Mad L Jour 514: 40 Mad 654.

[2] *Bando Subrao* v. *Jambu Tavnappa*, (1910) 7 Ind Cas 986 (986, 987): 12 Bom L R 801; See also *Gowardhan* v. *Harlal Ramsukh*, 1923 Nag 62 (63): 69 Ind Cas 541; *Ramyad Misra* v. *Thakur Misra*, 1899 All W N 2 (2) [First Court laying *onus* of proof on defendant and decreeing suit as defendant declined to produce any evidence—Appellate Court laying *onus* on plaintiff and dismissing suit—Appeal to High Court—High Court holding that *onus* was on defendant and setting aside decree dismissing suit—Defendant not entitled to remand as he had an opportunity of producing evidence and had declined to do so]; *Sahdeo Narain* v. *Kusum Kumari*, (1918) 46 Ind Cas 929 (936) Pat.

Note 13.

[1] *Secretary of State* v. *Ananda Mohan Roy*, 1921 Cal 661 (672): 34 Cal L Jour 205: 66 Ind Cas 287; *Ganga Singh* v. *Lachman Singh*, (1911) 10 Ind Cas 441 (441) All [Evidence of defendant not taken—Case remanded]; *Gorachand* v. *Basanta Kumar*, (1911) 12 Ind Cas 684 (686): 15 Cal L Jour 258 [Important questions disallowed—Opportunity to produce evidence not given—Case may be remanded]; *Venkamma* v. *Goparaju Perraju*, 1928 Mad 991 (992): 1928 Mad W N 164: 112 Ind Cas 1 [Court has inherent power to remand case for reception of evidence rejected by the trial Court]; *Susthir Bala Dutt* v. *Akhoy Kumar Bhuttacharjee*, (1916) 36 Ind Cas 813 (813) Cal [Important questions disallowed—Case may be remanded]; *Subbe Goundan* v. *Krishnamachari*, 1922 Mad 112 (114): 1922 Mad W N 269: 15 Mad L W 537: 42 Mad L Jour 372: 45 Mad 449: 30 Mad L Tim 217: 68 Ind Cas 869 [Where, owing to improper or defective enquiry in lower Court, where for *e.g.*, relevant documents are not admitted or material witnesses have not been examined, and the appellate Court is not in a position to adjudicate finally upon matters in dispute remand may be ordered under S 151 if necessary to meet ends of justice]. See *Nilkant Chuckerbutty* v. *Sheo Narain Koonwar*, (1867) 8 Suth W R 276 (277) [Party probably misled by the action of the Court into not giving evidence fully—Case may be remanded]. See also *Velayappa Chetty* v. *Nellayya Pillai*, (1911) 10 Ind Cas 675 (676): 9 Mad L Tim 317 [When ground on which an appellate Court declares a document admissible has arisen subsequently to disposal of the suit by lower Court, order of remand may be made under O 41, Rr 23 or 33 of the C P C of 1908].

[2] *Brojo* v. *Protab*, (1874) 22 Suth W R 296 (296); *Muhammad Abdul Aziz* v. *Muhammad Abdul Jalil*, (1918) 43 Ind Cas 57 (59) All [Trial Court refusing to grant time for the production of certified copies—Appellate Court may remand]; *Bonomalee Churn Mytee* v. *Sheikh Hafizuddeen*, (1874) 13 Beng L R 247 (Note): 12 Suth W R 317; *Gora Chand* v. *Basanta Kumar*, (1911) 12 Ind Cas 684 (686): 15 Cal L Jour 258 [Trial Court refusing to summon witnesses—Case may be remanded].

[3] *Karti Manjhi* v. *Banamali Mukerji*, 1930 Pat 7 (13): 11 Pat L Tim 637: 124 Ind Cas 385; *Ram Dutt Shankarlal* v. *Punam Chand*, 1927 Nag 192 (192): 101 Ind Cas 281. But see *Ganga Prasad Singh* v. *Ishri Pershad Singh*, 1918 P C 3 (4): 45 Cal 748: 45 Ind App 94: 16 All L J 409: 20 Bom L R 587: 27 Cal L Jour 548: 22 Cal W N 697: 34 Mad L Jour 545: 28 Mad L Tim 388: 8 Mad L W 176: 1918 Mad W N 382: 4 Pat L W 349: 45 Ind Cas 1 P C.

Note 14.

[1] *Sarup Rai* v. *Srikant Prasad*, (1920) 55 Ind Cas 922 (922): 2 U P L R (Pat) 49: 1 Pat L Tim 224; *Rohee Lal* v. *Dindayal Lal*, (1874) 21 Suth W R 257 (257).

[2] *Faijaddin* v. *Agni Kumar*, 1924 Cal 370 (371): 71 Ind Cas 300.

O. 41, R. 23, Notes 15—18.

15. **New plea is not a ground of remand.**—As a general rule, a remand cannot be ordered to enable a new plea raised for the first time in appeal, to be tried.[1] (*See* Notes under O. 41, Rr. 1 and 12). But this may be done in exceptional cases.[2]

16. **Remand in cases under special and local laws.**—*See* the undermentioned cases.[1]

17. **Remand in appeal from ex parte decree.**—*See* S. 96, Note 12 points 12, 13 and 14 and the following decisions.[1]

18. **Remand in appeal from order refusing to set aside ex parte decree.**—Where an application to set aside an *ex parte* decree is dismissed on the preliminary ground that there was no want of "appearance" on the part of the defendant and the question of "sufficient cause" for non-appearance was therefore not gone into by the lower Court, the appellate Court, on reversing the decision of the lower Court on the preliminary point, can remand only the *application* to set aside the *ex parte* decree and cannot remand the *suit itself* for re-trial.[1] But where the lower Court has refused an application to set aside an *ex parte* decree *on the merits*, there is no disposal on a preliminary point and the appellate Court cannot remand the application to the lower Court.[2]

Note 15.

[1] *Mubarak Hussain v. Shah Hamid Hussain*, (1917) 38 Ind Cas 509 (511): 1 Pat L W 188: 2 Pat L Jour 8: 1917 Pat H C C 308; *Bajrang v. Brahma*, (1919) 52 Ind Cas 849 (850): 6 Oudh L J 322; *Durga Charan Biswas v. Kailash Chandra Das*, (1920) 54 Ind Cas 645 (645) Cal; *Noor Bibi v. Ashan-ulla*, (1920) 55 Ind Cas 435 (436) Cal; *Basseemati v. Tarit Basani*, (1918) 44 Ind Cas 416 (418) Cal.

[2] *See* for instance *Motaleb Khan v. Idris Khan*, 1926 Cal 414 (415): 86 Ind Cas 750.

Note 16.

[1] **Cases under Agra Tenancy Act:**—*Mt Phulbane Kuar v. Bhagdat Singh*, 1928 All 13 (14): 26 All L J 103: 107 Ind Cas 677; *Hira Lal v. Maharaj Singh*, (1916) 35 Ind Cas 105 (105, 106) All; *Gulzari Lal v. Latif Husain*, (1916) 35 Ind Cas 27 (28): 14 All L J 84: 38 All 181; *Raghunath Prasad v. Jagannath Das*, (1912) 14 Ind Cas 176 (176) All; *Zahur Ali v. Sher Ali*, (1906) 28 All 283 (285): 1906 All W N 5: 3 All L J 20; *Wilayat Husen v. Maharaja Mahendra Chandra Nandy*, (1906) 28 All 83 (84); *Jagannath v. Bhawani*, (1905) 27 All 167 (168, 169): 1904 All W N 203; *Partap Singh v. Narain Das*, (1894) 16 All 375 (378, 379): 1894 All W N 120; *Girwar Singh v. Sitaram*, (1889) 11 All 31 (32): 1888 All W N 282; *Sheo Prasad v. Anrudh*, (1884) 6 All 440 (441): 1884 All W N 154; *Debi Saran Lal v. Debi Saran Upadhia*, (1884) 6 All 378 (379): 1884 All W N 122; *Ahmaduddin v. Majlis Rai*, (1883) 5 All 438 (440): 1883 All W N 69.

Cases under Bengal Tenancy Act:—*Debi Prosad v. Official Trustee*, 1923 Cal 333 (335): 37 Cal L Jour 314: 72 Ind Cas 1013; *Mothur Chandra Majumdar v. Tara Sankar Ghose*, (1903) 7 Cal W N 440 (441).

Cases under Madras Estates Land Act:—*Nandura Sobhanadracharyulu v. Nandura Venkata Narasimhacharyulu*, 1928 Mad 1062 (1062): 113 Ind Cas 552; *K. Gurusami Naidu v. K Subba Naidu*, (1915) 29 Ind Cas 265 (265) Mad *Vilvanatha Mudaliar v. Mannar Naidu*, (1914) 25 Ind Cas 425 (426): 1 Mad L W 667; *Veeraswami v. Manager, Pittapur Estate*, (1903) 26 Mad 518 (519, 520) 13 Mad L Jour 296.

Cases under Oudh Rent Act:—*Uma Baksh Singh v. Ram Sahae*, (1901) 4 Oudh Cas 261 (263): *Kishen Kuer v. Mahant Bajrang Das*, (1898) 1 Oudh Cas 172 (174).

Note 17.

[1] **Cases holding that the appellate Court has inherent power of remand in such cases:**—*Brojeswar v. Syama Charan*, (1919) 50 Ind Cas 363 (364) Cal; *Ma On Me v. Ma Pya Gyi*, (1920) 56 Ind Cas 255 (256): 3 U B R 198. See also *Vijayaraghava Reddi v. Komarappa Reddi*, (1912) 15 Ind Cas 367 (368): (1912) 1 Mad W N 410: 11 Mad L Tim 199: 22 Mad L Jour 409 [*Quaere*:—Whether such power exists]; *Ram Raghubir Lal v. Dip Narain Singh*, 1923 All 287 (290): 21 All L J 168: 71 Ind Cas 749: 45 All 311: 4 L R All (Civ) 380 [Appellate Court reversing *ex parte* decree *on merits* may remand if plaintiff had been mislead into not giving his full evidence by the Court intimating that the evidence already let in was sufficient for passing an *ex parte* decree].

Cases holding that there is no power of remand in such cases:—*Caussanel v. Soures*, (1900) 23 Mad 260 (261): *Parvati Shankar v. Bai Naval*, (1883) 17 Bom 733 (734).

Note 18.

[1] *Radha Kishen v. Collector of Jaunpur*, (1901) 23 All 220 (226): 28 Ind App 28: 5 Cal W N 153: 11 Mad L Jour 56: 7 Sar 800: 3 Bom L R 78 P C.

[2] *Sona Ulla v. Beake Mandal*, (1908) 7 Cal L Jour 379 (380).

The appellate Court in an appeal from an order rejecting an application for setting aside an *ex parte* order can treat the appeal as one from the *ex parte* decree itself and decide the whole case finally.[3]

19. **Remand by consent.**—A case may be remanded with the consent of parties though a remand may not be permissible otherwise.[1] Thus a case may be remanded on the agreement of parties for trial on issues not raised in the memorandum of appeal.[2]

20. **Remand in second appeal.**—O. 41, R. 23 applies also to second appeals. (*See* S. 108 and O. 42, R. 1.) Hence, where a first appeal has been disposed of on a preliminary point the High Court may, in second appeal, remand the case if it reverses the decision on the preliminary point[1] or it may itself dispose of the appeal.[2] But even if a case has not been disposed of on a preliminary point, the High Court in second appeal may remand the case in the exercise of its *inherent* power to prevent the ends of justice from being defeated.[3] (*See* Note 10, *supra*). But generally speaking, a case will not be

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(3) *Chand Meah* v. *Mohammad Muzaffar Howladar*, 1926 Cal 1232 (1233): 97 Ind Cas 313.

Note 19.

(1) *Muthuswami Odayan* v. *Kolandavelu Odayan*, (1914) 22 Ind Cas 41 (41): 1914 Mad W N 90; *Manager, Court of Wards, Kalahasti Estate* v. *Ramasami*, (1905) 28 Mad 437 (440): 15 Mad L Jour 236; *Baikuntha* v. *Salimulla*, (1896-97) 12 Cal W N 590. See also *Jagannath Pershad* v. *Hanumant Pershad*, (1909) 3 Ind Cas 465 (465): 13 Cal W N 830: 10 Cal L Jour 74: 6 Mad L Tim 7: 11 Bom L R 861: 19 Mad L Jour 435: 36 Cal 833: 36 Ind App 221 P C [Additional evidence by consent of parties—They cannot subsequently complain about it].

(2) *Natesa* v *Venkatarama*, (1907) 30 Mad 510 (513): 17 Mad L Jour 518: 2 Mad L Tim 455.

Note 20.

(1) *Ram Narain* v. *Bhavani Din*, 1882 All W N 104: 9 All 29 Note; *Wazeer Ali* v. *Kallee Kumar*, (1869) 11 Suth W R 228 (229): 2 Beng L R A C 815; *Ram Ditta* v. *Allayar*, 1887 Pun Re No 98; *Fida Ali* v. *Ismaiiji*, (1910) 5 Ind Cas 701 (703): 6 Nag L R 20; *Ghanshyamdas* v. *Hardei*, (1916) 32 Ind Cas 380 (386): 2 Oudh L J 562. See also *Man Mohan Das* v. *Shib Chandra Saha*, 1931 Cal 853 (855): 34 Cal W N 839: 131 Ind Cas 562 [Lower appellate Court deciding appeal on preliminary point should decide case on merits as well to obviate a remand if the decision on preliminary point was reversed].

(2) *Ghanshyamdas* v. *Hardei*, (1916) 32 Ind Cas 380 (386): 2 Oudh L J 562.

(3) **Lower appellate Court acting in excess of its powers**:—*Babaji* v. *Kasim Bhai*, (1865) 3 Bom H C R A C 60 [District Judge reversing Munsif's decree but failing to pass decree in favour of successful appellant—High Court remanding to District Judge for passing decree—District Judge (successor of former one) going into the merits and deciding case against the appellant—High Court again reversed this decree and remanded the case to District Judge to pass judgment in favour of appellant]. But see *Kasheenath Deb* v. *Maharanee Shibessuree Debia*, (1867) 8 Suth W R 503 (503).

Lower Court misappreciating true controversy between the parties:—*Chunder Monee* v. *Modhoo Dey*, (1875) 23 Suth W R 166 (167). [Lower Court not examining evidence with reference to the right issues in case—Case remanded]; *Bahal Singh* v. *Surain Singh*, 1927 Lah 480 (480, 481): 9 Lah L Jour 268: 103 Ind Cas 854: 28 Pun L R 679 [Case decided with reference to irrelevant issues—Case remanded]; *Quadir Baksh* v. *Shames Din*, 1923 Lah 206 (207): 73 Ind Cas 756 [Lower Court misappreciating true controversy in the case—Case remanded]; *Ranchhor Das* v. *Har Krishan Das*, 1921 All 335 (335): 19 All L J 558: 63 Ind Cas 501 [Lower Court misunderstanding the nature of the case—Case remanded].

Failure to decide material issues—Case may be remanded:—*Ram Pershad* v. *Rajunder*, (1866) 6 Suth W R 262 (265): *Lachman* v. *Sadhu*, 1926 Lah 351 (352): 93 Ind Cas 829; *Tara Singh* v. *Jawala Das*, 1923 Lah 308 (308); *Rupan Raut* v. *Pitamber Lal*, (1920) 55 Ind Cas 233 (234) Pat; *Kailash Chander* v. *Kunja Behari*, (1906) 4 Cal L Jour 86 (87); *Amanut Ali* v. *Ukloo Pasee*, (1876) 25 Suth W R 140 (141). See also *Sagur Chunder Shaha* v. *Sreemuthi Mohamaya*, (1876) 25 Suth W R 25 (26).

Decision based on an incorrect view of the law applicable—Case remanded:—*Gopala Kudva* v. *Juvappa Kamathi*, 1931 Mad 577 (579): 1930 Mad W N 874: 133 Ind Cas 369: 35 Mad L W 400; *Ram Sewak* v. *Mt Ram Dei*, (1908) 11 Oudh Cas 264 (266).

Improper admission of evidence—Case may be remanded:—*Krishna* v. *Waryaman*, 1927 Lah 45 (45): 99 Ind Cas 920: 8 Lah L Jour 537; *Nabendra Kishore Roy* v. *Rahima Banu*, (1915) 31 Ind Cas 695 (697): 19 Cal W N 1015.

Improper exclusion of evidence—Case may be remanded:—*Brindaban Chandra De* v. *Krishna Mohan De*, (1918) 47 Ind Cas 159 (160) Cal; *Jamni Mohan Bhattacharjee* v. *Narendra Mohan Chakkaravarthy*, (1917) 41 Ind Cas 71 (72) Cal; *Durga Dihal* v. *Anoraji*, (1895) 17 All 29 (31, 32): 1894 All W N 190; *Brojo Nath Mookhopadhya* v. *Protab Chunder Thakoor*, (1874) 22 Suth W R 296 (296).

Lower appellate Court not complying with the provisions of O. 41, R 31—Case may be remanded:—*Harmandan* v. *Sheo Gulam*, 1889 All W N 178 (179); *Jagannath* v. *Suravan Dulaiya*, 1888 All W N 61 (62); *Sohawan* v. *Babu Nand*, (1887) 9 All 26 (33): 1886 All W N 284; *Kolahal* v. *Nanku*, 1886 All

O.41, R.23, Notes 20—21.

remanded for re-hearing on an issue raised for the first time in second appeal.[4] Further, unless it is absolutely necessary in the interests of justice, to remand a case, a remand will not be ordered under the inherent power of the Court.[5] (*See* Note 10, *supra.*)

Moreover, the powers of the High Court in second appeal are circumscribed by the provisions of S. 100, and hence the High Court cannot in second appeal reverse a finding of *fact* of the lower appellate Court, however erroneous it may be, and cannot remand a case on the basis of such reversal, unless the finding is vitiated by any such illegality or defect as is mentioned in S. 100.[6] It should also be noted that the power of the High Court to decide questions of *fact* from the materials on record have been considerably extended by S. 103 and the amendments to that section made by Act VI of 1926, and the High Court may itself decide such questions where it is in a position to do so satisfactorily from the materials on the record. For further information *see* S. 103 and the notes thereto and also the following cases.[7]

21. Appeal against an order of remand under this rule.—O. 43, R. 1 (*u*) gives a right of appeal against an order of remand under this rule if an appeal would lie from the decree of the appellate Court.[1] An appeal

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W N 285 (285, 286); *Mahdadeo* v. *Sarju*, 1886 All W N 171 (171, 172); *Mangru Rai* v. *Bishun Dial*, 1884 All W N 99 (99); *Hasmatullah* v. *Hari Mohan*, (1916) 34 Ind Cas 942 (945) Cal; *Santishwar* v. *Lakhikanta*, (1908) 35 Cal 818 (816); 13 Cal W N 177; 4 Ind Cas 321; 5 Mad L Tim 89; *Saravana Pillai* v. *Sesha Reddi*, (1908) 31 Mad 469 (470, 471); 3 Mad L Tim 71; 18 Mad L Jour 34 F B; *Mubarak Hussain* v. *Syed Shah Hamid Hussain*, (1918) 38 Ind Cas 509 (510); 1 Pat L W 188; 2 Pat L Jour 8; 1917 Pat H C C 308.

Miscellaneous:—*Shyama Charan Pramanik* v. *Prohlad Durwan*, (1904) 8 Cal W N 390 [Case decided without giving opportunity to prove case—Case remanded]; *Goluck Chunder Dutt* v. *Anunt Kishore Gossain*, (1876) 25 Suth W R 38 (38) [Issue not decided on merits but taken for granted—Case remanded]; *Maharaja Bahadur Kesho Prasad Singh* v. *Bhagwat Saran Pande*, 1923 Pat 174 (175): 67 Ind Cas 710 [Lower appellate Court not deciding point with reference to the evidence bearing upon the point but with reference to the pleadings—Case may be remanded by the High Court]; *Bidhumukhi Dabea Chowdhrain* v. *Kefyutullah*, (1886) 12 Cal 93 (95) [Finding based on no evidence—Case may be remanded]; *Jahadali* v. *Ajiman Nessa Bibi*, (1918) 44 Ind Cas 18 (19) Cal [Lower appellate Court not realising the legal effect of admission by the pleader of a party—Case to be remanded]; *Kanhai Lal* v. *Manorath*, 1894 All W N 19 (19) [Appeal disposed of at advanced date without notice to parties—Case may be remanded].

[4] *Ramchandra Bhanj Deo* v. *Secretary of State*, (1917) 37 Ind Cas 223 (227): 1916 P C 126: 20 Mad L Tim 235: 20 Cal W N 1245: (1916) 2 Mad W N 175: 4 Mad L W 251: 14 All L J 1009: 18 Bom L R 838: 24 Cal L Jour 296: 31 Mad L Jour 745: 43 Cal 1104: 43 Ind App 172 P C; *Baikuntha Nath Das* v. *Sheik Azidulla*, 1928 Cal 870 (872): 32 Cal L W 778; *Ganodanessa Bibi* v. *Makseddannessa Bibi*, (1911) 11 Ind Cas 84 (85) Cal; *Bisheshar Nath* v. *Mehr Chand*, 1923 Lah 21 (22): 79 Ind Cas 440.

[5] See *Anandrao* v. *Dada*, 1924 Nag 65 (65): 71 Ind Cas 43 [Unless it is very clearly shown that material circumstances were brought to notice of lower appellate Court and that it omitted to consider them, the High Court will not impute any negligence to it and will not remand the case for reconsideration by it]. See also *Mt Bashiram* v. *Bisambar Nath*, 1922 Oudh 268 (269): 9 Oudh L J 439: 69 Ind Cas 667 [If grounds which appellants wish to urge in Court below are all grounds of law which can be argued equally well in High Court, High Court will not send back the case to have the appeal re-argued in the Court below on the same legal grounds which were argued before it previously].

[6] *Gunpat Rao Banka Puri* v. *Raj Kumar Singh*, 1922 Pat 575 (577): 1 Pat 639: 67 Ind Cas 494 [Where issue has been determined, no remand merely because the issue was not scientifically framed]; *Durga* v. *Jowahir*, (1891) 18 Cal 23 (29): 17 Ind App 122: 5 Sar 560 P C [Overruling *Nivath* v. *Bhikhi*, (1885) 7 All 649 (655)].

[7] **Findings of fact by lower appellate Court vitiated by illegality—Cases decided prior to Act VI of 1926 holding that even if there is ample material on the record to decide a question without a remand the High Court cannot determine it itself but remand the case:**—*Palakdhari* v. *Manners*, (1896) 23 Cal 179 (185, 186); *Womas Chunder* v. *Chunder Churn*, (1881) 7 Cal 293 (296); *Sumitra Kuer* v. *Ram Kair Choubey*, (1920) 57 Ind Cas 561 (563): 5 Pat L Jour 410: 1 Pat L Tim 702: 1921 Pat H C C 17.

Finding of fact by lower appellate Court vitiated by illegality within the meaning of S 100—Cases after Act VI of 1926 showing that the High Court itself can determine question without a remand if the materials on the record are sufficient:—*Kshirodamoyi Dexi* v. *Kashi Lal Seal*, 1931 Cal 129 (130, 131): 34 Cal W N 951: 130 Ind Cas 140; *Promotha Nath* v. *Nagendra Nath*, 1930 Cal 235 (238): 33 Cal W N 1211: 125 Ind Cas 603; *Rajani Kanta Deb* v. *Bashiram Mestari*, 1929 Cal 636 (639): 49 Cal L Jour 532: 121 Ind Cas 409.

Note 21.

[1] *Ramaswami Pillai* v. *Narayanaswami Pillai*, 1925 Mad 488 (2) (484): 48 Mad L Jour 100:

O. 41, R. 23, Note 21.

will, therefore, lie from an order of remand only in those cases in which an appeal would lie against the decree, if the appellate Court, instead of making an order of remand, passed a decree on the strength of the adjudication on which the order of remand was based. The test is whether, in the circumstances, an appeal would lie if the order of remand were itself treated as a decree and not a mere order.[2] Thus no appeal lies against an order of remand in a suit of a small cause nature whose value does not exceed Rs. 500,[3] as a second appeal would be barred by S. 102 if the order of remand were treated as a decree. Similarly, an appeal against an order of remand is only maintainable on a question of law.[4]

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21 Mad L W 318: 1925 Mad W N 82: 86 Ind Cas 548. See *Karam Singh* v. *Vir Fingh*, 1921 Lah 154 (155): 2 Lah 252: 3 Lah L Jour 426: 89 Pun L R 1921: 63 Ind Cas 776 [Court of appeal confirming dismissal of a suit as to a part and, reversing decision as to the rest and remanding that part of the case. Plaintiff is a person aggrieved by the order and may appeal]. See also *Angne Lal* v. *Jagdish*, (1911) 9 Ind Cas 431 (432) Oudh [Order which made virtually under R 23 but by a clerical mistake R 25 quoted—Order is appealable]; *Lala Ram Saran Lal* v. *Nem Narain Singh*, (1902) 6 Cal W N 326 (327) [Remand under R 23—Appeal lies though the order is informal in that the decree of the lower Court is not formally declared as set aside]. See also *Sundar Das* v. *People's Bank of India, Ltd*, (1912) 16 Ind Cas 834 (834): 272 Pun W R 1912: 169 Pun L R 1912. But see *Hazarilal* v. *Gangacharan*, (1913) 18 Ind Cas 525 (526) All [Where party appealing accepted compensation for order of remand being made, appeal is not maintainable].

No appeal lies under O 43, R 1 (u) if the order of remand is not one under O 41, R 23. —See the following cases:—*Vijayaraghava Reddi* v. *Komarappa Reddi*, (1912) 15 Ind Cas 367 (368): 1912 Mad W N 410: 11 Mad L Tim 199: 22 Mad L Jour 409; *Venkatarama Ayyar* v. *Sundaram Ayyar*, 1926 Jour 102 (2): 1926 Mad W N 48: 92 Ind Cas 1045; *Jawahir Lal* v. *Fateh Mahton*, 1926 Pat 514 (515): 1926 Pat H C C 279: 97 Ind Cas 1: 8 Pat L Tim 9; *Gurusami* v. *Veerabadhra*, 1926 Mad 695 (697): 23 Mad L W 540: 95 Ind Cas 325; *Hamir Kaur* v. *Court of Wards of the Estate of Sardar Balwant Singh*, 1932 Lah 538 (539): 138 Ind Cas 62: 33 Pun L R 634 [Appellate Court remanding suit to Court of proper pecuniary jurisdiction—*Held*, the remand is not under this rule]; *Mathura* v. *Basanta*, (1909) 2 Ind Cas 572 (572): 36 Cal 510 [Order of remand by special Judge exercising powers under S 109-A of the Bengal Tenancy Act—Not appealable].

(2) *Mt Umri* v. *Shah Mahomed*, 1922 Lah 178 (181): 3 Lah 218: 4 Lah L Jour 359: 68 Ind Cas 849 F B; *Sawan Singh* v. *Mothu*, (1914) 23 Ind Cas 817 (818): 162 Pun L R 1914: 120 Pun W R 1914: 85 Pun Re 1914; *Ali Baksh* v. *Chunnar Singh*, (1910) 8 Ind Cas 1157 (1157): 101 Pun Re 1910: 41 Pun L R 1911: *Mt Fati* v. *Gaddi*, (1913) 20 Ind Cas 788 (789): 158 Pun W R 1913: 279 Pun L R 1913: *Malap Kaur* v. *Hakim Singh*, (1915) 28 Ind Cas 441 (441): 8 Pun Re 1915: 195 Pun L R 1915; *Moti* v. *Nandan*, 1930 All 122 (123): 121 Ind Cas 545: 1930 All L J 454. The view taken in *Faiz Ahmad* v. *Badar Din*, (1911) 11 Ind Cas 315 (316): 137 Pun W R 1911: 50 Pun Re 1911: 210 Pun L R 1911 that an appeal would lie only if it could be stated with certainty that the decree which the appellate Court would have passed if it had decided the appeal *on the merits* would be appealable was overruled in 1922 Lah 178 *Mt Umri* v. *Shah Mahomed*. See also *Mt Chando* v. *Miran Bakhsh*, 1923 Lah 535 (536): 73 Ind Cas 650: 5 Lah L Jour 392 [No special appeal in Punjab against order of remand if it was based on finding as to custom].

(3) *Sant Prasad* v. *Bhawani Prasad*, 1921 All 55 (55): 43 All 403: 19 All L J 72: 60 Ind Cas 831; *Amba Prasad* v. *Mushtaq Hussain*, (1920) 54 Ind Cas 432 (433): 18 All L J 167: 2 U P L R (All) 69: 42 All 200; *Sarup* v. *Kundar*, (1916) 36 Ind Cas 396 (396) All; *Bindraban* v. *Sahodra*, (1913) 21 Ind Cas 638 (638): 11 All L J 599; *Haradeb Das Agarwalla* v. *Ananda Sheik*, (1915) 30 Ind Cas 894 (894): 22 Cal L Jour 97. See *Ramaswami Reddi* v. *Authi Lakshmi Ammal*, (1910) 8 Ind Cas 162 (162): 34 Mad 502: 1910 Mad W N 614: 9 Mad L Tim 85 [Suit for mesne profits not being of small cause nature, order of remand in such a suit is appealable].

Section 589, Cl. (28) (correspondent to O. 43, R 1) of the former Code did not contain the condition as to an appeal being open from the decree. Hence it was held in the following cases that S 536 (now S 102) was no bar to an appeal from an order of remand though it would have barred an appeal from the decree—These cases are no longer good law:—*The Collector of Bijnor* v. *Jafar Ali Khan*, (1881) 3 All 18 (20); *Gulam Husen* v. *Musa Miya*, (1884) 8 Bom 260 (261); *Mahadev Narsingh* v. *Ragho Keshav*, (1883) 7 Bom 292 (293); *Kirte Mohalder* v. *Ramjan Mohaldar*, (1884) 10 Cal 528 (524): 5 Shome L R 159; *Bhai Wazira* v. *Chuhar Mal*, 1895 Pun Re No 85 F B; *Chinnatambi Goundan* v. *Chinnanna Goundan*, (1896) 19 Mad 391 (394); *Agandh* v. *Khaja*, (1907) 11 Cal W N 862 (865); *Qadir Bakhsh* v. *Shamas Din*, 1923 Lah 206 (207): 73 Ind Cas 756.

(4) *Honda Ram* v. *Hotu Ram*, 1922 Lah 97 (98): 2 Lah 25: 36 Pun L R 1921: 58 Pun L R 1921: 59 Ind Cas 715; *Seshammal* v. *Kuppanayyangar*, 1926 Mad 475 (476): 91 Ind Cas 462; *Qamar Jehan Begam* v. *Bansi Dhar*, 1921 Oudh 214 (214): 8 Oudh L J 624: 65 Ind Cas 376; *Joseph Arumugam Pillai* v. *Muruga Pillai*, (1909) 3 Ind Cas 283 (284): 6 Mad L Tim 198; *Sawan Singh* v. *Mothu*, (1914) 23 Ind Cas 817 (818): 162 Pun L R 1914: 120 Pun W R 1914: 85 Pun Re 1914; *Waryam Singh* v. *Harnam Singh*, (1918) 48 Ind Cas 379 (379): 109 Pun Re 1918: 23 Pun L R 1919; *Malap Kuar* v. *Hakim Singh*, (1915) Pun Re No 8: 195 Pun L R 1915: 28 Ind Cas 441; Contra *Ram Rattan Shah* v. *Kirpa Ram*, (1910) 8 Ind Cas 246 (246): 192 Pun W R 1910: 86 Pun L R 1910.

Even under the former Code S 588, Cl. (28) of which (now O. 43, R. 1 (u) did not contain the condition as to an appeal being competent from the decree of the appellate

O.41, R.23, Note 21.

S. 104, sub-S. (2) bars a second appeal from an order passed in an appeal from an order under S. 104 or O. 43, R. 1. Hence, where an order of remand is made in an appeal against an order under O. 43, R. 1 no further appeal is competent.[5]

Can an order of remand be appealed from after it has been carried out and the lower Court has decided the suit on the merits in accordance with the order of remand? On this question there is a conflict of decisions. The High Court of Allahabad[6] the Chief Court of Punjab[7] and the Judicial Commissioner's Courts of Nagpur[8] and Oudh[9] have held that an appeal is not barred under such circumstances and that if the order of remand is set aside in appeal the proceedings based on the order of remand fall to the ground. This view proceeds on the ground that there is nothing in the Code to limit the right of appeal against an order of remand under such circumstances. On the other hand, the Calcutta High Court has held that an appeal against an order of remand must be filed before the lower Court has decided the suit on the merits in accordance with the order of remand.[10] The reason given is that an appeal

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Court, it was held in the following cases that questions of fact could not be re-opened in an appeal from an order of remand, the reason given being that such an appeal was a second appeal:—*Tika Ram* v. *Shama Charn*, (1898) 20 All 42 (45): 1897 All W N 195; *Gouri Shankar* v. *Karima Bibi*, (1893) 15 All 413 (414): 1893 All W N 178; *Naimallah Pramanick* v. *Girish Narain*, (1882) 8 Cal 674 (675); *Venganayyan* v. *Ramasami*, (1896) 19 Mad 422 (424): 4 Mad L Jour 263.

But in some cases it was held that questions of fact might be re-opened in an appeal from an order of remand as it was not a second appeal from a decree:—*See* the observations of Shadi Lal, C J, in *Mt Umri* v. *Shah Mahomed*, 1922 Lah 178 (181): 3 Lah 218: 68 Ind Cas 849.

(5) *Raj Bhai* v. *Yakub Ali*, 1907 Pun Re No 120: 193 Pun W R 1907; *Timmanna Banta* v. *Mahabala Bhatta*, (1896) 19 Mad 167 (168): 6 Mad L Jour 24. See also *Nanda* v. *Ramji Lal*, (1906) 3 All L J 119 (123): 1906 All W N 58 [Order refusing review—Appeal—Remand in—*Held*, that no appeal being competent from orders refusing review, the appeal was not one under S 588 and hence the bar of the second para. of able].

Appeal under O. 43, R. 1 (a) against an order returning plaint under O 7, R 10—Remand by appellate Court—No further appeal lies—See the following cases:—*Moti Lal* v. *Nandan*, 1930 All 122 (123): 121 Ind Cas 545: 1930 All L J 454; *Naubat Singh* v. *Baldeo Singh*, (1911) 9 Ind Cas 666 (667): 8 All L J 12: 33 All 479; *Krishna Ram* v. *Narsingh Serak Singh*, (1881) 3 All 855 (856): 1881 All W N 101; *Chhubu Mian* v. *Harcharan Das*, (1912) 18 Ind Cas 529 (530): 119 Pun Re 1912: 101 Pun L R 1913: 48 Pun W R 1913; *Paidapati Venkatanarasu* v. *Vikram Kotayya*, 1926 Mad 900 (900): 51 Mad L Jour 119: 1926 Mad W N 613: 24 Mad L W 630: 97 Ind Cas 790.

Appeal under O 43, R 1 (j)—Remand—No appeal lies from order of remand:—*Mathura Nath Ghose* v. *Nobin Chandra Kundu Biswas*, (1897) 24 Cal 774 (777): 1 Cal W N 674.

Appeal under O. 43, R. 1 (q)—Remand—No appeal lies against order of remand:—*Jhanday Lal* v. *Sarman Lal*, (1899) 21 All 291 (292): 1899 All W N 68.

Some of the decisions above cited will show the law in this respect was the same under the former Code also.

(6) *Uman Kunwari* v. *Jarbandhan*, (1908) 30 All 479 (482): 5 All L J 447: 1908 All W N 195: 4 Mad L Tim 162 F B; *Babu Lal* v. *Ramkali*, (1906) 3 All L J 40 (42): 1906 All W N 28. See *Meer Tukee Ali* v. *Meer Saadut Ali*, 5 N W P H C 137 [In this case the appellant against the order of remand was not given his costs though he succeeded in his appeal because he had not appealed before the remand order had been carried out by the lower Court].

The following decisions to the contrary should be regarded as overruled by the Full Bench decision already cited:—*Ikra Munnissa* v. *Muhammad Wazir*, 1882 All W N 53 (53); *Karori Mal* v. *Sahodra*, 1884 All W N 5 (5); *Gulzari Mal* v. *Kabir-un-nissa*, (1908) 30 All 191 (192): 1908 All W N 76: 5 All L J 270; *Salig Ram* v. *Brij Bilas*, (1907) 29 All 659 (660): 4 All L J 569: 1907 All W N 234; *Prag Lal* v. *Raghubar*, 1881 All W N 174 (174).

(7) *Jag Lal* v. *Shib Lal*, 1902 Pun Re No 37: 25 Pun L R 1902; *Mehr Khan* v. *Ram Nath*, 1900 Pun L R page 314; *Ghulam Jilani* v. *Ghulam Haidar Khan*, 1891 Pun Re No 89; *Surjan Mal* v. *Bawa*, 1887 Pun Re No 65; *Tara Singh* v. *Gurditta*, 1887 Pun Re No 40.

But see the following decisions to the contrary:—*Ali Bahadur* v. *Raja Aladad Khna*, 1884 Pun Re No 129; *Lachman* v. *Mahomed Husain*, 1886 Pun Re No 117; *Mt Mehran* v. *Fateh Din*, 1886 Pun Re No 83.

(8) *Vithoba* v. *Tanba*, (1912) 14 Ind Cas 672 (673): 8 Nag L R 42.

(9) *Hub Lal* v. *Ganga*, (1912) 15 Ind Cas 191 (191): 15 Oudh Cas 43; *Girdhari Lal* v. *Jaswant Singh*, (1912) 15 Ind Cas 181 (182): 15 Oudh Cas 33.

(10) *Janki Nath* v. *Promotha Nath*, (1911) 10 Ind Cas 514 (515): 15 Cal W N 830; *Baikunta Nath* v. *Nawab Salimulla*, (1907) 6 Cal L Jour 547 (556): 12 Cal W N 590;

O.41, R.23, Notes 21—22.

against an interlocutory order cannot be filed after the decree in the case has been passed.

An appeal lies as to an order regarding costs in an order of remand.[11] (*See also* the undermentioned case.[12])

22. Appeal from order of remand under inherent power.—O. 43, R. 1 (*u*) gives a right of appeal only against an order of remand under O. 41, R. 23. Hence, there is no right of appeal against an order of remand under the inherent power of the Court.[1] But the right of appeal under O. 43, R. 1 (*u*) is not confined to cases which properly come within the scope of O. 41, R. 23 but extends also to cases in which the order of remand *purports* to be under R. 23 although in reality the circumstances under which the order is passed may not fall within the purview of that rule.[2] This view proceeds on the reasoning that the right of appeal depends on what the Court purports to have

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Madhusudan Sen v. *Kamini Kanta Sen,* (1905) 32 Cal 1023 (1029): 9 Cal W N 895: 2 Cal L Jour 35 Note; Contra *Jatinga Valley Tea Co* v. *Chera Tea Co,* (1888) 12 Cal 45 (47).

(11) *Nathu Lal* v. *Zahru Mal,* 1889 Pun Re No 89.

(12) *Shariful Hasan* v. *Lachmi Narain,* 1932 All 16 (17): 1931 All L J 858: 135 Ind Cas 558 [Ordinarily in an appeal from an order of remand appellate Court would not modify order without first issuing notice to the opposite party. But if the remand order has been modified without notice to the other party, the order modifying the remand order though irregular is not *ultra vires* and without jurisdiction].

Note 22.

(1) *Chajju Mal Munna Lal* v. *Pyare Lal,* (1921) 63 Ind Cas 858 (858) All; *Ramanath Naskar* v. *Tarak Nath Banerjee,* 1928 Cal 305 (305): 107 Ind Cas 746; *Jagot Hari Saha* v. *Medini Mohan,* 1927 Cal 642 (644): 31 Cal W N 878: 104 Ind Cas 422; *Mahendra* v. *Ram Taran,* (1920) 55 Ind Cas 96 (96): 23 Cal W N 1049: 31 Cal L Jour 357; *Radhabullab Surma* v. *Anundmoyee Dabia,* 1864 Suth W R Mis 39 (40): *Harnam Singh* v. *Indar,* 1932 Lah 311 (311): 33 Pun L R 285: 138 Ind Cas 202; *Mt Gaindo* v. *Radhe Mohan,* 1932 Lah 219 (220): 33 Pun L R 54: 136 Ind Cas 559; *Ram Dhan* v. *Lal Chand,* 1931 Lah 302 (302): 32 Pun L R 169: 133 Ind Cas 127; *Ramchandra* v. *Narayan,* (1920) 58 Ind Cas 909 (910); *Wisakhi Ram* v. *Alawal,* 1924 Lah 487 (487): 6 Lah L Jour 153: 78 Ind Cas 408; *Mahmud Shah* v. *Talab,* 1924 Lah 245 (246): 73 Ind Cas 915; *Har Devi* v. *Harnam Singh,* (1910) 6 Ind Cas 491 (492): 17 Pun L R 1910: 123 Pun W R 1910; *Vaithialingam Pillai* v. *Kandaswami Pillai,* 1931 Mad 1 (2): 33 Mad L W 210: 60 Mad L Jour 713: 132 Ind Cas 311; *Kakamma* v. *Chandrasekara Somayajulu,* 1929 Mad 205 (207, 208): 119 Ind Cas 705; *Venkamma* v. *Goparaju Perraju,* 1928 Mad 991 (992): 1928 Mad W N 164: 112 Ind Cas 1; *Suppiah Nadar* v. *Muthia Pillai,* 1928 Mad 984 (985): 112 Ind Cas 710; *Karuppana Pillai* v. *Ethumalai Pillai,* 1927 Mad 859 (860): 103 Ind Cas 670; *Mallayya* v. *Veerayya,* 1927 Mad 335 (336): 52 Mad L Jour 90: 25 Mad L W 198: 38 Mad L Tim 15: 100 Ind Cas 135; *Suppu Chetty* v. *Arunachalam Chettiar,* 1926 Mad 1065 (1066): 1926 Mad W N 5; *Venkatarama Ayyar* v. *Sundaram,* 1926 Jour 102 (2): 1926 Mad W N 48: 92 Ind Cas 1045; *Radhakrishna Rao* v. *Venkata Rao,* 1925 Mad 229 (229): 47 Mad L Jour 552: 20 Mad L W 711: 35 Mad L Tim 135: 1924 Mad W N 922: 84 Ind Cas 965: 48 Mad 713; *Subbe Goundan* v. *Krishnamachari,* 1922 Mad 112 (113): 69 Ind Cas 869: 1922 Mad W N 269: 15 Mad L W 537: 42 Mad L Jour 372: 45 Mad 449: 30 Mad L Tim 217; *Sheikh Muhammad* v. *Rangaswami Naidu,* 1921 Mad 716 (716): 16 Mad L W 515: 69 Ind Cas 826; *Ponangi Venkata Subbaraidu* v. *Zamindar of Nuzvid,* (1921) 60 Ind Cas 609 (609): 12 Mad L W 667; *Vemi Reddi* v. *Nallappa Reddi,* (1920) 57 Ind Cas 800 (802); 11 Mad L W 611; *Athappa* v. *Ramanathan,* (1919) 53 Ind Cas 417 (419): 10 Mad L W 359: 37 Mad L Jour 536; *Sobharam* v. *Ram Prasad,* 1929 Nag 63 (63): 117 Ind Cas 280: 26 Nag L R 44; *Farzand Ali* v. *Ekadashi,* 1923 Oudh 177 (179): 26 Oudh Cas 10: 10 Oudh L J 36: 73 Ind Cas 591; *Chaudhary* v. *Mithu Rai,* 1927 Pat 296 (297): 6 Pat 380: 108 Ind Cas 722; *Jageshar Jha* v. *Mahatap Singh,* 1926 Pat 516 (516): 1926 Pat H C C 302: 96 Ind Cas 440: 7 Pat L Tim 811; *Brij Mohan Pathak* v. *Deobhajan Pathak,* (1920) 55 Ind Cas 484 (485): 1 Pun L Tim 509; *Raghunandan* v. *Jadunandan,* (1918) 48 Ind Cas 959 (960): 3 Pat L Jour 253: 4 Pat L W 450; *Ma Me Mya* v. *Ma Min Zan,* 1925 Rang 320 (320): 4 Bur L Jour 159: 3 Rang 490: 92 Ind Cas 368; *Ashrof* v. *Mahomed,* 1924 Rang 177 (177): 1 Rang 656: 79 Ind Cas 482.

See also the following cases:—*Raghunath Das* v. *Jhari Singh,* (1918) 45 Ind Cas 100 (100): 3 Pat L Jour 99 [Lower Court dismissing suit for possession—Appellate Court reversing and remanding for ascertainment of mesne profits—No appeal lies]; *Umrao Ali Khan* v. *Abdul Subhan Khan,* (1908) 5 All L J 545 (546): 1908 All W N 40 [Partition suit—Appellate Court remanding suit not for decision on merits but for division by metes and bounds—No appeal lies]; *Wahidunnissa* v. *Kundan Lal,* (1913) 20 Ind Cas 145 (145): 11 All L J 615: 35 All 427 [Order of dismissal of suit for non-appearance of parties—Order set aside by appellate Court—First Court directed to hear the case—No appeal lies against the order].

But the Allahabad High Court has amended O 43, R 1 (u) so as to allow an appeal even when the remand is not under O 41, R. 23:—*Moti Lal* v. *Nandan,* 1930 All 122 (123): 121 Ind Cas 545: 1930 All L J 454. *See also* the new R. 23 substituted by the Madras High Court.

(2) *Gokul Prasad* v. *Ram Kumar,* 1922 All 254 (256): 44 All 176: 64 Ind Cas 878: 19 All L J 971; *Jagathari Saha* v. *Medini Mohan Burdhan,* 1927 Cal 642 (644): 31 Cal W N 878: 104 Ind Cas 422; *Kayam Biswas* v. *Bahadur Khan,* 1925 Cal 1258 (1259): 42 Cal L Jour 22: 89 Ind Cas 744: 30 Cal W N 41; *B N Ry* v. *Behari,* 1925 Cal 716 (717, 718): 29 Cal W N 614: 52 Cal 783: 90 Ind Cas 426; *Radha*

O.41, R.23, Note 22.

done and not on what it ought to have done.[2-a] It has been held in the undermentioned cases[3] that where the order appealed from is silent as to whether it was passed under S. 151 or under this rule, it should be held to have been passed under this rule and not under S. 151 even though the circumstances of the case do not bring it within the scope of this rule. The reasoning on which these cases proceed is this. An order of remand can be passed under the Court's inherent power only in exceptional cases. Therefore where the Court intends to remand a case under its inherent power it may be expected to show in its order that it considers the case to be of an exceptional nature and that it therefore applies the provisions of S. 151. Where this is not done the order may be presumed to have been passed as under O. 41, R. 23 and not under S. 151. If such a presumption is not to be made, many an illegal order of remand would be incapable of being appealed against. It is submitted that this reasoning is not correct. It involves a presumption that the appellate Court illegally applied the provisions of R. 23 to a case to which it does not apply when it was legally open to it to achieve its object by applying S. 151. The Madras High Court has

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Krishna v. *Kamal Kamini*, 1922 Cal 456 (457): 35 Cal L Jour 345: 70 Ind Cas 547; *Sashi* v. *Abinash Chandra*, 1922 Cal 279 (279): 80 Ind Cas 172; *Prasanna Chattopadya* v. *Baidya Nath Mistry*, (1920) 56 Ind Cas 516 (517): 31 Cal L Jour 360: 24 Cal W N 708; *Baseemati* v. *Tarith Basani*, (1918) 44 Ind Cas 416 (418) Cal; *Gobinda Ram* v. *Chuni Lal*, 1930 Lah 221 (222): 119 Ind Cas 330: 30 Pun L R 645; *Karam Nawaz* v. *Rukna*, 1929 Lah 376 (377): 29 Pun L R 270: 108 Ind Cas 400; *Harbhajan Singh Mewa Singh*, 1928 Lah 753 (753): 110 Ind Cas 748; *Gopal Singh* v. *Mangal Singh*, 1928 Lah 341 (341): 107 Ind Cas 284; *Sahibji* v. *Mahomed*, 1928 Lah 116 (116): 9 Lah L Jour 543: 106 Ind Cas 842: 29 Pun L R 300; *Nand Lal* v. *Baij Nath*, 1926 Lah 537 (538): 95 Ind Cas 169; *Srinivasaraghava Patrachariar* v. *Srinivasaraghava Ayyangar*, 1928 Mad 1200 (1200): 110 Ind Cas 692.

But according to some decisions the question of appeal must depend on whether the conditions laid down in O 41, R 23 have been complied with and not on, whether the appellate Court purported to act or did not purport to act under R 23—See the following cases:— *Banka Behari Deb* v. *Birendra Nath Dutta*, 1927 Cal 850 (852, 853): 103 Ind Cas 864: 55 Cal 219: 47 Cal L Jour 69 [Remarks were *obiter* in this case]. *See also* observations in *Jagathari* v. *Medini Mohan*, 1927 Cal 642 (643, 644): 31 Cal W N 878: 104 Ind Cas 422; *Sundararama* v. *Sathianatha*, 1927 Mad 1190 (1190): 1927 Mad W N 286: 102 Ind Cas 28 [Remand is not under R 23 though the appellate Court refers to the rule in the judgment, if R 23 does not really apply to the case]. See also *Umrao Ali Khan* v. *Abdul Subhan Khan*, (1908) 5 All L J 545 (546): 1908 All W N 40 [Partition suit—Remand *not* for decision on merits but for partition by metes and bounds—Order wrongly described as one under S 562—Appeal must be as from a decree and not as from an order of remand and should bear stamp as an appeal from a decree]; *Imambibi* v. *Ghulam Hussain*, 1908 Pun Re No 38: 86 Pun W R 1908: 177 Pun L R 1908; *Musst Makhan Devi* v. *Asa Singh*, 1892 Pun Re No 6.

One of the tests usually relied on for determining whether the order of remand was intended to be made under R 23 is to see whether the Court-fee was ordered to be refunded, because under S 13 of Court Fees Act, an order for the refund of Court-fee can be passed only in the case of a remand under R 23—See the following cases:— *Agent, Bengal-Nagpur Railway* v. *Beharilal Dutt*, 1925 Cal 716 (717, 718): 29 Cal W N 614: 52 Cal 783: 90 Ind Cas 426; *Mt Sahibji* v. *Mahomed Sarwar Khan*, 1928 Lah 116 (116): 9 Lah L Jour 543: 106 Ind Cas 842: 29 Pun L R 300; *Nand Lal* v. *Baij Nath*, 1926 Lah 537 (538): 95 Ind Cas 169. See *Harnam Singh* v. *Indar Singh*, 1932 Lah 311 (311): 33 Pun L R 285: 138 Ind Cas 202 [*Refusal* to order refund of Court-fee indicates that remand is not under R 23]. But see *Gokal Chand Jagannath* v. *Lila Ram Ramchand*, 1929 Lah 175 (176): 118 Ind Cas 393 [Mere omission to order refund of Court-fee does not necessarily indicate intention not to make the order under O 41, R 23]; *Mt Gendo* v. *Radha Mohan*, 1932 Lah 219 (220): 33 Pun L R 54: 136 Ind Cas 559 [In this case it was held that the mere fact that refund of Court-fee was ordered is not proof that remand was under R 23 as refund of Court-fee can be ordered even if the remand is under inherent power. This view, it is submitted, overlooks the express provisions of S 13 of the Court Fees Act].

(2-a) See *Harnam* v. *Indar*, 1932 Lah 311 (311): 33 Pun L R 285: 138 Ind Cas 202 [Remand made under S 151—No appeal lies though it might have been validly made under O 41, R 23].

(3) *Gokul Prasad Har Prasad* v. *Ram Kumar*, 1922 All 254 (256): 44 All 176: 64 Ind Cas 878: 19 All L J 971; *Srimati Bhaba Sundari* v. *Aditya Nath*, 1927 Cal 401 (402): 45 Cal L Jour 194: 102 Ind Cas 384; *Harbhajan Singh* v. *Mewa Singh*, 1928 Lah 753 (753): 110 Ind Cas 748.

Appellate Court not mentioning the provision of law under which it remands—Order must be presumed to be under R 23 and not under S 151 though R 23 does not apply to the circumstances of the case:— *Bibi Kulsoom-un-nissa* v. *Ram Prasad*, 1922 All 226 (228): 20 All L J 321: 67 Ind Cas 713: 44 All 492; *Mt Sahibji* v. *Mohammad Sarwar Khan*, 1928 Lah 116 (116): 9 Lah L Jour 543: 106 Ind Cas 842: 29 Pun L R 300; *Umesh Narain* v. *Secretary of State*, 1925 Cal 1157 (1158): 87 Ind Cas 575.

O.41, R.23, Notes 22—25.

in the case cited below,[4] refused to make any such presumption. Where an order of remand under the Court's inherent powers amounts to an adjudication under S. 2, sub-S. (2), it will be appealable as a *decree* under S. 96.[5] (*See also* S. 151, Note 9.) As to whether an appeal lies from an order of remand under the Court's inherent powers, by virtue of the amendment in Oudh of O. 43, R. 1 (*u*), *see* the case cited below.[6]

23. **Letters Patent Appeal.**—An order of remand by a single Judge of the High Court is a "judgment" within the meaning of Cl. 15 of the Letters Patent and is appealable as such.[1] (*See also* for fuller information, S. 104, Note 6.)

24. **Privy Council Appeal.**—*See* S. 109, Note 4 and the undermentioned cases.[1]

25. **Powers of High Court in appeal from order of remand.**—In an appeal from an order of remand under this rule the High Court may not only consider whether the lower appellate Court's order satisfies the requirements of this rule but may also enter into the merits of the decision of the first Court on the preliminary point[1] and if possible, may dispose of the case

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(4) *Athappa* v. *Ramanathan,* (1919) 53 Ind Cas 417 (419): 10 Mad L W 359: 37 Mad L Jour 536.

(5) *Bhairob Chandra Dutta* v. *Kali Kumar Dutta,* 1923 Cal 606 (607): 37 Cal L Jour 491: 71 Ind Cas 453: 74 Ind Cas 1038; *B N Ry* v. *Behari,* 1925 Cal 716 (717, 718): 29 Cal W N 614: 52 Cal 783: 90 Ind Cas 426; *Radharani Santra* v. *Rameshchandra Kalamuri,* 1928 Cal 218 (219); *Jeebun Kissen* v. *Dwarka Nath,* 1864 Suth W R 363 (364). See also *Ashrof* v. *Mahomed,* 1924 Rang 177 (178): 1 Rang 656: 79 Ind Cas 482 [Remand under inherent power—Appeal from maintainability—Test is whether decree of Court of first instance is set aside or not—Where decree is not expressly set aside, no appeal lies]; *Harprasad* v. *Chhadami,* 1928 Nag 68 (68): 105 Ind Cas 567 [Remanding judgment adjudicating rights with regard to certain matters—It has the force of a decree and is appealable as such]; *Subbe Goundan* v. *Krishnamachari,* 1922 Mad 112 (115): 1922 Mad W N 269: 15 Mad L W 537: 42 Mad L Jour 372: 45 Mad 449: 30 Mad L Tim 217: 68 Ind Cas 869 [Remand—Rights of parties adjudicated upon—Appeal lies].

Where the order does not decide on the rights of parties as to the matter in controversy it will not be a decree—See the following cases:— *Permanand Kumar* v. *Bhom Lohar,* 1926 Pat 457 (459): 7 Pat L Tim 535: 97 Ind Cas 105: 1926 Pat H C C 333 [Dissenting from 58 Ind Cas 909]; *Banka Behari* v. *Birendra,* 1927 Cal 850 (851): 103 Ind Cas 864: 55 Cal 219: 47 Cal L Jour 69; *Sobharam* v. *Ram Prasad,* 1929 Nag 63 (63): 117 Ind Cas 280: 26 Nag L R 44.

(6) *Sarabjit* v. *Farahatulla,* 1930 Oudh 366 (368): 7 Oudh W N 594: 127 Ind Cas 83.

Note 23.

(1) **Remand under O. 41, R. 23:**—*Rai Benode Behari Bose* v. *Rai Pasupati Nath Bose,* (1909) 4 Ind Cas 329 (330): 13 Cal W N 105; *Gopinath Pati* v. *Moheshwar Pradhan,* (1908) 35 Cal 1096 (1098).

Remand under inherent power:—*Ballai Rai* v. *Mahabir Rai,* (1899) 21 All 178 (180): 1899 All W N 23; *Bara Estate, Ltd* v. *Anupchandra,* (1917) 41 Ind Cas 337 (340): 2 Pat L Jour 663: 2 Pat L W 71: 1917 Pat H C C 342; *Munshi Lal* v. *Ramasis,* 1922 Pat 384 (385): 3 Pat L Tim 343: 65 Ind Cas 175: 1 Pat 246 [Distinguishing 58 Ind Cas 538].

Note 24.

(1) **Order of remand is not "final order" within S 109 unless it decides some cardinal issue in the case:**—*Tasadduk Rasul* v. *Farsand Husain,* (1898) 1 Oudh Cas 205 (210) P C; *Nuri Mian* v. *Ganges Sugar Works, Ltd, Cawnpore,* (1916) 32 Ind Cas 360 (361): 14 All L J 50: 38 All 150; *Kausella* v. *Ram Sarup,* (1908) 5 All L J 57 (58): 1907 All W N 291; *Habibunnissa* v. *Munawarunnissa,* (1903) 25 All 629 (630, 631): 1903 All W N 159; *Yusaf Shah* v. *Ghulam Jilani,* 1888 Pun Re No 56; *Abdul Rahman* v. *Cassim and Sons,* 1933 P C 58 (60): 1933 Mad W N 166: 10 Oudh W N 195: 142 Ind Cas 328: 37 Cal W N 405: 11 Rang 58: 1933 All L J 244: 35 Bom L R 331: 64 Mad L Jour 307: 37 Mad L W 331 P C [The test of finality is whether the order finally disposes of the rights of the parties. 1920 P C 86 foll].

Note 25.

(1) *Badam* v. *Imrat,* (1881) 3 All 675 (680): 1881 All W N 46 F B; *Bhau Bala* v. *Bapaji Babuji,* (1889) 13 Bom 14 (17); *Abrahim* v. *Abrahim,* (1881) 17 Cal 168 (170); *Loki Mahto* v. *Aghore Ajaib Lall,* (1880) 5 Cal 144 (146): 4 Cal L Rep 465: 2 Shome L R 258; *Ram Ratan* v. *Kirpa Ram,* (1910) 8 Ind Cas 246 (246): 86 Pun L R 1910: 192 Pun W R 1910; *Maha Ram* v. *Ram Mohar,* 1903 Pun Re No 1: 1 Pun L R 1903 F B; *Nand Lal* v. *Gurditta,* 1902 Pun Re No 99: 141 Pun L R 1902; *Mehr Khan* v. *Ram Nath,* 1900 Pun L R page 314; *Bhai Wazira* v. *Chuhar Mal,* 1895 Pun Re No 85 [Overruling 1886 Pun Re No 126] *Musst Makhan Devi* v. *Asa Singh,* 1892 Pun Re No 6; *Kalas* v. *Kalyan Singh,* 1887 Pun Re No 109; *Tara Singh* v. *Gurditta,* 1887 Pun Re No 40; *Sankaran* v. *Ramankutti,* (1897) 20 Mad 152 (154, 155): 6 Mad L Jour 232; *Girdhari Lal* v. *Jaswant Singh,* (1912) 15 Ind Cas 181 (182): 15 Oudh Cas 33. See also *Chinnaswami* v. *Karuppa,* (1898) 21 Mad 234 (236) [Appeal against order of lower appellate Court returning plaint for presentation to proper Court—High Court can consider the merits of the decision on which the lower appellate Court's order was based]. But see *Arumugam Chetty* v. *Raja Ven-*

O.41, R.23,
Notes
25—27.

itself.[1-a] Similarly, in an appeal from an order of remand *purporting* to be under R. 23 (though that rule did not apply to the case), the High Court may enter into the merits of the lower Court's decision in respect of which the order of remand was made[2] and may either dispose of the case itself or remand it to the lower appellate Court according to the necessities of the case.[3] But the High Court has no power in an appeal from an order of remand, to go into any questions unconnected with the correctness of the order of remand.[4]

26. **To what Court remand could be made.**—Ordinarily the case should be remanded to the Court from whose decree the appeal is preferred and to no other Court.[1] But if the appellate Court has power to transfer a case from one Court to another there is nothing illegal in remanding the case to a Court to which the case could have been transferred.[2] (*See also* Note 30, *infra* and S. 24, *ante*.)

27. **Effect of order of remand.**—An order of remand implies a reversal of the decision of the lower Court[1] and re-opens the whole case for re-trial by the lower Court except in regard to matters decided by the order of remand.[2] There is a difference of opinion as to whether where a suit is remanded the lower Court can raise *another* preliminary point which was not the subject-matter of the appeal, and decide the case thereon. According to

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kateswara Ettappa, (1905) 28 Mad 444 (451, 452): 15 Mad L Jour 292 [*Per* Moore, J:—Proper time for the High Court to consider the correctness of the decision on the preliminary point is, in second appeal, if any preferred from the decree after remand.—Subramania Ayyar, J *contra*].

(1-a). *Hasan Ali* v. *Siraji Husain,* (1894) 16 All 252 (254): 1894 All W N 64; *Girdhari Lal* v. *Jaswant Singh,* (1912) 15 Ind Cas 181 (183): 15 Oudh Cas 33.

(2) *Sant Ram* v. *Musst Mohan Devi,* 1898 Pun Re No 56.

(3) *Sohan Lal* v. *Azizunnissa,* (1885) 7 All 136 (139, 140): 1884 All W N 294 [Lower appellate Court remanding whole case instead of remitting issues—High Court cannot deal with it as if it was first appeal from decree—It can only rectify the procedure of lower Court and direct it to decide the case itself on the merits].

(4) *Jain-ul-abideen Marakayar* v. *Habibulla Sahib,* 1928 Mad 430 (432): 27 Mad L W 483: 109 Ind Cas 130; *Syed Muhammad Ishaq* v. *Mohru Mal,* 1902 Pun Re No 28: 185 Pun L R 1901. See also *Deokishen* v. *Bansi,* (1886) 8 All 172 (176, 177): 1886 All W N 35: 10 Ind Jur 340 [Order of High Court on appeal from the order of remand, setting aside the order of remand, being merely of an interlocutory kind cannot have the effect of *res judicata* upon any point that may be urged in appeal on the *merits*].

Note 26.

(1) *Bai Shri Majirajba* v. *Maganlal Bhai Shankar,* (1895) 19 Bom 303 (306); *Fati* v. *Gaddi,* (1913) 20 Ind Cas 788 (789): 158 Pun W R 1913 279 Pun L R 1913.

(2 *Chajju* v. *Sham Lal,* 1922 Lah 239 (240): 66 Ind Cas 113: 25 Pun W R 1922; *Gopal Chandra Naskar* v. *Gadadhar Mandal,* (1909) 1 Ind Cas 110 (112) Cal [Failure in a marked manner to do justice between the parties—Case was sent to another Court]; *Gajadhar Prasad* v. *Lohia,* (1916) 35 Ind Cas 698 (700): 24 Cal L Jour 457; *Fati* v. *Gaddi,* (1913) 20 Ind Cas 788 (789): 158 Pun W R 1913: 279 Pun L R 1913. See also *Dhun Monee Chowdhrain* v. *Woomachurn Roy,* (1875) 23 Suth W R 445 (446) [Decision of the lower Courts found in special appeal to have been without jurisdiction and the suit cognisable by the Small Cause Court—High Court made an order sending the plaint to the Small Cause Court for trial].

Note 27.

(1) *Tarinee Kant Lahoree* v. *Koonj Beharee Awastee,* (1869) 12 Suth W R 112 (112, 113); *Kebul Kishen* v. *Mt Ambala,* (1867) 7 Suth W R 326 (327). See also *Sitaram* v. *Jadho Rai,* 1932 All 353 (355): 1922 All L J 285: 137 Ind Cas 785. See also *Saroda Prasad* v. *Saudamini,* (1906) 3 Cal L Jour 181 (182) [When decree is set aside in appeal and case is remanded under this rule the appellant is entitled to restitution of the property taken possession of in execution of the decree, so set aside, although an appeal has been preferred against the order of remand]. See also *J P Wise* v. *Ishan Chunder,* (1870) 14 Suth W R 380 (381) [But evidence taken on the previous occasion may be considered —*See* words newly added to the present rule].

(2) *Gudadhur* v. *Shushee Monee,* (1874) 21 Suth W R 7 (8): *Kartick* v. *Satya,* (1916) 32 Ind Cas 240 (241): 20 Cal W N 584; *Syed Abdul Huck* v. *Jayaram Naidu,* 1928 Mad 14 (14): 39 Mad L Tim 506: 106 Ind Cas 76; *Ram Chunder Surmah Chowdhry* v. *Dugoo Khan,* (1868) 10 Suth W R 339 (340); *Tumeazooddeen Khondkar* v. *Mohima Chunider Mookerjee,* (1869) 11 Suth W R 227 (227, 228) [If law is altered by Full Bench ruling since the case was remanded, the trying Court should take it into consideration]; *Chengalraya Chettiar* v. *Raghava Ramanuja Dass,* (1919) 52 Ind Cas 569 (572): 37 Mad L Jour 100 [Whole case is re-opened even in respect of those who did not appeal]. See also *Katchekalayana Rangappa Kallakku Tola Oodiar* v. *Kachivijaya Rangappa Kalakka Tola Oodiar,* (1867-69) 12 Moo Ind App 495 (502, 503): 2 Beng L R P C 72: 11 Suth W R P C 33: 2 Suth 206: 2 Sar 461 P C [Remand of whole case cures defects in original trial]. See also *Rughoo-*

O.41, R.23, Notes 27—28.

the High Courts of Allahabad[3] and Bombay[4] it cannot. According to these decisions such points might and ought to have been raised before the remand. The High Court of Madras has held that it can.[5] The High Court of Calcutta has expressed conflicting views.[6]

After a suit has been remanded the appellate Court is not competent to pass any order in it unless and until the case comes before it again in appeal.[7] (*See also* Notes 2 and 30.)

28. **Effect of improper order of remand.**—Where an order of remand is passed in circumstances which do not warrant it, the defect involved in the order is one of procedure and not of substantive law and comes within the purview of S. 99 of the Code. But the question arises whether such an order is one affecting the jurisdiction of the Court within the meaning of S. 99. On this question there is a conflict of opinion. According to the High Courts of Bombay[1] and Calcutta[2] such an order is not one passed without jurisdiction and hence, does not, in itself, affect the jurisdiction of the Court and neither the order of remand nor the subsequent proceedings based thereon can be interfered with unless the decision of the case on the merits or the jurisdiction of the Court in any other respect has been affected. But according to the

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nundan Prasad Singh v. *Chuttur Paul Singh*, (1868) 10 Suth W R 335 (336) [A fresh appeal lies from the decision after remand].

Whole case is re-opened—Judge in lower Court can come to conclusions different from those arrived at by himself or his predecessor previously, in respect of matters not touched by order of remand.—*Jitendra Kumar Pal Chowdhury* v. *Mukshoda Charan Das*, (1920) 56 Ind Cas 1001 (1003) Cal; *Ajodhya Prasad* v. *Jagadish Singh*, (1912) 13 Ind Cas 813 (814): 14 Oudh Cas 321; *Tarinee* v. *Kunj Biharee*, (1869) 12 Suth W R 112 (112, 113); *Lakshmi Narain* v. *Mohamadi Begam*, 1932 Oudh 123 (126): 9 Oudh W N 60: 137 Ind Cas 102. See also *Umrao Singh* v. *Pirthi*, 1925 All 369 (370): 6 L R All (Civ) 117: 86 Ind Cas 445 [Where at stage of second appeal the case is remanded for decision on a certain issue and the case comes back after remand, the parties having had full opportunity to meet the case, it cannot be urged that the Court should not have allowed a new case to be set up]. But see *Kartick Chandra Das* v. *Satya Sri Ghosal*, (1916) 32 Ind Cas 240 (241): 20 Cal W N 584 [A High Court in the exercise of its power of supervision under the Charter can assume in certain cases, an authority to limit the scope of certain appeals remanded to the lower Courts without keeping them in its own file]. See also *Ramachandra Genuji* v. *Shripati Sukaji Gade*, 1929 Bom 202 (204): 31 Bom L R 557: 118 Ind Cas 252 [Suit in Court of second class Sub-Judge returned for proper presentation—First class Sub-Judge rejecting plaint—Appeal from order returning plaint—Rejection not brought to notice—Case remanded to second class Sub-Judge—No plaint being in existence suit could not be proceeded with—Plaintiff's remedy was by appeal against rejection of plaint by First Class Sub-Judge].

(3) *Chunilal* v. *Habib Ali*, (1916) 35 Ind Cas 571 (574) All. But see *Beni Prasad* v. *Sampat*, 1897 All W N 108 (109).

(4) *Temulji* v. *Furdunji*, (1869-70) 5 Bom H C R (A C) 187; *Dattu* v. *Kasai*, (1884) 8 Bom 535 (537); *Moru Bin* v. *Gopal Bin*, (1877-78) 2 Bom 120 (130, 131).

(5) *Saravanaperumal* v. *Subbayyan*, 1922 Mad 514 (516, 517): 16 Mad L W 802: 1922 Mad W N 763: 31 Mad L Tim 430 [In this case it was held that the point *could* be raised and decided but that the lower Court acted improperly in disposing of the suit on a preliminary point again after remand without giving its findings on the other issues].

(6) *Sheo Sahay Tewaree* v. *Ram Pershad Narain Tewari*, (1875) 24 Suth W R 333 (333) [Cannot]; *Anzar Ali* v. *C E Grey*, (1905) 2 Cal L Jour 403 (405, 407), (Do.); *Tej Kishen* v. *Shib Chunder*, (1865) 3 Suth W R Act X 158 (159) [It can]; *Mt Judoobunsee* v. *Mt Asman Kooer*, (1870) 14 Suth W R 370 (371) (Do.); *Trilokya Mohini Dasi* v. *Kali Prosanna Ghose*, (1907) 11 Cal W N 380 (386), (Do.).

(7) *Tilak Dhari* v. *Gobind Prasad*, 1888 All W N 171 (172).

Note 28.

(1) *Savitri* v. *Ramji*, (1890) 14 Bom 232 (235, 236).

(2) *Bisai Nath* v. *Tara Nath Deb*, 1923 Cal 385 (386): 72 Ind Cas 588; *Nabin Chandra Tripat* v. *Pran Krishna*, (1913) 20 Ind Cas 39 (40): 18 Cal L Jour 613: 41 Cal 108; *Trailokya Mohini Dasi* v. *Kali Prasanna*, (1907) 11 Cal W N 380 (386); *Debendranath* v. *Prasanna Kumar*, (1907) 5 Cal L Jour 328 (333); *Durga Kinkar Narha* v. *Kunchai Ronza*, (1907) 5 Cal L Jour 71 (74); *Ram Gopal Dey* v. *Raghunath Ghoshal*, (1905) 2 Cal L Jour 496 (497); *Moheshchandra* v. *Jamiruddin*, (1901) 28 Cal 324 (333): 5 Cal W N 509; *Jugobundhoo* v. *Sreenarain*, (1873) 20 Suth W R 188 (188); *Ganga Monee* v. *Issar Chunder*, (1872) 17 Suth W R 465 (466); *Nussurooddeen* v. *Lal Muhammad Puramanick*, (1870) 13 Suth W R 234 (235); *Mirza Jiwad Ali* v. *Hossein Bibi*, (1867) 8 Suth W R 207 (207); *Now Cowree* v. *Mookta*, (1865) 2 Suth W R 181 (182). See however *Jatinga Valley Tea Co* v. *Chara Tea Co*, (1886) 12 Cal 45 (47); *Khandakar Kafactoollah* v. *Mahomed Kabel*, (1868) 9 Suth W R 345 (346); *Gunganarain Behutta* v. *The Collector of Midnapore*, (1866) 6 Suth W R 47 (47).

High Courts of Allahabad,[3] Madras[4] and Patna[4-a] such an order of remand is one made *without jurisdiction,* the term "jurisdiction" being understood not in the sense of the power to deal with a certain matter but in the sense of the power to pass a given kind of order in such matter, and therefore the order of remand and the subsequent proceedings based thereon may be set aside although the decision of the case on the merits or the jurisdiction of the Court in any other respect has not been affected.

If an appellate Court passes an order of remand in a matter over which it has no jurisdiction, the order is *ultra vires.*[5]

As to the effect of setting aside an order of remand, *see* the following cases.[6]

29. Matters decided by order of remand, finality of.—S. 105, sub-S. (2) of the present Code provides that if the party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he cannot subsequently question the correctness of the order of remand. (*See* S. 105, Note 8 and the following cases.[1]) But even apart from the said provisions an order of remand under this rule as contrasted with an order remitting issues for findings under R. 25, is, as regards the Court passing the order, conclusive on all points decided thereby and they cannot be re-opened in that Court before the same Judge or his successor, in appeal from the decision of the lower Court on remand.[2] Nor can the Court to which the case is remanded go behind the

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(3) *Rameshur* v. *Sheodin,* (1890) 12 All 510 (513, 514, 519): 1890 All W N 18 F B; *Mullu Khan* v. *Than Singh,* 1891 All W N 187 (187); *Maghu* v. *Faujdar,* 1891 All W N 105 (106); *Jarbhandan* v. *Nakchand Singh,* 1887 All W N 224 (224). But see *Ghasi Ram* v. *Budh Singh,* (1875) 7 N W P H C R 193; *Gujraj Singh* v. *Bijai Singh,* (1874) 6 N W P 114; *Buldeo Pershad* v. *Golab Khan,* (1874) 6 N W P 101.

(4) *Palani Chetty* v. *Rangi Doss Naidu,* (1908) 32 Mad 83 (85): 4 Mad L Tim 479: 1 Ind Cas 746; *Mallikarjuna* v. *Pathaneni,* (1896) 19 Mad 479 (481); *Subba* v. *Balachandra,* (1895) 18 Mad 421 (422).

(4-a) *Ram Asis Puri* v. *Munshi Lal,* (1920) 58 Ind Cas 538 (540) Pat.

(5) *Cheda* v. *Badulla,* (1889) 11 All 35 (39, 40): 1888 All W N 284: 13 Ind Jur 190; *Karindad Khan* v. *Amir Debi,* (1909) 1 Ind Cas 460 (461): 26 Pun W R 1909.

(6) *Rajkali* v. *Gopi Nath Naik,* 1922 All 35 (37): 44 All 211: 20 All L J 44: 66 Ind Cas 817 [Remand order—Set aside—Subsequent proceedings based on it also fall with it]; *Lal Raghuraj Singh* v. *Har Pershad,* (1902) 5 Oudh Cas 301 (303) [Remand order set aside—Decree of original Court is restored—Limitation for execution runs from appellate order].

Note 29.

(1) *Karm Narain* v. *Salamat Rai,* (1920) 57 Ind Cas 52 (53): 2 U P L R (Lah) 120 [Order of remand from which appeal lies not appealed from—Its propriety cannot be questioned in an appeal on the merits from the final decree.

But a person not adversely affected by an order of remand is under no obligation to appeal against it and may challenge it in an appeal from the first decree after remand:— See *Jalesar Singh* v. *Mahadeo Bax Singh,* 1931 Oudh 242 (243): 8 Oudh W N 243: 132 Ind Cas 78.

Similarly, a point can be raised by the appellate Court suo motu under O. 41, R. 2:— *Baliram* v. *Sadaram,* 1926 Nag 147 (148): 89 Ind Cas 1019.

Cases under the old Code which proceeded on the footing that the propriety of an order of remand could be challenged in appeal from the appellate decree passed after remand though the order of remand was appealable and was not appealed against:—*Forbes* v. *Ameerunnisa,* (1863-66) 10 Moo Ind App 340 (359, 360): 5 Suth W R 47: 1 Ind Jur N S 117: 1 Suth 621: 2 Sar 153 P C; *Ramjas* v. *Aman Sahai,* (1910) 5 Ind Cas 667 (668) All; *Hem Kunwar* v. *Amba Prasad,* (1900) 22 All 430 (432, 433): 1900 All W N 136; *Sher Singh* v. *Diwan Singh,* (1900) 22 All 366 (367): 1900 All W N 109; *Kharag Prasad* v. *Durdhari Rai,* (1892) 14 All 348 (349, 350): 1892 All W N 25; *Maghu* v. *Faujdar,* 1891 All W N 105 (105); *Kanto Prosad Hazari* v. *Jagat Chandra Dutta,* (1896) 23 Cal 335 (338); *Lala Prayag Lal* v. *Jai Narain Singh,* (1895) 22 Cal 419 (422); *Rangu Ram* v. *Jowala Singh,* 1906 Pun L R 32; *Mansukhdas and Srikishen* v. *Mt Girja Bai and Lakshmi Narain,* (1892) 5 C P L R 116 (117); *Sri Harakh* v. *Ram Dut,* (1906) 9 Oudh Cas 80 (84); *Lochun Mundal* v. *Warzeer Puramanick,* (1870) 13 Suth W R 464 (465) [*Held,* that in this case order of remand was not of such a character as precluded the raising of a certain point]. But see *Makhun Kooer* v. *Tincowree Dutt,* (1870) 14 Suth W R 22 (22) [Review specifically granted for considering a certain question—Remand ordered on review—Decision of question on review cannot be re-opened].

(2) *Rai Brij Raj Krishan* v. *Chatu Singh,* 1923 Pat 226 (228): 4 Pat L Tim 35: 76 Ind Cas 136; *Masihunnissa* v. *Kaniz Sughra,* (1921) 60 Ind Cas 975 (976): 1921 All 276: 19 All L J 139: 43 All 377: *Nageshar Sahai* v. *Mata Prasad,* 1922 Oudh 236 (248): 9 Oudh L J 235: 25 Oudh Cas 189: 69 Ind Cas 730; *Sultan Beg* v. *Chooni Lal,* (1918) 46 Ind Cas 922 (924) Nag; *Subbalakshmamma* v. *Venkatarayudu,*

O.41, R.23, Notes 29—30.

order of remand.[3]

The High Court of Allahabad has, however, held in the undermentioned case[3-a] that notwithstanding the fact that an order of remand is not appealed against the Court is bound to take notice of a subsequent event which renders the order of remand nugatory. Thus, where a Revenue Court dismisses the suit on the ground that the plaintiff has no title to the property and the District Judge remands the suit in appeal under this rule, and the trial Court, after remand, decrees the suit, but before the hearing of the appeal after remand, the defendant obtains a declaration from the Civil Court that he was the owner, it has been held, that the Court is bound to take notice of the Civil Court's decree and act accordingly.

But an order of remand does not preclude the determination of points not conclusively decided by it.[4]

30. **Jurisdiction after remand depends upon the order of remand.**—Where a case is remanded to a particular Court, it is only that Court and no other Court that can try it.[1] But if a case is remanded to a District Court, that Court can, under S. 24 of the Code, transfer the case to any other Court subordinate to it which is competent to try it.[2] An order of remand cannot confer on the lower Court to which the case is remanded jurisdiction which it

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(1909) 2 Ind Cas 525 (526): 5 Mad L Tim 75: 32 Mad 318; *Brojo* v. *Juggut*, (1874) 21 Suth W R 199 (A) (199); *Bodun Burooah* v. *Abdul Gunny*, (1873) 19 Suth W R 281 (282); *Luleet* v. *Byjnath*, (1870) 14 Suth W R 285 (285); *Suraj Din* v. *Chattar*, (1881) 3 All 755 (757): 1881 All W N 55; *Kharag Prasad* v. *Durdhari Raj*, (1892) 14 All 348 (349): 1892 All W N 25; *Raghunath Das* v. *Ganesh Das*, 1932 All 603 (604): 1932 All L J 615: 138 Ind Cas 406; *Ram Kuvar* v. *Damodhar*, (1870-71) 6 Bom H C R 146. See also *Aja Nasya* v. *Karim Baksh*, (1918) 46 Ind Cas 816 (816) Cal; *Ashiq Ali* v. *Arjumannissa*, 1923 Oudh 50 (51): 25 Oudh Cas 254: 70 Ind Cas 937; *Kotpal Singh* v. *Sheo Prasad Singh*, (1907) 10 Oudh Cas 350 (352); *Munshi Lal* v. *Ramasis Puri*, 1922 Pat 384 (385): 3 Pat L Tim 343: 65 Ind Cas 175: 1 Pat 246; *Brij Krishan* v. *Chathu Singh*, 1923 Pat 226 (228): 4 Pat L Tim 35: 76 Ind Cas 136; *Lachumammal* v. *Gangammal*, (1910) 7 Ind Cas 858 (859): 8 Mad L Tim 233: 1910 Mad W N 692: 34 Mad 72; *Garibulla* v. *Modu*, (1919) 50 Ind Cas 301 (303) Cal; *Rahimunnessa Bibi* v. *Mahadeb Das*, (1910) 7 Ind Cas 846 (847): 12 Cal L Jour 428; *Sujjada* v *Peerjada*, (1919) 53 Ind Cas 677 (680): 1919 Mad W N 662. But see *Ram Asis Pari* v. *Munshi Lal*, (1920) 58 Ind Cas 538 (539, 540) Pat. *If the remand was under R 25, the remanding Court can re-consider its opinion.*—*K M Moideen Pillai* v. *M O Umar Uduman Tharaganar*, 1929 Mad 391 (392): 113 Ind Cas 548; *Brij Lal* v. *Loku Ram*, (1912) 14 Ind Cas 16 (17): 116 Pun W R 1912: 136 Pun L R 1912; *Haitennessa Bibi* v. *Kailash Chandra Saha*, (1912) 17 Ind Cas 224 (226): 16 Cal L Jour 259; *Hanuman Das* v. *Gursahay Singh*, (1913) 21 Ind Cas 700 (701): 18 Cal L Jour 181; *Sheo Narain Singh* v. *Bishnath Singh*, (1914) 22 Ind Cas 315 (317): 1914 P C 153: 18 Cal W N 426: 17 Oudh Cas 39: 1 Oudh L J 159: 27 Mad L Jour 128 P C. See also *Muhmmad Zahur* v. *Cheda Lal*, (1892) 14 All 141 (143, 144): 1892 All W N 3. But see *Ganendra Nath Roy Chowdhury* v. *Surja Kanta Roy Chowdhury*, (1912) 15 Ind Cas 39 (41): 17 Cal W N 462 [Judge is not *bound* to re-consider]. But see *Hira Lal Pal* v. *Etbar Mandal*, (1916) 32 Ind Cas 866 (868): 20 Cal W N 48 [Court *not bound* to re-consider].

(3) See *Parasu Pattar* v. *Venkatachala Pattar*, (1915) 28 Ind Cas 982 (982) Mad; *Court of Wards* v. *Leelanand*, (1876) 25 Suth W R P C 157. See also *Gopal Rao* v. *Nemichand*, 1921 Nag 129 (130): 61 Ind Cas 575.

(3-a) *Mt Uma Devi* v. *Gur Narain*, 1927 All 694 (695): 103 Ind Cas 349.

(4) *Haree Nath* v. *Issuer Chunder*, (1875) 24 Suth W R 316 (317); *Ahmed Buksh Mullick* v. *Bipin Behari Singh Roy*, (1911) 11 Ind Cas 6 (7) Cal; *Lingo Raoji* v. *Secretary of State*, 1928 Bom 201 (202): 30 Bom L R 570: 111 Ind Cas 278; *Lachmipal Singh* v. *Bhagwat Singh*, 1925 Oudh 527 (528): 85 Ind Cas 468; *Ajodhya Prasad* v. *Jagadish Singh*, (1912) 13 Ind Cas 813 (814): 14 Oudh Cas 321.

Note 30.

(1) *Uthuman Ammal* v. *Naina Muhammad*, 1923 Mad 351 (352): 44 Mad L Jour 238: 17 Mad L W 355: 1923 Mad W N 194: 32 Mad L Tim 276: 72 Ind Cas 314.

(2) *Rajkali* v. *Gopinath*, 1922 All 35 (36): 44 All 211: 20 All L J 44: 66 Ind Cas 317. See also *Protab Chandra* v. *Judhister*, (1914) 23 Ind Cas 69 (70): 19 Cal L Jour 408: 19 Cal W N 143. See also *Gurdeo Singh* v. *Chandrika Singh*, (1909) 1 Ind Cas 913 (917, 918): 36 Cal 193: 5 Cal L Jour 611.

The following decisions to the contrary under the former Code should be regarded as no longer good law in view of the amendment of S 24 in the new Code:—*Ramabaran Upadhia* v. *Kashi Upadhia*, (1910) 6 Ind Cas 400 (401) All; *Ramanna* v. *Sitamma*, (1900) 10 Mad L Jour 238 (239); *Sita Ram* v. *Naunt Dulaiya*, (1899) 21 All 230 (232): 1899 All W N 88; *Hamedullah* v. *Muteeonissa*, (1871) 15 Suth W R 574 (575); *Chowdhry Hamedullah* v. *Muteeonnissa Bibi*, (1871) 15 Suth W R 574 (575).

O.41, R.23. Notes 30—33.

would not have possessed but for the order of remand.[3] Where the order of remand lays down any limits for the enquiry to be made by the lower Court, that Court has no jurisdiction to enter into questions which fall outside those limits.[4]

31. **Right of parties after remand.**—*See* Notes 27, 29 and 32.

32. **Procedure after remand.**—When a case is remanded for retrial, the whole case is re-opened and the Court is to proceed *de novo* and is entitled to take evidence again even of those witnesses who had already been examined.[1] But if the remand is only to enable the Judge in the lower Court to record his reasons, for his judgment a trial *de novo* is *ultra vires*.[2] When the lower Court has not properly carried out the order of remand, the case may be again remanded to it.[3]

Where a case is remanded to the lower Court for re-trial the parties are, according to the practice of the Nagpur Judicial Commissioner's Court, not entitled as of right to notice of the date fixed for re-hearing.[4] Nor are they entitled to notice of the receipt of records by the lower Court.[4-a] They are, however entitled to have a reasonable date fixed for further hearing.[4-b] No fresh vakalatnama is necessary in a remanded case.[5] When a case is remanded in second appeal to the first appellate Court, the latter may ask the trial Court to take additional evidence.[6]

33. **Refund of Court-fee on remand.**—Where a remand is made under this rule the appellate Court is *bound* under S. 13 of the Court-Fees Act, 1870 to order a refund of the Court-fee.[1]

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(3) *Ishar* v. *Dhanpat*, 1929 Lah 534 (535): 30 Pun L R 244: 116 Ind Cas 324 [Order of remand cannot confer jurisdiction which the lower Court would not have had but for the order of remand]; *Vuppuluri Achayya* v. *Seetharamachandra*, (1913) 39 Mad 195 (203): 13 Mad L Tim 60: 24 Mad L Jour 112: 18 Ind Cas 555 F B.

(4) *Shib Chunder* v. *Joymala*, (1881) 7 Cal L Rep 103 (106): 35 Cal 176: 12 Cal W N 122: 7 Cal L Jour 103; *Shaheb Tewaree* v. *Kishore Sahay*, (1875) 24 Suth W R 330 (330); *Gossain Dowlat Geer* v. *Bissessur Gheer*, (1874) 22 Suth W R 207 (208); *Narendro Coomar Dut* v. *French*, (1865) 3 Suth W R 198 (199). See also *Khagendra Nath* v. *Sonatan Guha*, (1915) 31 Ind Cas 987 (992): 20 Cal W N 149 [Remand order to find whether a person has a title includes an enquiry as to whether he has lost the title or whether he is precluded from relying upon the title].

Note 32.

(1) *Koonji Behari Awustee* v. *Tarinee Kant Lahoree*, (1867) 8 Suth W R 285 (287); *Kristo Churn* v. *Muggan Chuckerbutty*, (1868) 10 Suth W R 491 (492); *Gudadhur Dutt* v. *Shushee Monie Dossia*, (1874) 21 Suth W R 7 (8) [Plaintiff may prove his case in any way he can].

(2) *Bhoyro Lal* v. *Mokund*, (1865) 2 Suth W R 275 (276); *Manik Sett* v. *Khetter Mohan*, 1 Ind Jur N S 101; *Bhyrup* v. *Khettur Mohan*, (1866) 5 Suth W R 124 (124).

(3) See *Radhabullub* v. *Anundmoyee*, 1864 Suth W R Mis 39 (40) [In remanding a second time Court should point out the manner in which the carrying out of the previous order seemed defective]. But see *Kasheenath Deb* v. *Maharanee Shibessuree Debia*, (1867) 8 Suth W R 503 (503) [Where the lower appellate Court has not fully carried out order of the High Court remanding a case the High Court would not remand a second time if it should appear that the lower appellate Court substantially tried the case fully on its merits].

(4) *Baldar* v. *Imam*, 1925 Nag 31 (31): 76 Ind Cas 46; *Gosari* v. *Mubraj*, (1911) 12 Ind Cas 807 (808): 7 Nag L J 172 [But in fixing date for proceeding with the case, Court should select such date as will give parties reasonable opportunity to ascertain the date fixed]; *Atmaram* v. *Krishna*, (1908) 4 Nag L J 166 (168).

(4-a) In re *Kalee Mohun*, (1872) 17 Suth W R 70 (70); *Banchi Diwan* v. *Mahajar Uddin Talukdar*, (1932) 36 Cal W N 693 (695); *Jagadambu Prasad* v. *Ram Dulary*, (1932) 136 Ind Cas 251 (252). 1931 Notes 13 (*b*): 8 Oudh W N 1235: L R 12 A (O) 380: 1932 Oudh 107.

(4-b) *Haradhan* v. *Protap Narain*, (1870) 14 Suth W R 401 (402); *Watson & Co* v *Kunhye Bahadur*, (1868) 9 Suth W R 294 (295).

(5) *Sreemutee* v. *Joy Gopal*, (1864) 1 Suth W R 276 (277).

(6) *Moti Singh* v. *Sobhamal*, (1916) 32 Ind Cas 634 (634): 9 Sind L R 148.

Note 33.

(1) *Bhau Singh* v. *Chaganiram*, (1918) 45 Ind Cas 552 (553): 20 Bom L R 348: 42 Bom 363; *Bansi* v. *Jhamman*, 1930 Lah 441 (442): 122 Ind Cas 485; *Sher Mohammad* v. *Mian Ahmad*, 1927 Lah 592 (593): 103 Ind Cas 298; *Harnam* v. *Indar*, 1932 Lah 311 (311): 33 Pun L L R 285: 138 Ind Cas 202; *Mohammad Shafi* v. *Fatehgar*, 1927 Lah 196 (197): 100 Ind Cas 49; *L Shantilal* v. *Agha Dost Mohammad*, 1932 All 641 (642): 1932 All L J 745: 140 Ind Cas 56.

O.41, R.23, Notes 33—35.

There is a difference of opinion, however, as to whether a refund can be ordered in cases in which a remand has been made, not under this rule but under the Court's inherent powers. The Judicial Commissioner's Court of Nagpur has held that a refund cannot be ordered in such cases.[2] According to the High Court of Patna also S. 13 of the Court-Fees Act, 1870 applies only to cases of remand under this rule.[3] The High Court of Lahore has, on the other hand, held that a refund could be ordered in such cases[4] but that the power is a *discretionary* one.[5]

When an appeal is remanded as to a part, the appellant is entitled to a refund of a proportionate part of the Court-fee.[6]

34. **Costs.**—*See* the undermentioned cases.[1]

35. **Revision.**—*Remand under O. 41, R. 23.*—No revision lies against an order of remand under this rule because such an order is *appealable.*[1] Even if the order of remand is not justified under the terms of this rule it is not a case of want of jurisdiction within the meaning of S. 115, as the Court has inherent jurisdiction to remand.[2]

Remand under inherent power.—An order of remand under the inherent power of the Court is not appealable. Hence the question arises whether such an order is revisable under S. 115. On this question there is a conflict of opinion. According to some decisions a revision does not lie in such a case.[3] But according to other decisions a revision is maintainable.[4]

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(2) *Vithoba* v. *Waman,* (1917) 42 Ind Cas 804 (804) Nag; *Jagannath* v. *Maruthi,* (1916) 36 Ind Cas 241 (242): 12 Nag L R 126.

(3) *Nand Kumar Singh* v. *Bilas Ram Marwari,* (1917) 43 Ind Cas 855 (856): 1917 Pat H C C 377: 4 Pat L W 100: 3 Pat L Jour 116.

(4) *Mt Gendo* v. *Radhe Mohan,* 1932 Lah 219 (220): 33 Pun L R 54: 136 Ind Cas 559; *Central Bank of India* v. *Thakur Das,* 1933 Lah 135 (135): 141 Ind Cas 400.

(5) *Bansi* v. *Jhamman,* 1930 Lah 441 (442): 122 Ind Cas 485.

(6) In re *Doorga Das Dutt,* (1866) 6 Suth W R Mis 65 (68): Beng L R Sup Vol 511; In re *Bhagwanti,* (1917) 39 Ind Cas 28 (28): 14 All L J 671 [The remand as to a part *must be as against all the respondents—If a decree is reversed* as to some of the respondents but is confirmed as to others, no refund can be ordered].

Note 34.

(1) *Tarakant* v. *Puddomoney,* (1866) 5 Suth W R 63 (66): 10 Moo Ind App 476 [Case disposed of on points (1) limitation, (2) *res judicata* without any decision on the principal point on the merits—Privy Council reversing decision on the above points—Case remanded—Priyy Council granted appellant the costs of the appeal]; *Digambur* v. *Ram Roodhro,* (1870) 13 Suth W R 39 (40) [Costs of appeal can be recovered only if order of remand provides for them, *e.g.,* by providing that costs shall abide the result]; *Lakshmanan* v. *Muthiah,* (1915) 30 Ind Cas 785 (786): 2 Mad L W 755: 18 Mad L Tim 247 [When case is remanded to lower Court because of appellant's failure to set out his case properly and support it by proper evidence, respondent is entitled to his costs of appeal]; *Sarfaraz Ali* v. *Ram Ratan,* 1892 All W N 215 (216) [Remanding Court has power to apportion costs—*Held,* that ordinarily costs must be left to abide the result—It is premature to award costs to the appellant as question depends on merits of case].

Note 35.

(1) *Meer Tukee Ali* v. *Meer Sandut Ali,* (1873) 5 N W P 14; *Meer Tukee Ali* v. *Meer Saadut Ali,* (1873) 5 N W P 137.

(2) *Autul Chandra Seal* v. *Kobadali,* (1921) 64 Ind Cas 436 (437) Cal.

(3) *Sundararama* v. *Sathianatha,* 1927 Mad 1190 (1190): 1927 Mad W N 286: 102 Ind Cas 28. See also *Bishnath Singh* v. *Ram Sri,* 1923 All 464 (465): 76 Ind Cas 525 [Not clear whether remand was under inherent power].

No revision lies because there is no usurpation of jurisdiction.—*Malayya* v. *Veerayya,* 1927 Mad 335 (336): 52 Mad L Jour 90: 25 Mad L W 198: 38 Mad L Tim 15: 100 Ind Cas 135; In re *Donepudi Rangayya,* 1927 Mad 1111 (1112): 39 Mad L Tim 120; *Sheikh Mahomed Maracayar* v. *Rangaswami Naidu,* 1921 Mad 716 (716): 16 Mad L W 515: 69 Ind Cas 826.

No revision lies because no case is decided within S. 115.—*Thukordas* v. *Lallubhai,* 1923 Bom 401 (401): 25 Bom L R 452: 75 Ind Cas 102; *Ramji Das* v. *Sankar Das,* (1912) 13 Ind Cas 855 (855): 10 Pun W R 1912: 140 Pun L R 1912; *Faiz Ahmad* v. *Badar Din,* (1911) 11 Ind Cas 315 (316): 137 Pun W R 1911: 50 Pun Re 1911: 210 Pun L R 1911. See also *Musamat Har Devi* v. *Harnam Singh,* (1910) 6 Ind Cas 491 (492): 17 Pun L R 1910: 123 Pun W R 1910.

No revision lies because another remedy, viz., by way of appeal against the decree after remand is open.—*Wisakhi Ram* v. *Alawal,* 1924 Lah. 487 (487): 6 Lah L Jour 159: 78 Ind Cas 408.

(4) *B N Ry* v. *Behari,* 1925 Cal 716 (718): 29 Cal W N 614: 52 Cal 783: 90 Ind Cas 426;

O.41, R.23, Note 35.

A revision will lie in the following cases:—

(*a*) Where an appellate Court entertains an appeal from an unappealable order and remands the case.[5]

(*b*) Where an appellate Court remands a case to a Court which is not competent to try it.[6]

(*c*) Where an appellate Court remands a case to the lower Court directing it to return the plaint under O. 7, R. 10 in a case where the lower Court has jurisdiction to try the suit.[7]

See S. 115, *ante* and the notes thereto.

O.41, R.24, Note 1.

Where evidence on record sufficient, Appellate Court may determine case finally.

R. **24**. [S. 565.] *Where* the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the *suit*, notwithstanding that the judgment of the Court *from* whose decree the appeal is *preferred* has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

[1877—S. 565; 1859—S. 353.]

Synopsis.

1. **Scope of the rule.**
2. **Second appeal**

1. **Scope of the rule.**—This rule enables the appellate Court to dispose of a case finally without a remand if the evidence on the record is sufficient for the purpose[1] notwithstanding that the appellate Court proceeds on a

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Mithai v. *Hasan Ali*, 1930 All 863 (864): 128 Ind Cas 827; *Srimati Bhaba Sundari* v. *Aditya Nath*, 1927 Cal 401 (402): 45 Cal L Jour 194: 102 Ind Cas 884; *Banki Behari* v. *Dutta*, 1927 Cal 850 (853): 47 Cal L Jour 69: 103 Ind Cas 864: 55 Cal 219. See also *Ram Dhan* v. *Lallachand*, 1931 Lah 302 (302): 32 Pun L R 169: 133 Ind Cas 127 [Revision was entertained because the alternative remedy by way of appeal against decree after remand would entail delay]; *Firm, Chajju Mal Munna Lal* v. *Firm, Pyare Lal Jumna Prasad*, (1921) 63 Ind Cas 858 (858) [Lower Court was held to have practically declined to exercise its jurisdiction when it remanded instead of trying case itself]. See also *Hafiz Zahur Ahmad* v. *Taslimunnissa*, 1926 All 55 (56): 23 All L J 891: 6 L R A (Civ) 575: 89 Ind Cas 404: 48 All 27.

Revision held to lie on grounds of want of jurisdiction.—*Ram Dhan* v. *Lalchand*, 1931 Lah 302 (302): 32 Pun L R 169: 133 Ind Cas 127; *Chelmayya* v. *A Lakshmi Devamma*, 1925 Mad 171 (172): 79 Ind Cas 857.

Revision held to lie on grounds of material irregularity.—*Vaithilingam* v. *Kandaswami*, 1931 Mad 1 (5): 33 Mad L W 210: 60 Mad L Jour 713: 132 Ind Cas 311; *Pericherla* v. *Ganapathy*, 1923 Mad 113 (113): 16 Mad L W 593: 30 Mad L Tim 314: 70 Ind Cas 655.

[5] *Nanda* v. *Ramji*, (1906) 3 All L J 119 (123): 1906 All W N 58.

[6] *Vuppuluri Atchayya* v. *Seetharamachandra Rao*, (1913) 18 Ind Cas 555 (560): 13 Mad L Tim 60: 24 Mad L Jour 112: 39 Mad 195 F B.

[7] *Dwarka Das* v. *Rahim Bakhsh*, 1923 Lah 524 (525): 73 Ind Cas 755.

Order 41, Rule 24—Note 1.

[1] *Debi Saran* v. *Debi Saran*, (1884) 6 All 378 (378): 1884 All W N 122; *Bebee Zaharh* v. *Bhugwan Doss*, (1871) 16 Suth W R 211 (212); *Ram Lal Jha* v. *Issur Chunder Dey*, (1868) 10 Suth W R 451 (452): *Abdullah Khan* v. *Muhammad Maqbul Husain*, 1923 All 603 (604): 45 All 565: 21 All L J 538: 4 L R A Civ 260: 74 Ind Cas 822; *Badli Das* v. *Pajan*, (1911) 10 Ind Cas 225 (226) All [Appellate Court has full power to decide with respect to evidence on record the issues left undetermined by the Lower Court without sending the case to Lower Court]; *Saiyid Muzhar Hossein* v. *Mussammat Bodha Bibi*, (1895) 17 All 112 (116): 22 Ind App 1: 5 Mad L Jour 20: 6 Sar 580 P C; *Radha Pershad* v. *Lal Saheb*, (1891) 13 All 53 (63): 17 Ind App 150: 5 Sar 600 P C; *Caribullah* v. *Modu*, (1919) 50 Ind Cas 301 (303) Cal; *Chandra Nandi* v. *Saradindu*, (1919) 45 Ind Cas 408 (409): 27 Cal L Jour 599: 23 Cal W N 593; *Govinda Charlu* v. *Krishna Rao*, (1894) 4 Mad L Jour 181 (182); *Venkata* v. *Anantha*, (1893) 16 Mad 299 (301): 3 Mad L Jour 150: 6 Sar 364 P C; *Maung Ba Thein* v. *Maung Ba Po*, 1933 Rang 35 (36) [Whole evidence *recorded* though trial Court held a portion inadmissible—*Held*, appellate Court justified in deciding without a remand].

O.41, R.24, Notes 1—2.

ground entirely different from that on which the lower Court proceeded. Prior to Act, VII of 1888 the word "shall" occurred after the words "the appellate Court" and so it was held that the appellate Court was bound to decide the case itself in the circumstances mentioned in the rule.[2] The word "shall" has now been replaced by the word "may" and the appellate Court may now, if necessary, remand a case under the present Code notwithstanding that the decision of the lower Court has not resulted in the exclusion of any material evidence.

There is a conflict of opinion as to whether an appellate Court can, under this rule, decide a case without a remand on an issue not raised in the Court below. According to the High Court of Calcutta, the framing of a *new issue* is not a "*resettling*" of the issues, and the appellate Court cannot, under this rule frame such issue and decide it.[3] The High Court of Bombay, has on the other hand, held that though the point was raised for the first time in appeal, a remand was not necessary where it could be decided on the evidence on the record.[4] It is submitted that the latter view is correct. There is no reason why the framing of a new issue should be regarded as necessarily different from "resettling" issues within the meaning of this rule. The true view appears to be that when a new case is pleaded in the appellate Court it will not act under this rule unless the case arises on the facts stated in the pleadings and the opposite party is not taken by surprise.[5]

In an appeal against an order returning a plaint for presentation to the proper Court, the appellate Court, cannot decide the suit on the merits under this rule: the reason is that such a decision would be outside the scope of the appeal the same not being against the decree in the suit.[6]

2. **Second Appeal.**—*See* S. 103, Note 2 and the following cases.[1]

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(2) *Umrao Singh* v. *Raghunath Singh*, 1882 All W N 5; *Mussammat Rama Kooer* v. *Lalla Bhugwan Lall*, (1874) 22 Suth W R 224 (225); *Futtehullah* v. *Oomdanissa*, (1870) 14 Suth W R 69 (70); *Ram* v. *Joy Nundo Moyee*, (1868) 10 Suth W R 374 (374); *Punchamu Koonwar* v. *Luckhee Preea Debia*, (1865) 3 Suth W R Act X 154 (155); *Amma* v. *Kunhunni*, (1886) 9 Mad 355 (356); *Bandi Subbayya* v. *Madalapalli Subbanna*, (1880) 3 Mad 96 (98): 5 Ind Jur 192.

(3) See also *Laskari* v. *Abbas Bepari*, (1917) 40 Ind Cas 411 (413): 25 Cal L Jour 527. See also *Official Trustee* v. *Krishna Chandra*, (1886) 12 Cal 239 (246): 12 Ind App 166: 4 Sar 657: 9 Ind Jur 399 P C [Rule does not enable appellate Court to declare a right in favour of one of the parties, where no issue has been framed on the point, and the right has not been set up in the lower Court].

(4) *Haridas Purushotham* v. *Gamble*, (1875) 12 Bom H C R 23.

(5) *Ramchandra Sil* v. *Ramanmani Dasi*, (1916) 36 Ind Cas 890 (900): 20 Cal W N 773. See also *Maung Po Han* v. *Ma Ta Lok*, (1913) 20 Ind Cas 674 (675): 6 Bur L Tim 134: 7 L B R 79.

(6) *Rameswar Pershad Misra* v. *Industrial and Prudential Assurance Co, Ltd, Bombay*, 1927 Oudh 218 (219): 1 Luck Cas 24: 102 Ind Cas 467.

Note 2.

(1) **Cases under the former Code.**—*Ram Narain* v. *Bhawani Din*, (1887) 9 All 29 Note: 1882 All W N 104; *Sohawan* v. *Babu Nand*, (1886) 9 All 26 (30): 1886 All W N 284; *Dena Nath* v. *Hari Dosi*, (1885) 11 Cal 499 (501); *Rasul Singh* v. *Kishoree Lall*, (1867) 8 Suth W R 499 (499).

Cases under the present Code—High Court can determine questions of fact not determined by Lower Appellate Court.—*Devi Das* v. *Vithaldas*, (1911) 12 Ind Cas 925 (925): 13 Bom L R 1183: 36 Bom 183; *Ghanshyam* v. *Hardei*, (1916): 32 Ind Cas 380 (386): 2 Oudh L J 562.

Cases under present Code—High Court's power to interfere when finding of lower Court is vitiated by error of law—Conflict of decisions.—*Chanda Singh* v. *Wasawa Singh*, (1914) 25 Ind Cas 144 (145): 108 Pun W R 1914: 202 Pun L R 1914 [High Court has power to interfere]; *Lochan Rai* v. *Sant Prasad*, 1922 Pat 417 (419): 65 Ind Cas 536: 3 Pat L Tim 303 [Evidence improperly rejected by lower Court—Can High Court decide after taking into consideration that evidence under R 24? No. (Per Dawson Miller, C J and Per Jwala Prasad, J)]; *South Indian Railway Co, Ltd* v. *V M S P Brothers*, 1932 Mad 545 (552): 62 Mad L Jour 573: 1932 Mad W N 506: 35 Mad L W 687: 137 Ind Cas 884 [High Court can arrive at finding not recorded by lower appellate Court instead of referring the matter to the lower Court]; *Madho Singh* v. *Kalloo Singh*, 1933 Oudh 28 (30): 9 Oudh W N 923: 140 Ind Cas 580 [All evidence on record—High Court can determine question without remand].

25. [S. 566.] *Where* the Court *from* whose decree the appeal is *preferred* has omitted to frame or try any issue,[3] or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues,[5] and refer the same for trial to the Court *from* whose decree the appeal is *preferred*, and in such case shall direct such Court to take the additional evidence required;[6]

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed *from*.

and such Court [7] shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon *and the reasons therefor*.

[1877—S. 566; 1859—S. 354.]

Synopsis.

1. **Legislative changes.**
2. **Scope of the rule.**
3. **"Has omitted to frame or try any issue."**
4. **Distinction between this rule and R. 23.**
5. **"May, if necessary, frame issues."**
6. **"Shall direct such Court to take the additional evidence required."**
7. **What Court may try the issues remitted.**
8. **Powers and duties of Court to which issues are remitted.**
9. **Remand, if open for reconsideration by appellate Court after return of findings—See R. 26, Note 4, infra.**
10. **New issues raised before the appellate Court.**
11. **Remand in second appeal.**
12. **Appeal.**
13. **Letters Patent Appeal.**
14. **Revision.**

Power of Court to which issue is remitted to restore case disposed of ex parte. **See Note 8, Pt. (8).**

1. Legislative changes.—

The words "and the reasons therefor" in the second paragraph are new.

2. Scope of the rule.—This rule enables the appellate Court to remit issues to the lower Court for findings where the lower Court has failed to try any issues or determine any question of fact essential to the right decision of the suit on the merits.[1] Where the lower Court has not disposed of the suit

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Order 41, Rule 25—Note 2.

(1) *Sethunathnam Ayyar* v. *Venkatachala Goundan*, 1920 P C 67 (68): 43 Mad 537: 47 Ind App 76: 18 All L J 707: 22 Bom L R 576: 25 Cal W N 485: 38 Mad L Jour 476: 27 Mad L Tim 102: 11 Mad L W 399: 1920 Mad W N 61: 56 Ind Cas 117 P C; *Chotay Lal* v. *Channoo Lal*, (1879) 4 Cal 744 (746): 6 Ind App 15: 3 Cal L Rep 465: 3 Sar 880: 3 Ind Jur 175: 3 Suther 572 P C; *Grish Chunder* v. *Bhuggobutty Debia*, (1869) 13 Moo Ind App 419 (425, 426): 14 Suth W R P C 7: 2 Suth 339: 2 Sar 579 P C; *Hari Singh* v. *Debi Saran*, 1895 All W N 79 (79); *Jonab* v. *Siva*, 1927 Cal 855 (856): 46 Cal L Jour 253: 104 Ind Cas 733 [In the absence of proof of some fact within Evidence Act S 32, what the appellate Court has to do is to find whether or not there was any real contention that the writer was still alive and if so grant a remand]; *Sadak Ali* v. *Safar Ali Sufani*, (1920) 56 Ind Cas 984 (985, 986) Cal; *Chandra Deb* v. *Gour Chandra*, (1919) 49 Ind Cas 475 (476) Cal; *Chandra Kumar* v. *Nabi Bux*, (1918) 48 Ind Cas 959 (959) Cal; *Bungo Chander* v. *Chunder Nath*, (1876) 25 Suth W R 47 (47); *Radhi* v. *Buta Mal*, 1929 Lah 618 (619): 119 Ind Cas 431; *Har Kishen Singh* v. *Lahore Bank, Ltd*, (1919) 51 Ind Cas 712 (714): 64 Pun Re 1919; *Karimkhan* v. *Secretary of State*, (1911) 12 Ind Cas 53 (54): 121 Pun W R 1911: 223 Pun L R 1911; *Vaidinadha* v. *Appu*, (1886) 9 Mad 44 (45); *Vishnu* v. *Krishan*, (1884) 7 Mad 3 (10); *Jai Narain* v. *Bajrang Bahadur*, (1918) 48 Ind Cas 914 (916): 5 Oudh L J 691; *Bichana* v. *Hira Lal*, (1901) 4 Oudh Cas 224 (227); *Shah Mahomed* v. *Ramzan*, 1921 Sind 155 (157): 16 Sind L R 17: 66 Ind Cas 833.

See also the following cases.—*Ramakrishna Murarji* v. *Ratna Chand*, 1931 P C 136 (140):

O. 41, R. 25, Notes 2—3.

on a preliminary point within the meaning of R. 23 but at the same time has omitted to try any material issues or to determine any material questions of fact, it is not competent to the appellate Court to remand the whole case under R. 23, but it may, if necessary, remit issues for findings under this rule keeping the case on its own file.[2] The appellate Court is not precluded from passing an order of remand under the present rule merely because it would have been competent to the Court under the circumstances to remand the case under R. 23.[3]

In an appeal from an order under O. 7, R. 10 returning a plaint for presentation to the proper Court, the appellate Court has no power to remand issues which would have arisen if the lower Court had entertained the suit.[4]

As to the points of distinction between this rule and R. 23, *see* Notes to R. 23.

3. **"Has omitted to frame or try any issue"**.—The rule applies only to cases in which the lower Court has *omitted* to try any issue or to determine any question of fact. Hence where the lower Court has not omitted to decide any issue or any question of fact a remand cannot be ordered under this rule[1] merely for the purpose of enabling a party to produce evidence which ought

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1931 All L J 458: 33 Bom L R 988: 53 Cal L Jour 561: 35 Cal W N 841: 132 Ind Cas 613: 58 Ind App 173: 1931 Mad W N 733: 34 Mad L W 175: 53 All 190: 61 Mad L Jour 665 P C; *Ramamoogra Sahay* v. *Musst Dhondia*, (1876) 25 Suth W R 140 (141) [Lower Court having come to no decision on a point raised, plaintiff in appeal has a right to remand even though the point is very trifling]; *Narasimharav Krishnarav* v. *Antaji Virupaksh*, (1864) 2 Bom H C R 61; *Tarakant Banerjee* v. *Puddomoney Dossee*, (1866) 5 Suth W R P C 63 (66): 10 Moo Ind App 476: 2 Sar 184: 1 Suth 681 P C [In appealable cases Courts below should as far as possible pronounce opinion on all the important issues so as to obviate necessity for a remand]; *Shiam Lal* v. *Narain Das*, (1867) 2 Agra 106 [Co-defendants—One defendant cannot bind another by his pledge to abide by reference to rent roll for a certain year for the decision of the principal issue in the case]; *Sajan* v. *Roopram*, (1867) 2 Agra 61 [Judge's remark as to certain fact, without any issue being framed for trial does not amount to judicial finding].

(2) *Ram Lal* v. *Tirbeni Sahai*, (1915) 26 Ind Cas 454 (455) All; *Ram Prasad* v. *Musst Krishna*, (1868) 3 Agra 146; *Annaji* v. *Thakubai*, 1929 Bom 175 (176): 31 Bom L R 208: 118 Ind Cas 790: 53 Bom 335; *Mansur Ali Sarkar* v. *Jamiran Bewa*, 1926 Cal 976 (977): 95 Ind Cas 203: 44 Cal L Jour 101; *Krishna Das Roy* v. *Sir Manindra Chandra Nandi*, 1926 Cal 954 (954, 955): 95 Ind Cas 123; *Mahendra Kumar Chakravarti* v. *Narayani Kar Purkaistha*, 1926 Cal 912 (912): 95 Ind Cas 170; *Ambica Churn Das* v. *Kala Chandra Das*, (1906) 10 Cal W N 422 (423); *Rakhit Mahanta* v. *Puddo Bauri*, (1905) 9 Cal W N 54 (56); *Ram Dao Mondal* v. *Indra Moni*, (1899) 3 Cal W N 325 (328); *Lala Chunilal* v. *Mohiji Singh*, (1897) 1 Cal W N 840 (841); *Hureenarain Gosami* v. *Shumboonath Mundal*, (1864) 1 Suth W R 6 (7); *Mokund Lal* v. *Hurbullabh* (1883) 12 Cal L Rep 136 (138); *Goluck Chunder* v. *Puresh*, (1876) 25 Suth W R 284 (285); *Hills* v. *Osman*, (1876) 25 Suth W R 35 (35); *Lachman Lal Doobey Gowally* v. *Hursohoy Lal*, (1864) Suth W R 361 (361); *Ramchandra Gupta* v. *Bhagiswar Sarma*, 1864 Suth W R 357 (358); *Shibo Sundari Dasi* v. *Kali Churn Raja*, (1864) 1 Suth W R 296 (297); *Herrikosim* v. *Stephenson*, (1864) 1 Suth W R 298 (299); *Ram Singh* v. *Kundan Singh*, (1916) 36 Ind Cas 211 (211): 103 Pun L R 1916: 96 Pun W R 1916; *Koru Kutty* v. *Valikathodiyil Ahammad*, 1925 Mad 169 (170): 78 Ind Cas 1; *Munisami Naicken* v. *Muniswami Naicken*, 1923 Mad 227 (228): 16 Mad L W 979: 1923 Mad W N 11: 76 Ind Cas 1041; *Kelu Mulacheri Nayar* v. *Chendu*, (1896) 19 Mad 157 (159); *Krishnayya* v. *Panchu*, (1894) 17 Mad 187 (188); *Balku Bhagat* v. *Aghori Mandal*, (1917) 38 Ind Cas 641 (642) Pat; *Boncharee Ghose* v. *Ainoodden Biswas*, (1875) 24 Suth W R 137 (137); *Wise* v. *Ishan Chunder Banerjee*, (1870) 14 Suth W R 380 (380). See also *Sheikh Umer Ali* v. *Sheikh Rumzan Ali*, (1875) 23 Suth W R 347 (348).

(3) *Ramyad Misra* v. *Thakur Misra*, 1899 All W N 2 (3).

(4) *Kandhai Lal* v. *Anantu*, 1925 Oudh 393 (394): 12 Oudh L J 277: 2 Oudh W N 239: 87 Ind Cas 172: 29 Oudh Cas 21.

Note 3.

(1) *Chandra Kumar* v. *Nabi Bux*, (1918) 48 Ind Cas 959 (959) Cal; *Chandramoni* v. *Halijennessa*, (1909) 4 Ind Cas 168 (169): 9 Cal L Jour 464; *Kalu* v. *Mojiram*, (1889) 2 C P L R 113 (114); *Raghunath Das* v. *Randhir Singh*, (1914) 22 Ind Cas 128 (129) Oudh; *Ganapat Rao Banka Puri* v. *Raj Kumar Singh*, 1922 Pat 575 (577): 1 Pat 639: 67 Ind Cas 494; *Mujibar Rahman* v. *Isub Surati*, 1928 Cal 546 (547): 32 Cal W N 867: 49 Cal L Jour 1; *Sarwan Singh* v. *Ram Sarup Singh*, (1910) 6 Ind Cas 499 (500) All; *Maung Pu Gyi* v. *Maung Shwe Hongiri*, (1900-1902) 1 L B R 143 (143); *Imtiaz Hussain Khan* v. *Bengali Nonia*, (1918) 43 Ind Cas 750 (751): 2 Pat L Jour 564; *Venkata Varadha* v. *Ananthachariar*, (1893) 16 Mad 299 (301): 3 Mad L Jour 150: 6 Sar 364 P C; *Mahomed Asan* v. *Mahomed Yasin*, (1868) 9 Suth W R 106 (106); *Runpal* v. *Joy Mungal*, (1869) 11 Suth W R 106 (107); *Nymooddee Joardar* v. *R S Moncrieff*, (1869) 12 Suth W R 140 (141): 3 Beng L R 283; *Bhoobun Das Mundal* v. *Srimathy Bilashomony Dassee*, (1878) 1 Cal L Rep 415 (417); *Guman Singh* v. *Bughawan Singh*, 1881 All W N 88 (89).

O.41, R.25, Notes 3—5.

to have been given in the lower Court.[2] It has, however, been held that a remand can be made under this rule where the lower Court has not arrived at its findings after a full and proper trial, inasmuch as, in such a case, the issue cannot be regarded as having been tried by the lower Court.[3]

The omission by a plaintiff to press a certain point is, generally speaking, no ground for refusing to remit an issue on the point, if the lower Court has omitted to frame or try the same.[4]

4. **Distinction between this rule and R. 23.**—*See* R. 23, Note 2.

5. **"May, if necessary, frame issues".**—The appellate Court is not bound to remand issues under this rule in every case in which the lower Court has failed to frame or decide any issue.[1] The question is one for the exercise of the discretion of the Court in each case.[2] Thus, where, in spite of there being no formal issue on a point, it has been tried by the lower Court after giving the parties full opportunity to produce their evidence and present their case on it, a remand under this rule is not necessary,[3] especially where the parties have led evidence fully on the point.[4] But where a point is newly raised in the appellate Court, it should not be decided without giving the opposite party an opportunity to meet the new case.[5] A remand

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(2) *Ram Prasad* v. *Abdul Karim,* (1887) 9 All 513 (518, 519): 1887 All W N 146: 12 Ind Jur 34; *Devshi* v. *Bhikamchand,* 1927 Bom 125 (126); 29 Bom L R 147: 100 Ind Cas 993; *Jaitindra Mohan Chakravarti* v. *Bijoy Chand Mahatab,* 1924 Cal 396 (397): 71 Ind Cas 284; *Ram Chandra* v. *Abeda Khatun,* (1919) 53 Ind Cas 562 (563) Cal; *Anando Lal Das* v. *Boycaunt Ram Roy,* (1880) 5 Cal 283 (285): 4 Cal L Rep 473; *Muhammad Baksh Karim Elahi* v. *Sad Muhammod Mahomed Baksh,* 1927 Lah 272 (273): 8 Lah 123: 27 Pun L R 768: 100 Ind Cas 60; *Debi Dyal* v. *Ganesh Prasad,* (1919) 50 Ind Cas 933 (933) Oudh.

(3) *Yar Ali* v. *Hashmat Bibi,* 1897 All W N 90 (91); *Ahmad Bakhsh* v. *Saira Bibi,* (1912) 15 Ind Cas 3 (5) All; *Mahesh Singh* v. *Masri Singh,* 1881 All W N 12 (12); *Rambhat* v. *Bababhat,* (1894) 18 Bom 250 (255); *Nivath Singh* v. *Bhikki Singh,* (1885) 7 All 649 (655): 1885 All W N 151: 10 Ind Jur 34 F B; *Ganga Prasad* v. *Lal Bahadur Singh,* (1895) 17 All 117 (119, 120): 1895 All W N 21; *Karam Nawaz* v. *Ruknam,* 1929 Lah 376 (377): 29 Pun L R 270: 108 Ind Cas 400; *Dhondo* v. *Panhalal,* (1899) 1 Bom L R 110 (112). See also *Shumboochunder Surnokar* v. *Russick Chunder Chung,* (1871) 15 Suth W R 346 (347); *Kari Bapanna* v. *Sunkari Veeramma,* 1923 Mad 718 (718): 45 Mad L Jour 324: 18 Mad L W 49: 1923 Mad W N 452: 74 Ind Cas 218: 33 Mad L Tim 46; *Shumboo* v. *Russick,* (1871) 15 Suth W R 346 (347); *Ahmad Baksh* v. *Saira Bibi,* (1912) 15 Ind Cas 3 (5) All. But see *Umbika Charan* v. *Ramadhan,* (1869) 11 Suth W R 35 (36) [Appellate Court has no power to send back case for trial upon issue not satisfactorily tried by Court of first instance].

(4) *Mathuresh* v. *Baidahi,* (1902) 4 Bom L R 818 (820). But see *Banga Chandra Pal* v. *Kailash Chandra Pal,* (1920) 58 Ind Cas 189 (191) Cal.

Note 6.

(1) *Mitna* v. *Fuzl Rub,* (1869) 13 Moo Ind App 573 (588); *Rangasami Nadar* v. *Sundarapandia Thevar,* 1928 Mad 635 (636): 110 Ind Cas 548; *Abdulla Khan* v. *Mohmed Maqbul Hussain* 1928 All 603 (604): 45 All 565: 21 All L J 538: 4 L R A (Civ) 260: 74 Ind Cas 822.

(2) *Guru Prosonna Roy* v. *Falchand Mandal,* 1923 Cal 291 (292): 67 Ind Cas 244; *Raman Menon* v. *Mammali,* (1917) 39 Ind Cas 954 (957): 1917 Mad W N 560; *Chotay Lal* v. *Chunno Lal,* (1878) 22 Suth W R 496 (499): 14 Beng L R 235. See also *Ganga Prasad* v. *Ishri Parshad,* 1918 P C 3 (4): 45 Cal 748: 45 Ind App 94: 16 All L J 409: 20 Bom L R 587: 27 Cal L Jour 548: 22 Cal W N 697: 34 Mad L Jour 545: 23 Mad L Tim 388: 8 Mad L W 176: 1918 Mad W N 382: 4 Pat L W 349: 45 Ind Cas 1 P C [*Held* that in the circumstances there was no justification for remand]; *Doorga Pershad* v. *Doorga Kunwari,* (1879) 4 Cal 190 (204, 205): 3 Cal L Rep 31: 5 Ind App 149: 3 Sar 827: 3 Suth 540: 2 Ind Jur 650: 2 Shome L R 21 P C [Declaratory decree being a matter of discretion, claim for a declaration ought not to be remanded for further enquiry which is likely to entail delay and expense].

(3) *Gundappa Bharma Gowda* v. *Santappa Bhau Rao,* 1924 Bom 113 (114); *Chandra Kunwar* v. *Narpat Singh,* (1907) 29 All 184 (195): 34 Ind App 27: 4 All L J 102: 9 Bom L R 267: 5 Cal L Jour 115: 11 Cal W N 321: 17 Mad L Jour 103: 2 Mad L Tim 109 P C; *Kundan Lal* v. *Beni Prasad,* 1932 Lah 293 (294): 137 Ind Cas 115: 32 Pun L R 861: 13 Lah 399 [Party knowing and failing to discharge *onus*—Remand is not proper though issue is not clear]; *Raja Saheb Perladh Singh* v. *Broughton,* (1875) 24 Suth W R 275 (276).

(4) *Mewa Ram* v. *Lal Sahai,* 1927 All 410 (411): 100 Ind Cas 650; *Kania Lala* v. *Narain Singh,* (1919) 50 Ind Cas 299 (300): 177 Pun W R 1918. See also *Vishnu Ramchandra* v. *Ganesh Appaji,* (1897) 21 Bom 325 (327) [Wrong issue framed but finding given on point which would have been raised if correct issue had been framed—High Court in second appeal refused to remand for a new finding on that issue]; *Hamid Hussain* v. *Bishen Sarup,* (1918) 46 Ind Cas 659 (660): 137 Pun W R 1918.

(5) *The Kaisth Bank* v. *Iqbal Hussain,* (1915) 28 Ind Cas 50 (50, 51): 21 Pun L R 1915: 236 Pun W R 1915; *Laskari* v. *Abbas Bepari,* (1917) 40 Ind Cas 411 (413): 25 Cal L Jour 527; *Basdeo Rai* v. *Jagroo Rai,* 1922 All 281 (282):

O.41, R.25, Notes 5—7.

will not, however, be ordered if the circumstances are such that even if the remand is granted it is unlikely that the party asking for the remand, would be able to establish the case he wants to make out.[5-a] In ordering a remand under this rule, the appellate Court should specify the issues to be tried by the lower Court.[6]

6. **"Shall direct such Court to take the additional evidence required".**—These words "additional evidence required" leave a discretion to the appellate Court not to direct the lower Court to take further evidence when it remands a case for a finding on a specific issue on a consideration of the evidence in the case.[1] Where the appellate Court has not directed the lower Court to take further evidence the lower Court may,[2] but is not *bound* to do so.[3]

7. **What Court may try the issues remitted.**—Where issues are referred to the Court from which the appeal was preferred, no other Court has power to try them.[1] It has been held by the Punjab Chief Court that an order remitting issues to a Court other than that from which the appeal has been preferred, is not one without jurisdiction but is only an error of procedure.[2] Where during the pendency of an appeal to the High Court, the lower Court had lost jurisdiction over the suit area owing to a re-distribution of areas, but the High Court directed the lower Court to submit findings on certain issues, *Held*, that the lower Court should be considered to have retained the jurisdiction as regards pending suits, and that even assuming that the lower Court had lost its jurisdiction to try the suit, the direction of the High Court should be considered as a transfer of the case to that Court.[3]

In the undermentioned case[4] the Court of first instance omitted to try

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20 All L J 464: 66 Ind Cas 572: 44 All 571; *Karbasangavda* v. *Gadiava*, 1889 Bom P J 333 (333); *The Nawab Nizim of Bengal* v. *Amrao Begam*, (1874) 21 Suth W R 59 (60, 61); *Latoo Mundal* v. *Bhooban Mohan*, (1872) 17 Suth W R 361 (361).

(5-a) *Ganga* v. *Pancham*, 1925 Oudh 97 (98): 80 Ind Cas 591: 27 Oudh Cas 388.

(6) *Kalu* v. *Mojiram*, (1889) 2 C P L R 113 (114); *Girish Chunder* v. *Soshi Shikareswar*, (1900) 27 Cal 951 (960): 10 Mad L Jour 356: 27 Ind App 110: 4 Cal W N 631: 2 Bom L R 709: 7 Sar 687 P C. See *Satyendra Nath* v. *Charu Chandra*, 1927 Cal 657 (658): 45 Cal L Jour 557: 104 Ind Cas 188 [Order merely sending back papers with directions to record clear findings is not one under R 25]. See also *Chundernath* v. *Ramnath*, (1864) 1 Suth W R 69 (70) [Appellate Court cannot remand case for re-trial with instructions to frame new issues]; *Punna Bibee* v. *Khoda Baksh Beparee*, (1874) 22 Suth W R 396 (397) [Appellate Court should not remand a case and order the lower Court to call upon the parties to submit to arbitration. But parties may waive the irregularity].

Note 6.

(1) *Bhagwan Din* v. *Mata Dayal*, (1912) 15 Ind Cas 670 (671) All; *Changa Mal* v. *Gulabi*, 1894 All W N 158 (158).

(2) *Kamalakshi* v. *Ramaswami*, (1896) 19 Mad 127 (139). The corresponding section of the Code of 1859 did not require the appellate Court to direct further evidence to be taken, still, it was held in the following cases under that Code, that the lower Court could take further evidence, though the order of remand did not specifically direct it to do so:—*Kali Kristo* v. *Judoo Lal*, (1875) 24 Suth W R 20 (21); *Abdool Khyrat* v. *Jumaloodeen*, (1868) 10 Suth W R 244 (245); *Rakhal Chunder Tewaree* v. *Kinoram Halder*, (1868) 10 Suth W R 442 (442); *Ram Shankur* v. *Nilkant*, (1868) 9 Suth W R 392 (392).

(3) *Mathur Mohan* v. *Ramanath*, (1918) 20 Ind Cas 35 (36) Cal. See also *Ramnath* v. *Syed Ali Azim*, 1888 All W N 81 (81). But see *Ashraf Ali* v. *Wahajuddin Haidar*, 1881 All W N 75 (76) [Omission to direct further evidence to be taken—Still party entitled to adduce further evidence].

See also the following cases under Code of 1859 in which it was held that the parties are entitled to have an opportunity of giving further evidence.—*Kisto Churn* v. *Muggun*, (1868) 10 Suth W R 491 (492); *Watson and Co* v. *Kunhye Bahadoor*, (1868) 9 Suth W R 294 (295).

Note 7.

(1) *Ali Sherkhan* v. *Ahmad*, (1907) 29 All 660 (662): 1907 All W N 209: 4 All L J 603.

(2) *Bhojan Das* v. *Muraddu*, 1886 Pun Re No 111.

(3) *Alagappa* v. *Thyagaraj*, (1910) 7 Ind Cas 864 (864): 1910 Mad W N 477: 8 Mad L Tim 299.

(4) *Karimdad* v. *Nur Muhammad*, (1909) 1 Ind Cas 460 (461): 26 Pun W R 1909.

O.41, R.25, Notes 7—8.

a certain issue. The case went up in appeal before a Court which had no jurisdiction to entertain the appeal. The appellate Court, however, entertained the appeal and remanded an issue under this rule to the Court of first instance. On the return of the findings, the appeal was returned for presentation to the proper Court. The appeal then came before the proper Court. It was held that though the order of remand was made by a Court which had no jurisdiction to deal with the case, this was not a fatal objection to the result of the enquiry made in pursuance of the order and that the appellate Court which subsequently dealt with the case could take it into consideration.[4-a] It has also been held in the case cited below that where an additional District Judge has remanded the case to a subordinate Judge, the District Judge has power to transfer the proceedings to another subordinate Judge.[4-b] *See also* the undermentioned case.[5]

8. **Powers and duties of Court to which issues are remitted.**—A Court to which issues are remitted under this rule can only try the issues and has no power to decide the *suit itself*[1] which continues to be pending in the appellate Court.[2] Hence it has no power to refer the case to arbitration.[3] Nor can such Court delegate its function of deciding the remanded issues to any other Court.[4] But where the High Court has remanded issues to the lower appellate Court for findings, the latter can, under O. 41, R. 28, direct the Court of first instance to take further evidence[5] or appoint a commissioner to examine witnesses under S. 75 of the Code.[6]

The Court to which issues are remitted must give its findings on *all* the issues remitted. It is not open to it to decide only some of the issues, and to

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(4-a) *Karimdad* v. *Nur Muhammad*, (1909) 1 Ind Cas 460 (461): 26 Pun W R 1909.

(4-b) *Jas Kaur* v. *Bhag Devi*, (1932) 140 Ind Cas 238 (240): 1933 Lah 29.

(5) *Deelam Chowdhery* v. *Jetoo Kaijee*, (1875) 24 Suth W R 353 (353).

Note 8.

(1) *Habib* v. *Baldeo*, (1901) 23 All 167 (171): 1901 All W N 39; *Doulat* v. *Bissesur*, (1874) 22 Suth W R 207 (208); *Mollam Allee* v. *Shew Buksh*, 1863 Marsh 603; *Douzelli* v. *Rama Narain Singh*, 1862 Ind Jur N S 51; *Ramachurn Lal* v. *Mahomed Shafi*, (1911) 12 Ind Cas 107 (108): 8 All L J 894 [First Court has no jurisdiction to decide that no suit lies after remand by the lower appellate Court]; *Shib Chund Lahiri* v. *Joymala*, (1890) 7 Cal L Rep 103 (105, 106) [Lower Court cannot allow issue remitted to be abandoned and try case on other issues]; *Norendro Coomar Dut* v. *French*, (1865) 3 Suth W R 198 (199) [Lower Court cannot try any other issue]; *Puree Jan Khatoon* v. *Bykunt Chunder Chuckerbutty*, (1868) 9 Suth W R 380 (381), (Do.); *Ram Jeewan* v. *Arjun*, (1868) 10 Suth W R 303 (304) [Court receiving orders of remand for taking some special evidence should confine itself to such special evidence alone]; *Bykunt* v. *Puree Jan*, (1869) 11 Suth W R 77 (78, 79) [*Held*, that *under the terms of the remand* order the lower Court had power to try the issue of possession]. But see *Mahomed Hassim* v. *Kalli Churn Banerjee*, (1870) 13 Suth W R 91 (93) [Where High Court made a remand order mistakenly for the trial of an issue other than that which should have been remanded for trial and the lower Court disregarding the order tried the proper issue. *Held*, that lower Court's disregard of the High Court's order will not affect the merits of the case].

(2) *U Nyo* v. *Ma Pwa Thin*, 1932 Rang 137 (137): 10 Rang 335: 140 Ind Cas 420 [Remand order does not take away appellate Court's seisin of case].

(3) *Nand Ram* v. *Fakir Chand*, (1885) 7 All 523 (526): 1885 All W N 139; *Risal Singh* v. *Bhola Ram*, 1906 All W N 221 (222).

(4) *Sibri* v. *Ganeshi*, (1892) 14 All 23 (24, 25): 1891 All W N 205; *Ali Sher Khan* v. *Ahmadullah Khan*, (1907) 29 All 660 (662): 1907 All W N 209: 4 All L J 603; *Fateh Muhammad* v. *Kallu*, 1899 All W N 137 (137, 138); *Ramchandra Govind Manik* v. *Sono Sadashiv Sarkhot*, (1895) 19 Bom 551 (552, 553); *Anant Ram* v. *Din Mohammad*, 1927 Lah 769 (770): 102 Ind Cas 273; *Uttam Chand* v. *Muhammad Baksh*, 1924 Lah 354 (355): 71 Ind Cas 896; *Lahore Bank, Ltd* v. *Lakhi Ram*, (1913) 19 Ind Cas 970 (971): 242 Pun L R 1913: 144 and 215 Pun W R 1913: 105 Pun Re 1913; *Moti Singh* v. *Sobhamal*, (1916) 32 Ind Cas 634 (634): 9 Sind L R 148; *Khair Mahomed Yakhtiar Khan* v. *Hiromal Choithram*, (1909) 4 Ind Cas 605 (606): 3 Sind L R 120.

(5) *Partap Singh* v. *Musst Partapi*, (1918) 44 Ind Cas 907 (907): 147 Pun L R 1917; *Khashaba* v. *Chandrabhagabai*, (1908) 32 Bom 441 (445): 10 Bom L R 536 [District Court may also itself take what evidence it wants to take]. *Moti Singh* v. *Sobhamal*, (1916) 32 Ind Cas 634 (634): 9 Sind L R 148; *Khair Mahomed* v. *Hiramal*, (1909) 4 Ind Cas 605 (606): 3 Sind L R 120.

(6) *Labh Singh* v. *Ram Lal*, 1925 Lah 39 (41): 5 Lah 252: 81 Ind Cas 589.

O.41, R.25, Notes 8—10. say that in the view of the law it takes, a finding on the other issues is not necessary.[7] Where it is asked to submit a finding on an issue after recording such evidence as may be produced by the parties, it is bound to give an opportunity to both the parties to produce their evidence.[7-a] Where the Court to which issues are remitted records its findings *ex parte* without giving any party such an opportunity to produce his evidence, it may restore the case and allow him to produce his evidence.[8]

After a case is remanded under this rule the lower Court cannot add new parties to the suit[9]: but it can bring on record the legal representatives of a deceased appellant.[10]

As to the interpretation of a remand order, *see* the undermentioned case.[11]

9. **Remand, if open for re-consideration by appellate Court after return of findings.**—*See* R. 26, Note 4, *infra.*

10. **New issues raised before the appellate Court.**—As a general rule a new point not based on the case pleaded or set up by the parties in the lower Court, cannot be raised for the first time in the appellate Court, and a remand cannot be ordered for the decision of such point.[1] But the bar is not an absolute one and the appellate Court can, in a proper case, remand issues under this rule, even on points not arising on the pleadings as framed.[2] But this can be done only in exceptional circumstances, for good cause shown, and on payment of all costs thrown away.[3]

A remand can be ordered on a point not raised in the memorandum of appeal.[4]

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(7) *Premchand Hira* v. *Bai Galal,* 1927 Bom 594 (599): 29 Bom L R 1336: 51 Bom 1026: 105 Ind Cas 871.

(7-a) *Ajodhia Prasad* v. *Ram Narain,* (1921) 62 Ind Cas 447 (448): 19 All L J 79: 1921 All 127.

(8) *Ajodhia Prasad* v. *Ram Narain,* 1921 All 127 (128): 19 All L J 79: 62 Ind Cas 447.

(9) *Hargulal* v. *Khusal,* 1907 Pun L R 20.

(10) *Salabat Singh* v. *Ramkishan,* (1904) 7 Oudh Cas 17 (18).

(11) *Sripat Singh Dugar* v. *Rai Hariram Goenka,* 1922 P C 51 (52): 26 Cal W N 739: 31 Mad L Tim 38: 16 Mad L W 447: 1922 Mad W N 671: 74 Ind Cas 597 P C [Lower Court omitting to decide one of the two points involved—Appellate Court remanding for decision of the omitted point—Point such that its decision would be necessary only if decision on the other point was not accepted by the appellate Court—Appellate Court should be held to have confirmed the decision thereon].

Note 10.

(1) *Ganga Pershad Singh Bahadur* v *Ishri Pershad Singh,* (1918) 45 Ind Cas 1 (4): 4 Pat L W 349: 16 All L J 409: 34 Mad L Jour 545: 27 Cal L Jour 548: 22 Cal W N 697: 20 Bom L R 587: 23 Mad L Tim 388: 1918 Mad W N 382: 8 Mad L W 176: 45 Cal 748: 45 Ind App 94 P C; *Hurparshad* v. *Sheo Dyal,* (1875) 3 Ind App 259 (279): 3 Sar 611: 8 Suth 309: 26 Suth W R P C 55 P C; *Sudul* v. *Buldeo,* (1870) 2 N W P H C R 28; *Ahmedabad Municipality Manilal Udenath,* (1875) 19 Bom 212 (216); *Noor Bibi* v. *Ashamulla,* (1920) 55 Ind Cas 435 (436) Cal; *Tiluck Chunder* v. *Broja Soondar,* (1875) 24 Suth W R 121 (122): 15 Beng L R 294; *Ram Narain* v. *Nilmonee,* (1875) 23 Suth W R 169 (170); *Mahomed Ameer* v. *Pran Kishore Deb,* (1874) 21 Suth W R 338 (339); *Ustoorun* v. *Mohan Lal,* (1874) 21 Suth W R 333 (333); *Brojo Soonder Mitter* v. *Futick Chunder,* (1872) 17 Suth W R 407 (408); *Veeranna* v. *Sitamma,* 1927 Mad 83 (84): 1926 Mad W N 921: 98 Ind Cas 536; *Illikka Pakramar* v. *Kutti Kunhamed,* (1894) 17 Mad 69 (71, 72): 4 Mad L Jour 14; *Musst Assat* v. *Dhamanmal,* (1913) 19 Ind Cas 368 (369): 6 Sind L R 135; *Hurpurshad* v. *Sheo Dyal,* (1876) 26 Suth W R 55 (64): 3 Ind App 259: R & J 41 P C.

(2) *Spinning and Weaving Co* v. *Lakshmishankar,* (1906) 30 Bom 173 (188): 7 Bom L R 246; *Chandi Din* v. *Naraini Kuar,* (1892) 14 All 366 (371); *Ma Lugale* v. *Venkatachalam Chetty,* (1911) 10 Ind Cas 922 (923): 4 Bur L Tim 118; *Kasseenauth Moor* v. *Reejunnissa,* 1 Hay 467: Marsh 198.

(3) *Ramchandra* v. *Secretary of State for India,* (1916) 37 Ind Cas 223 (227): 20 Mad L Tim 235: 43 Cal 1104: 20 Cal W N 1245: (1916) 2 Mad W N 175: 4 Mad L W 251: 14 All L J 1009: 18 Bom L R 838: 24 Cal L Jour 296: 31 Mad L Jour 745: 43 Ind App 172 P C; *Bhikabai* v. *Ghoja Mhaku,* 1926 Bom 577 (578): 28 Bom L R 1090: 98 Ind Cas 297; *Gopal Krishna Sil* v. *Abdul Samad Chaudhuri,* 1921 Cal 569 (571): 34 Cal L Jour 319: 66 Ind Cas 640.

(4) *Chandu Lal* v. *Lakshmichand,* 1921 Lah 256 (258): 5 Lah L Jour 49: 65 Ind Cas 92.

O.41, R.25, Notes 11—14.

11. Remand in second appeal.—The High Court in second appeal can remit issues to the lower Court under this rule.[1] (*See also* S. 103.)

12. Appeal.—No appeal lies against an order remitting issues to the lower Court under this rule[1]: but it can be questioned in the appeal filed against the decision eventually arrived at, after the receipt of finding from the lower Court.[2]

13. Letters Patent Appeal.—No appeal lies under the Letters Patent against an order remitting issues under this rule.[1]

14. Revision.—*See* the undermentioned cases.[1]

O.41, R.26, Note 1.

Findings and evidence to be put on record. Objections to finding.

R. 26. [S. 567.] (1) Such evidence and findings shall *form* part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court,[1] present a memorandum of objections to *any* finding.[2]

Determination of appeal.

(2) After the expiration of the period *so* fixed for presenting such memorandum the appellate Court shall proceed to determine the appeal.[3]

[1877—S. 567; 1859—S. 354.]

Synopsis.

1. **Appellate Court to fix time for presenting memo. of objections.**
2. **Effect of not filing objections.**
3. **"Shall proceed to determine the appeal."**
4. **Unnecessary remission.**
5. **Second appeal.**
6. **Court-fee.**

1. Appellate Court to fix time for presenting memo. of objections.—The appellate Court must fix a time within which objections to the findings

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Note 11.

(1) *Chidambara Sivaprakasa Pandara Sannadiyal* v. *Veeranna Reddi*, 1922 P C 292 (297, 298): 1922 Mad W N 749: 43 Mad L Jour 640: 45 Mad 586: 16 Mad L W 102: 31 Mad L Tim 54: 68 Ind Cas 588: 49 Ind App 286: 37 Cal L Jour 199: 27 Cal W N 245 P C. See *Kamini Kumar Deb* v. *Durga Charan Nag*, 1923 Cal 521 (523): 37 Cal L Jour 122: 74 Ind Cas 392 [Second appeal involving several points difficult to disentangle—Appropriate course to follow is to make, not an order under O 41, R 25 but an order of remand in the exercise of inherent power).

Note 12.

(1) *Ganga Prasad Chaudury* v. *Kuladananda Roy*, 1926 Cal 568 (570): 30 Cal W N 415: 94 Ind Cas 235: 44 Cal L Jour 399; *Jagathari* v. *Medini Mohan*, 1927 Cal 642 (644): 31 Cal W N 878: 104 Ind Cas 422; *Sarabjit Singh* v. *Farahatulla Khan*, 1930 Oudh 366 (368): 7 Oudh W N 594: 127 Ind Cas 93; *Maung Shwe On* v. *N K R P Mudaliar*, 1924 Rang 131 (131): 2 Bur L Jour 216: 76 Ind Cas 816. See also *Ray Kishoree* v. *Bonomalee*, (1868) 10 Suth W R 209 (210): 1 Beng L R S N 14 [Issue remitted to trial Court—Limitation for appeal from the appellate Court's decree runs not from the order of remand but from the final decision]; *Khorshed Ali* v. *Probhat Chandra*, 37 Cal W N 190 (191).

(2) *Bhadai Singh* v. *Manowar Ali*, (1919) 52 Ind Cas 125 (126): 4 Pat L Jour 645: 1920 Pat H C C 91; *Ganga Prasad* v. *Kuladananda*, 1926 Cal 568 (570): 30 Cal W N 415: 94 Ind Cas 235: 44 Cal L Jour 399; *Sarjoo Prasad* v. *Deodat Lal*, 1927 Oudh 499 (502): 4 Oudh W N 958: 105 Ind Ind Cas 410; *Maung Shwe On* v. *N K R P Mudaliar*, 1924 Rang 131 (131): 2 Bur L Jour 216: 76 Ind Cas 816; *Lala Prag Lal* v. *Jainarayan*, (1895) 22 Cal 419 (422); *Nathu* v. *Amrao Singh*, 1929 Lah 119 (119): 10 Lah L Jour 497: 30 Pun L R 13: 117 Ind Cas 665 [Death of one of the plaintiffs after remand—Legal representative not brought on record—Objection can be taken in second appeal].

Note 13.

(1) *Kali Kristo* v. *Ramchunder*, (1882) 8 Cal 147 (147, 148): 9 Cal L Rep 461; *Punayya* v. *Parandamayya*, 1927 Mad 317 (319): 25 Mad L W 95: 99 Ind Cas 585: 38 Mad L Tim 206, *Bara Estate* v. *Anup Chandra*, (1917) 41 Ind Cas 337 (340): 2 Pat L W 71: 1917 Pat H C C 342: 2 Pat L Jour 663.

Note 14.

(1) *Bhojan Das* v. *Muraddu*, 1866 Pun Re 111 [Appellate Court in remanding a case under R 25 to a Court other than the Court which tried the case cannot be said to exercise a jurisdiction not vested in it by law within the meaning of S 115]; *Gopi Mal* v. *Ishar Das*, (1918) 46 Ind Cas 554 (554): 58 Pun L R 1918: 134 Pun W R 1918 [Remand under R 25—Case is not "decided" within the meaning of S 44 of Punjab Court's Act and no revision lies]: *Allah Baksh* v. *Lal Khan*, 1921 Lah 370 (371): 79 Pun L R 1922: 67 Ind Cas 269 [Order under R 25 will be interfered with only in exceptional cases because it is not a final order].

returned by the lower Court should be filed.[1] But the failure to fix a time is a mere technical irregularity and may be ignored if it does not in any way prejudice the party complaining of the same.[2] Where no time is fixed for filing objections, they may be filed at any time before the hearing.[3] The period for filing objections may be fixed at the time of remitting the issues. It is not necessary that it should be fixed only after the return of the findings.[4]

2. **Effect of not filing objections.**—Where no objections to the findings are filed within the time fixed the Court may, in its discretion, allow or decline to allow the objections to be taken afterwards.[1] But this does not mean that the appellate Court can treat the findings received from the lower Court as final and binding merely because objections are not filed in time. The appellate Court must examine the findings on their merits, inasmuch as the rule says that after the expiration of the period fixed for filing the objections the appellate Court "shall proceed to determine the appeal".[2] (*See* O. 41, R. 31.)

Where objections to findings were not taken in the lower appellate Court which remitted the issues, they cannot be raised for the first time as grounds of second appeal.[3]

3. **"Shall proceed to determine the appeal".**—At the hearing after the remand, the appellate Court is to determine the appeal on the whole of the material on the record, including the evidence and findings returned by the lower Court under the remand order.[1] It is not open to the appellate Court to consider only the findings returned by the lower Court under the remand, and simply confirm the other findings without examining them on the merits.[2] The appellate Court must take into consideration any objections to the findings returned by the lower Court, that may be duly

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Order 41, Rule 26—Note 1.

(1) *Bukhtouree* v. *Mehran Lall,* (1868) 3 Agra 93.

(2) *Suraj Bali* v. *Dan Bahadur,* (1914) 26 Ind Cas 736 (737): 1 Oudh L J 681.

(3) *Kiral Chand* v. *Madan Mohan Das,* 1884 All W N 158 (158).

(4) *Dadnu* v. *Somnath,* (1910) 7 Ind Cas 547 (548): 6 Nag L R 109.

Note 2.

(1) *Damodar Das* v. *Gopal Chand,* (1885) 7 All 79 (91, 92): 1884 All W N 303; *Pitam Singh* v. *Kalyan,* 1898 All W N 119 (119); *Akbari Begum* v. *Wilayat Ali,* (1875-78) 2 All 908; *Sheo Gholam* v. *Ram Jewan,* (1873) 5 N W P 114; *Munrakhan Lall* v. *Raheem Buksh,* (1872) 4 N W P 72; *Zoolfekar Ali* v. *Mahamod Tukee,* (1863) 9 Suth W R 438 (438); *Partab Singh* v. *Achhar Singh,* 1921 Lah 225 (226): 3 Lah L Jour 230: 67 Ind Cas 846; *Gulam Din* v. *Bhola,* 1890 Pun Re No 27; *Mt Aman* v. *Mula,* 1889 Pun Re No 131. See also *Mathur Mohan Naskar* v. *Ramnath Naskar,* (1913) 20 Ind Cas 35 (36, 37) Cal. See also *Chotay Lall* v. *Chunoo Lall,* (1879) 4 Cal 744 (751): 6 Ind App 15: 3 Cal L Rep 465: 3 Sar 880: 3 Ind Jur 175: 3 Suth 572 P C. But see *Mussammat Nooran* v. *Khoda Bakhsh,* (1866) 1 Agra 50 [Appellate Court is not competent to alter the finding in respect of which no objection is preferred within the time fixed].

(2) *Mukhtaru* v. *Sarada,* 1923 All 417 (417): 71 Ind Cas 444; *Dodraj* v. *Natho,* (1915) 28 Ind Cas 597 (598) All; *Mumtaz Begum* v. *Fateh Hussain,* (1884) 6 All 391 (392, 393): 1884 All W N 129; *Umed Ali* v. *Salima Bibi,* (1884) 6 All 383 (384): 1884 All W N 127; *Akbari Begum* v. *Wilayat Ali,* (1878-80) 2 All 908 (910); *Ramachandra Govind Manik* v. *Sono Sadashiv Sarkhot,* (1895) 19 Bom 551 (552, 553); *Bhagwan* v. *Kesur Kuverji,* (1893) 17 Bom 428 (430); *Woomesh Chunder Roy* v. *Jonardun Hajarh,* (1871) 15 Suth W R 235 (236); *Musammat Aman Bibi* v. *Mula Mal,* 1889 Pun Re No 131; *Subbayya* v. *Rami Reddi,* (1899) 22 Mad 344 (345); *Kunhi* v. *Kutti,* (1897) 20 Mad 496 (498); *Musaliyan Kunhi* v. *Valiyakath Periyattail,* (1908) 7 Mad L Jour 236 (237); *Dadnu* v. *Somanath,* (1910) 7 Ind Cas 547 (548): 6 Nag L R 109; *Maung San Aung* v. *Maung Gale,* 1893-1900 L B R 508; *Jeram* v. *Shah Ali,* (1917) 40 Ind Cas 405 (405): 10 Sind L R 208.

(3) *Adul Hai* v. *Sheo Bishal,* (1888) 10 All 28 (29): 1887 All W N 284.

Note 3.

(1) *Official Assignee of Bengal* v. *Bidyasundari Dasi,* (1920) 54 Ind Cas 700 (702): 30 Cal L Jour 428: 24 Cal W N 145.

(2) *Madhub Chunder* v. *Ram Dyal,* (1867) 8 Suth W R 308 (308).

filed.[2] But the absence of any objections is no justification for the appellate Court not examining the findings on their merits. (*See* Note 2, *supra.*)

It has been held in cases under the old Code that the Court which passed the order of remand under this rule has no power to transfer the case to any other Court for disposal whether before[4] or after[5] the return of the findings. It is submitted that under the present Code S. 24 is wide enough to enable such transfers to be made.

Where the lower Court makes its return without giving its findings on any of the issues, the appellate Court can remit the issues again for a proper finding being given.[6]

It has been held by the Punjab Chief Court[7] that before the return of findings by the lower Court the appellate Court has no jurisdiction to dismiss the appeal for default. (*See also* Note 4, *infra.*)

4. **Unnecessary remission.**—Is it open to the appellate Court when the appeal comes on for hearing after the receipt of fresh findings from the lower Court to reconsider the views expressed by it before the remand and to hold that the remand was improper or unnecessary? On this question there is a conflict of decisions. According to the great majority of cases[1] there is no *final* decision on any matter when an appellate Court remits issues under R. 25 and the entire appeal including matters on which the Court may have expressed its views before the order of remand, is open for consideration at the hearing after the remand. Under this view, it is open to the appellate Court to hold that the order of remand previously made was unnecessary or improper, and to disregard the findings returned by the lower Court. Thus it may dismiss the appeal, after the findings are received, on the ground that the appeal as originally filed was itself incompetent.[2] It has also been held that when a single Judge of the High Court makes an order of remand under R. 25 and the case subsequently comes on for final disposal before a Bench of two Judges, the latter can go back upon the order of remand and the views expressed therein.[3]

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(3) *Chikkanna* v. *Chinnathoyee*, (1912) 16 Ind Cas 354 (355) Mad.

(4) *Udit Narain Singh* v. *Jhanda*, (1893) 15 All 315 (316): 1893 All W N 108; *Thakur Prasad* v. *Narendra Bahadur Singh*, (1912) 15 Ind Cas 862 (863): 10 All L J 89.

(5) *Kumarasami Reddiar* v. *Subbaraya Reddiar*, (1909) 23 Mad 314 (317): 10 Mad L Jour 51.

(6) *Chidambara Sivaprakasa Pandara Sannadigal* v. *Veerama Reddi*, 1922 P C 292 (297, 298): 45 Mad 586: 16 Mad L W 102: 31 Mad L Tim 54: 68 Ind Cas 538: 49 Ind App 286: 1922 Mad W N 749: 43 Mad L Jour 640: 37 Cal L Jour 199: 27 Cal W N 245 P C; *Ram Chand* v. *Kameenee*, (1868) 10 Suth W R 236 (237)

(7) *Muhammad Chiragh* v. *Mussammat Jawai*, 1906 Pun L R 90.

Note 4.

(1) *Gopal Nath Shukul* v. *Sat Narain Shukul*, 1923 All 884 (885, 886): 74 Ind Cas 1014; *Mussammat Mashiunnissa* v. *Mussammat Kaniz Sughra*, 1921 All 276 (277): 43 All 377: 19 All L J 139: 60 Ind Cas 975; *Jhunku Singh* v. *Chatken Singh*, (1909) 2 Ind Cas 221 (222): 6 All L J 247: 31 All 325; *Pitam Singh* v. *Kalyan*, 1898 All W N 119 (119); *Mubarak Husain* v. *Bihari*, (1894) 16 All 306 (308): 1894 All W N 97; *Upendra Lal Gupta* v. *Jogesh Chandra Roy*, 1928 Cal 186 (188): 47 Cal L Jour 112: 107 Ind Cas 730: 32 Cal W N 1233; *Hanuman Das* v. *Gursahay Singh*, (1913) 21 Ind Cas 700 (701): 18 Cal L Jour 181: *Malliah* v. *Ganganna*, 1926 Mad 830 (832): 94 Ind Cas 226; *Janki Shah* v. *Muhammad Abbas*, 1923 Oudh 50 (51): 25 Oudh Cas 245: 70 Ind Cas 983; *Kuar Nageshar Sahai* v. *Kuar Mata Prasad*, 1922 Oudh 236 (248): 9 Oudh L J 235: 25 Oudh Cas 189: 69 Ind Cas 730; *Shyam Narain* v. *Jadhunath Singh*, 1922 Oudh 118 (120): 25 Oudh Cas 41: 68 Ind Cas 242. See also *Lachman Prasad* v. *Jamna Prasad*, (1888) 10 All 162 (165, 166): 1887 All W N 295.

(2) *Manomohan Das* v. *Shib Chandra Saha* 1931 Cal 353 (354): 34 Cal W N 839: 131 Ind Cas 562.

(3) *Achutanand* v. *Ram Nath*, (1913) 21 Ind Cas 79 (80): 18 Cal L Jour 354; *East Indian Railway Co* v. *Changa Khan*, (1915) 28 Ind Cas 245 (246): 19 Cal W N 1034: 22 Cal L Jour

O.41, R.26, Notes 4—6.

But it has been held by the Calcutta High Court in the undermentioned case[4] that an order of remand under R. 25 is an interlocutory order which, under the principle laid down by the Privy Council in *Administrator-General of Bengal* v. *Hook*[5] and *Ram Kirpal* v. *Rup Kuar*[6] will operate as *res judicata* and is binding on the Court which passed it, until it is set aside in appropriate proceedings.

An appellate Court is not bound to reconsider the views expressed in the remand order.[7]

Where the appellate Court has heard arguments on some of the issues and expressed its views thereon and remanded other issues under R. 25, it is not bound on the return of the findings, to hear the case *de novo* but may confine counsel to arguments on the findings returned.[8] It has been held that a party is not entitled to raise new issues for the first time at the hearing after the remand.[9]

5. **Second appeal.**—The findings of lower appellate Court upon issues remanded by the High Court in second appeal cannot be challenged upon the evidence as in the case of first appeals but objections to such findings must be restricted to the limits within which the original pleas in second appeal are confined.[1]

6. **Court-fee.**—No Court-fee is chargeable on a memorandum of objections filed under this rule.[1]

O.41, R.27.

Production of additional evidence in Appellate Court.

R. 27. [S. 568.] (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

212: 42 Cal 888. See also *Ganendra Nath Roy* v. *Surja Kanta Roy*, (1912) 15 Ind Cas 39 (40, 41): 17 Cal W N 462; *Hiatunnessa Bibi* v. *Kailash Chandra Saha*, (1912) 17 Ind Cas 224 (226): 16 Cal L Jour 259.

(4) *Kamini Kumar Deb* v. *Durga Charan Nag*, 1923 Cal 521 (522, 523): 37 Cal L Jour 122: 74 Ind Cas 392. See also *Balwant Ram Chandra* v. *Secretary of State*, (1908) 32 Bom 432 (437): 10 Bom L R 531; *Brojo Soonder* v. *Jaggat Chunder*, (1874) 21 Suth W R 199 (A) (199); *Luleet Pandey* v. *Byjnath*, (1870) 14 Suth W R 285 (285).

(5) 1921 P C 11 (13): 48 Cal 499: 19 All L J 366: 23 Bom L R 648: 33 Cal L Jour 405: 25 Cal W N 915: 40 Mad L Jour 423: 14 Mad L W 221: 1921 Mad W N 318: 60 Ind Cas 631: 48 Ind App 187 P C.

(6) (1884) 6 All 269 (274): 11 Ind App 37: 1886 All W N 286: 4 Sar 89: 8 Ind Jur 214 P C; *Mungal Pershad* v. *Girjakant*, (1882) 8 Cal 51 (60): 8 Ind App 123: 11 Cal L Rep 113: 4 Sar 248 P C.

(7) *Malliah* v. *Ganganna*, 1926 Mad 830 (832): 94 Ind Cas 226. See *Hiralal* v. *Etbar*, (1916) 32 Ind Cas 866 (868); 20 Cal W N 43. See *Sultan Beg* v. *Chunilal*, (1918) 46 Ind Cas 922 (924) Nag.

(8) *Lachman* v. *Jamna*, (1888) 10 All 162 (165, 166): 1887 All W N 295.

(9) *Ram Sukh* v. *Kanni Ram*, 1883 Pun Re No 54; *Radha Kishore* v. *Mahtab Chand*, (1865) 3 Suth W R Mis 5 (5).

Note 5.

(1) *Bal Kishen* v. *Jasoda Kuar*, (1885) 7 All 765 (768, 769): 1885 All W N 225; *Firm, Tejpal Jamna Das* v. *Ernest David*, 1928 P C 219 (221): 28 Mad L W 204: 111 Ind Cas 240: 32 Cal W N 1146: 48 Cal L Jour 415 P C; *Balkishen* v. *Josoda*, 1885 All W N 225 (225): 7 All 765 F B; *Nehal Singh* v. *Sewa Ram*, (1917) 40 Ind Cas 128 (129) All; *Beni Pershad Kuari* v. *Nand Lal*, (1897) 24 Cal 98 (101); *Ram Mehr* v. *Pali Ram*, 1924 Lah 455 (455): 6 Lah L Jour 145: 78 Ind Cas 404: 5 Lah 268; *Hinde* v. *Brayan*, (1884) 7 Mad 52 (53): 7 Ind Jur 599; *Ram Dulare* v. *Misri Lal*, (1910) 8 Ind Cas 878 (878): 13 Oudh Cas 352. See also *Gopal Singh* v. *Jhakri Rai*, (1886) 12 Cal 87 (28). But see *Hinde* v. *Brayan*, (1884) 7 Mad 52 (53, 54): 7 Ind Jur 599.

Note 6.

(1) *Md Salimulla* v. *Khalihurrahman*, 1932 All 526 (526): 1932 All L J 149: 140 Ind Cas 47: 54 All 465; *Muhammad Salimullah Khan* v. *Khaliurrahman Khan*, 1932 All L J 149 (149): 1932 All 526: 140 Ind Cas 47: 54 All 465; *Damodar Prasad* v. *Masudan Singh*, 1928 Pat 85 (85): 105 Ind Cas 108: 9 Pat L Tim 19.

(*a*) the Court *from* whose decree the appeal is *preferred has* refused to admit evidence which ought to have been admitted,[3] or

(*b*) the Appellate Court requires any document to be produced[5] or any witness to be examined [6] to enable it to pronounce judgment,[7] or for any other substantial cause,[8]

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) *Wherever* additional evidence is *allowed to be produced* by an Appellate Court, the Court shall record the reason[10] for *its* admission.

[1877—S. 568; 1859—S. 355.]

Synopsis.

1. **Scope and object of the rule.**
2. **When additional evidence may be admitted in appeal—See Notes 1, 3, 7, 8 and 9.**
3. **"Has refused to admit evidence which ought to have been admitted."**
4. **"If the appellate Court requires, etc."**
    5. **"The appellate Court requires any document to be produced."**
    6. **"Where appellate Court requires any witness to be examined."**
7. **"To enable it to pronounce judgment."**
    8. **"Or for any other substantial cause."**
9. **Discovery of fresh evidence.**
10. **Record of reasons.**
    11. **Additional evidence by consent of parties.**
12. **Procedure to be adopted under this rule.**
13. **Application to put in evidence.**
14. **Opportunity to opposite party to contest admissibility of or rebut the fresh evidence.**
15. **Remand for trial de novo.**
16. **Court, if can take notice of subsequent events.**
17. **Party on whom onus is shifted by appellate Court if entitled to let in additional evidence.**
18. **Second appeal.**
19. **Privy Council.**
20. **Revision.**

Additional evidence in appeal against ex parte decree. See Note 1, Pt. (14).

1. **Scope and object of the rule.**—The general principle is that the appellate Court should not travel outside the record of the lower Court and cannot take any evidence in appeal. This rule elucidates the provisions of S. 107, Cl. (*d*) of the Code[1] and is an exception to the general rule stated above in that it enables the appellate Court to take additional evidence in the circumstances mentioned therein.[2] Therefore, the appellate Court is entitled to call for fresh evidence only when the conditions laid down in this rule are

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Order 41, Rule 27—Note 1.

[1] *Parsotim v. Lal Mohar Thakur,* 1931 P C 143 (148, 149): 1931 All L J 513: 35 Cal W N 786: 33 Bom L R 1015: 58 Ind App 254: 34 Mad L W 76: 132 Ind Cas 721: 54 Cal L Jour 1: 12 Pat L Tim 683: 1931 Mad W N 929: 10 Pat 654: 61 Mad L Jour 489 P C.

[2] *Tarini Charan v. Bishun Chand,* 1917 P C 111 (115): 16 All L J 271: 20 Bom L R 558: 27 Cal L Jour 303: 22 Cal W N 505: 34 Mad L Jour 361: 23 Mad L Tim 147: 7 Mad L W 315: 1918 Mad W N 295: 4 Pat L W 249: 44 Ind Cas 304 P C.

O.41, R.27, Note 1. found to exist.[3] On the other hand, the Court is not *bound* under the circumstances mentioned in the rule, to allow additional evidence and the parties are not entitled, as of right, to the admission of such evidence; the matter is entirely in the *discretion* of the Court.[4] It has, however, been held in some cases that apart from this rule, an appellate Court can, under general principles of law[5] or under its inherent power[6] admit additional evidence. But these decisions cannot be accepted as correct in view of the decision of the Privy Council in *Kesowji Issur* v. *G. I. P. Ry.*[7] which lays down clearly that this rule can *alone* be looked to for taking additional evidence and that the Court has no *jurisdiction* to admit such evidence in cases where this rule does not apply. This rule does not apply so as to prohibit the appellate Court from doing any of the following things:—

(*a*) To take into consideration admissions by the parties before the appellate Court.[8]

(*b*) To issue a commission for local investigation[9] or to examine and adjust accounts.[10]

(*c*) To refer to books on history, etc., which may have a bearing on the facts of the case.[11] (*See* Evidence Act, S. 57.)

(*d*) To send for papers from its own records or from the records of any other Court and inspect the same.[12] (*See* O. 13, R. 10.)

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(3) *Hriday Krishna* v. *Rajani Kanta*, 1923 Cal 300 (301): 68 Ind Cas 293; *Mohesh Chandra Shaw* v. *Bepin Behary Khan*, (1919) 49 Ind Cas 510 (511) Cal; *Debi Das* v. *Jaini Mal*, (1932) 138 Ind Cas 253 (254) Lah; *Khem Chand* v. *Mohammed Yar*, (1919) 50 Ind Cas 805 (805): 22 Pun L R 1919; *Mahomed* v. *Ramdial*, (1915) 28 Ind Cas 14 (15): 25 Pun L R 1915: 241 Pun W R 1915; *Mt Sitti* v. *Narpat*, (1898) 1 Oudh Cas 199 (204).

(4) *Ram Piari* v. *Kallu*, (1901) 23 All 121 (122, 123): 1901 All W N 11; *Durga Prasad* v. *Jai Narain*, (1911) 9 Ind Cas 265 (266): 8 All L J 175: 33 All 379; *Kaniz Mustafa* v. *Musi Imran*, (1917) 38 Ind Cas 669 (669): 15 All L J 21; *Nayajan Ali* v. *Midnapore Zamindary Co*, 1923 Cal 285 (286): 67 Ind Cas 770; *Hari Charan Karanjai* v. *Bahar Sheikh*, (1922) 67 Ind Cas 252 (253) Cal; *Golam Mukdoom* v. *Hafeezoonissa*, (1867) 7 Suth W R 489 (490); *Thaman Singh* v. *Jiwan Singh*, 1931 Lah 506 (506): 131 Ind Cas 228; *Ganda Ram* v. *Firm, Dev Rajram Rakha*, (1932) 137 Ind Cas 513 (513): 1932 Notes 19 (e); 33 Pun L R 330; *Parbhu Lal* v. *Gulzari Mal*, 1923 Lah 584 (585): 76 Ind Cas 474; *Ambuja Ammal* v. *Appadurai Mudali*, (1915) 30 Ind Cas 402 (404): 38 Mad 414; *Kalka Singh* v. *Bharat Singh*, (1911) 12 Ind Cas 332 (333): 14 Oudh Cas 327; *Badri Prasad* v. *Mukandi*, 1923 Oudh 109 (111): 9 Oudh L J 505: 26 Oudh Cas 66: 75 Ind Cas 331; *Muhammad Ismail Khan* v. *Abdul Graffar Beg*, 1930 Oudh 110 (111): 6 Oudh W N 1060: 11 L R A (Rev) 28: 5 Luck 453: 124 Ind Cas 442; *Jitan Dusadh* v. *Jawahir Singh*, 1925 Pat 504 (504): 85 Ind Cas 459.

(5) *Indrajit* v. *Amar Singh*, 1923 P C 128 (135): 21 All L J 584: 4 Pat L Tim 447: 1 Pat L R 345: 2 Pat 676: 50 Ind App 183: 25 Bom L R 1259: 28 Cal W N 277: 45 Mad L Jour 578: 3 Mad L Tim 233: 18 Mad L W 728: 4 L R P C 123: 74 Ind Cas 747: 5 L R P C 8: 39 Cal L J 318: 1924 Pun L R P C 8; *Thiruthamayi* v. *Atikulla*, 1927 Cal 140 (142): 98 Ind Cas 129; *Jitan Dusadh* v. *Jawahir Singh*, 1925 Pat 504 (504): 85 Ind Cas 459; *Md. Ismail* v. *Abdul Ghaffar*, 1930 Oudh 110 (111): 6 Oudh W N 1060: 11 L R A (Rev) 28: 5 Luck 453: 124 Ind Cas 442.

(6) *Mangal* v. *Rani Indar*, (1918) 48 Ind Cas 1007 (1008): 5 Oudh L J 745.

(7) (1904) 31 Bom 381 (390): 9 Bom L R 671: 34 Ind App 115: 2 Mad L Tim 485: 11 Cal W N 721: 17 Mad L Jour 347: 6 Cal L Jour 5: 4 All L J 461 P C.

(8) *Ganpat* v. *Lala Miya*, 1920 P C 81 (81): 16 Nag L R 59: 12 Mad L W 574: 56 Ind Cas 673 P C.

(9) *Ram Dhial Lal* v. *Lakhpat Lal*, 1932 All 270 (271): 135 Ind Cas 248; *Bhawani Prasad* v. *Hakimullah*, 1927 All 175 (175): 98 Ind Cas 821; *Roy Sooltan* v. *Laloo Kooer*, (1872) 17 Suth W R 300 (301). But see *Kabul* v. *Kabul Singh*, 1923 All 413 (413, 414): 79 Ind Cas 408.

(10) *Mt Ram Piari* v. *Sultan Baksh*, 1928 Lah 115 (116): 8 Lah 382: 77 Ind Cas 207.

(11) *Secretary of State* v. *Anand Mohan Roy*, 1921 Cal 661 (672): 34 Cal L Jour 205: 66 Ind Cas 287.

(12) *Punja* v. *Bhadu*, (1913) 18 Ind Cas 857 (858, 859): 9 Nag L R 11; *Arjun Singh* v. *Darbara Singh*, (1916) 32 Ind Cas 312 (313): 193 Pun L R 1915: 140 Pun W R 1915; *Gauri Rai* v. *Bhaggina*, (1915) 31 Ind Cas 873 (875) All. But see *Harcharn Singh* v. *Sarup Singh*, 1930 Lah 750 (752): 126 Ind Cas 437; Compare *Dwarka Prasad* v. *Badri Lal*, 1930 All 220 (221): 127 Ind Cas 515 [Evidence not to be allowed on point not in issue and not arising on the pleadings].

(*e*) To examine parties present in Court.[12-a] (O. 10, R. 2.) *See also* the undermentioned case.[13]

Additional evidence may be admitted even in an appeal against an *ex parte* decree.[14] The rule is made applicable, so far as may be, to second appeals by O. 42, R. 1.[14-a] But the rule must be applied to second appeals subject to the conditions under which a second appeal is maintainable. Hence, the High Court has no power, in second appeal, to admit additional evidence for the purpose of entering into questions of fact.[14-b] But the High Court may, under its inherent powers, remand a case for retrial with a direction to take additional evidence.[14-c] The rule applies also to appeals in income-tax proceedings[15] but does not apply to proceedings under S. 195 of the Criminal Procedure Code.[16]

2. **When additional evidence may be admitted in appeal.**—*See* Notes 1, 4, 7, 8 and 9.

3. **"Has refused to admit evidence which ought to have been admitted".**—The appellate Court may admit additional evidence if the evidence in question was tendered in the lower Court but was improperly rejected by it.[1] But where the lower Court had properly rejected the evidence the appellate Court cannot admit the same.[2] Where the lower Court had declined to take certain evidence tendered by a party as being, in its opinion, unnecessary, and passed a decree in his favour and the appellate Court takes

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[12-a] *Bibee Hafiza* v. *Azhur Hossein*, (1870) 13 Suth W R 328 (329).

[13] *Nagina Singh* v. *Ramjanam Singh*, 1928 Pat 64 (65): 105 Ind Cas 83: 9 Pat L Tim 215.

[14] *Kodumal* v. *Aga Khan Sultan Mahomed Shah*, (1916) 34 Ind Cas 493 (493): 9 Sind L R 191. But see *Ashrof Ali* v. *Mahomed Morden*, 1924 Rang 177 (177): 1 Rang 656: 79 Ind Cas 482.

[14-a] *Gaddam Paramasavadu* v. *Mulakala Subbanna*, (1919) 52 Ind Cas 625 (626, 627): 1919 Mad W N 455; *Ranglal* v. *Lilawati*, 1929 All 375 (376): 119 Ind Cas 561.

[14-b] *Rang Lal* v. *Lilawati*, 1929 All 375 (376): 119 Ind Cas 561; *Nanabhai* v. *Haribhai*, (1872) 9 Bom H C R 89; *Shamsuddin Biswas* v. *Molannessa Bibi*, 1926 Cal 941 (943): 95 Ind Cas 300; *Raman Menon* v. *Mammali*, (1917) 39 Ind Cas 954 (957): 1917 Mad W N 560; *Kali Charan Sahu* v. *Jaldhari Raut*, 1929 Pat 98 (100, 101): 10 Pat L Tim 10: 115 Ind Cas 674. See also *The Secretary of State for India* v. *Manjeshwar Krishnaya*, (1908) 31 Mad 415 (416).

[14-c] *Indra Bhusan Saha* v. *Janardhan Saha*, 1924 Cal 1071 (1072): 28 Cal W N 945: 82 Ind Cas 104.

[15] *Commissioner of Income-tax* v. *E M Chettiar Firm*, 1930 Rang 4 (7): 7 Rang 635: 122 Ind Cas 898 S B.

[16] *Rama Iyer* v. *Venkatachala Padayachi*, (1907) 30 Mad 311 (312, 313): 2 Mad L Tim 84: 17 Mad L Jour 123.

Note 3.

[1] *Ram Narain* v. *Jagdeo*, (1911) 10 Ind Cas 903 (904): 8 All L J 839: 33 All 690; *Dhirajuddin Bepari* v. *Baharulla Sheikh*, 1926 Cal 318 (319): 90 Ind Cas 630; *Bank of Bengal* v. *Lucas*, 1924 Cal 578 (581): 51 Cal 185: 28 Cal W N 497: 81 Ind Cas 471: 41 Cal L Jour 1; *Raja Jyot Kumar* v. *Jadu*, 1921 Cal 122 (123): 34 Cal L Jour 160: 26 Cal W N 1022: 64 Ind Cas 693: *Kader Bux* v. *Beni Madhab Son*, (1919) 52 Ind Cas 327 (327) Cal; *Kali Kishore* v. *Bhusan Chunder*, (1891) 18 Cal 201 (203, 204): 17 Ind App 159: 5 Sar 607 P C; *Abelagh Roy* v. *Guggun Bhuggut*, (1874) 22 Suth W R 268 (269); *Nawazish Ali Khan* v. *Dharam Singh*, 1932 Lah 202 (202): 33 Pun L R 76: 137 Ind Cas 224; *Wisanda Mal* v. *Ganesh Mal*, (1916) 33 Ind Cas 813 (815): 14 Pun Re 1916: 195 Pun W R 1915; *Narayanasamy Iyer* v. *Vedambal Ammal*, 1927 Mad 1065 (1065): 39 Mad L Tim 399: 106 Ind Cas 498. *Seshan* v. *Seshan*, (1900) 23 Mad 447 (448): *Mt Rachhpali* v. *Mt Chandresar Dei*, 1924 Oudh 252 (251): 10 Oudh L J 595; 78 Ind Cas 256: 27 Oudh Cas 114; *Fida Abbas* v. *Rahim Baksh*, (1918) 45 Ind Cas 832 (832): 5 Oudh L J 139; *Hanwat Ram* v. *Bhagwati Prasad Singh*, (1911) 27 Ind Cas 516 (517): 2 Oudh L J 27; *Gokul Pande* v. *Baldeo Sukul*, 1928 Pat 113 (114): 105 Ind Cas 26: 7 Pat 90: 9 Pat L Tim 180; *Kodumal* v. *Aga Khan Muhamed Shah*, (1916) 34 Ind Cas 493 (493): 9 Sind L R 191 [Rule applies even to appeals from *ex parte* decree]. See *Har Gobind* v. *Noni Bahu*, (1892) 14 All 356 (357, 358): 1892 All W N 42.

[2] *Champabaty* v. *Bibi Jibun*, (1879) 4 Cal 213 (215) [Lower Court having rejected document as not being properly stamped].

Evidence not tendered in the trial Court in proper time:—*Vaishno Das* v. *Hem Raj*, 1921 Lah 279 (279, 280): 4 Lah L Jour 371; *Narain Das* v. *Tekchand*, 1923 Sind 42 (48): 84 Ind Cas 137; *Jawala Sahai* v. *Abdul Ghani*, (1911) 11 Ind Cas 289 (290) Oudh; *Muhammad Ali* v. *Ghazanfar Ali*, (1921) 60 Ind Cas 147 (162): 7 Oudh L J 474.

O.41, R.27.
Notes
3—4.

a different view of the matter, it should not reverse the decree without giving the decree-holder an opportunity to adduce the evidence which the lower Court had declined to take.[3]

4. **"If the appellate Court requires, etc.".**—Under Cl. 1 (*b*) of the rule, it is only when the Court "requires" it (*i.e.*, finds it needful) that additional evidence can be admitted.[1] It may be required (*a*) to enable the Court to pronounce judgment, or (*b*) for any other substantial cause, but in either case it must be the *Court* that requires it, upon its appreciation of the evidence as it stands.[2] The legitimate occasion, therefore, for the exercise of the discretion under this rule, is not, whenever *before the appeal is heard* a *party* applies to adduce evidence but when, *on examining the evidence* as it stands some inherent *lacuna* or defect becomes apparent to the Court.[3] It follows that additional evidence cannot be admitted under this rule on a preliminary objection *before* the hearing of the appeal.[3-a] It is, however, open to the party to point out the defect or to move the Court to supply the defect.[4]

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(3) *Brij Soondar* v. *Kimoonissa,* (1875) 23 Suth W R 63 (64): 14 Beng L R 367; *Appa* v. *Vithoba,* (1869) 6 Bom H C A 88; *Pubitra Kumar* v. *The Maharajah of Benares,* (1908) 30 All 367 (368, 369): 1908 All W N 140: 5 All L J 468; *Arjun* v. *Shankar,* (1898) 22 Bom 253 (255); *Khuda Paksh* v. *Imam Ali,* (1887) 9 All 339 (340): 1887 All W N 61; *Brij Soonder* v. *Kimoonissa,* (1875) 23 Suth W R 63 (64): 14 Beng L R 367; *Kirtibash* v. *Ram Pada,* (1914) 22 Ind Cas 833 (834): 21 Cal L Jour 574; *Kalyani Prasad* v. *Bishnath,* 1905 All W N 266 (266): 2 All L J 790; Compare *Pannalal* v. *Ganu Bavaji Nhavi,* (1911) 12 Ind Cas 691 (691) [Some witnesses examined—Others not examined because trial judge *expressed his opinion that the point was made out*—Appellate Court reversing decision—Opportunity to produce the omitted evidence need not be given].

Note 4.

(1) *Parsotim Thakur* v. *Lal Mohar Thakur,* 1931 P C 143 (148): 1931 All L J 513: 35 Cal W N 786: 33 Bom L R 1015: 58 Ind App 254: 34 Mad L W 76: 132 Ind Cas 721: 54 Cal L Jour 1: 12 Pat L Tim 683: 1931 Mad W N 929: 10 Pat 654: 61 Mad L J 489 P C; *Kessowji* v. *G I P Ry,* (1907) 31 Bom 381 (390): 9 Bom L R 671: 34 Ind App 115: 2 Mad L Tim 435: 11 Cal W N 721: 17 Mad L Jour 347: 6 Cal L Jour 5: 4 All L J 461 P C.

(2) *Parsotim Thakur* v. *Lal Mohar Thakur* 1931 P C 143 (149): 1931 All L J 513: 35 Cal W N 786: 33 Bom L R 1015: 58 Ind App 254: 34 Mad L W 76: 132 Ind Cas 721: 54 Cal L Jour 1: 12 Pat L Tim 683: 1931 Mad W N 929: 10 Pat 654: 61 Mad L Jour 489 P C.

(3) *Parsotim Thakur* v. *Lal Mohar Thakur,* 1931 P C 143 (148, 149): 1931 All L J 513: 35 Cal W N 786: 33 Bom L R 1015: 58 Ind App 254: 34 Mad L W 76: 132 Ind Cas 721: 54 Cal L Jour 1: 12 Pat L Tim 683: 1931 Mad W N 929: 10 Pat 654: 61 Mad L Jour 489; *Kessowji Issur* v. *G I P Ry Co,* (1907) 31 Bom 381 (390): 9 Bom L R 671: 34 Ind App 115: 2 Mad L Tim 435: 11 Cal W N 721: 17 Mad L Jour 347: 6 Cal L Jour 5: 4 All L J 461 P C; *Manmohan Das* v. *Ram Dei,* 1931 P C 175 (177): 1931 All L J 550: 35 Cal W N 925: 34 Mad L W 7: 8 Oudh W N 936: 1931 Mad W N 931: 33 Bom L R 1251: 134 Ind Cas 669 P C; *Kazan Singh* v. *Panna Lal,* (1912) 13 Ind Cas 131 (132): 9 All L J 59; *Bombay Sizing Co* v. *Kusumgar,* 1924 Bom 227 (228): 47 Bom 674: 25 Bom L R 310: 84 Ind Cas 74; *Firm of Ram Richhpal Sham Lal* v. *Firm of Bansi Dhar Sons,* (1922) 66 Ind Cas 370 (371) Lah; *Baijanath* v. *Diplal,* (1920) 57 Ind Cas 843 (844) Pat; *Jhingur Jha* v. *Badri Sahu,* (1920) 54 Ind Cas 666 (666) Pat; *Jagdeo Lal* v. *Ram Lagan Singh,* (1919) 53 Ind Cas 826 (827): 20 Cr L Jour 826; *Aparna Charan Chabri* v. *Gopi Nath Samantha,* (1919) 53 Ind Cas 567 (569) Cal; *Muhammad Siddiq* v. *Mahmud-un-nissa Bibi,* (1916) 33 Ind Cas 334 (336): 14 All L J 121: 38 All 191; *The Garden Reach Spinning and Manufacturing Co* v. *The Secretary of State,* (1915) 28 Ind Cas 865 (866): 19 Cal W N 401: 42 Cal 675; *Midnapore Zamindari Co, Ltd* v. *Muktakeshi Das,* (1912) 16 Ind Cas 776 (776): 17 Cal W N 615: 40 Cal 402; *Janki Koer* v. *Lal Man Roy,* (1911) 10 Ind Cas 332 (333) Cal; *Moniruddin Sarkar* v. *Mochhabin Mondal,* (1909) 2 Ind Cas 995 (995) Cal; *Labh Singh* v. *Ahmad Shah,* 1927 Lah 11 (12): 97 Ind Cas 369; *Ratna* v. *Harnam Singh,* (1918) 47 Ind Cas 12 (13): 150 Pun W R 1918; *Ram Naresh Singh* v. *Chirkut,* 1932 Oudh 227 (229): 9 Oudh W N 379: 138 Ind Cas 513; *Gokul Pande* v. *Baldeo,* 1928 Pat 113 (114): 105 Ind Cas 26: 7 Pat 90: 9 Pat L Tim 180; *Jai Krishna* v. *Bibi Soghra,* 1923 Pat 446 (449): 4 Pat L Tim 418: 71 Ind Cas 881; *Jagernath Gir* v. *Rajman Gir,* (1919) 49 Ind Cas 868 (869) Pat; *Husseinbhoy Karimji* v. *Ramdas Morarji,* 1930 Sind 105 (110): 24 Sind L R 15: 125 Ind Cas 803; *Assat* v. *Dhamonmal,* (1913) 19 Ind Cas 368 (369): 6 Sind L R 135; Compare *Kaniz Mustafa* v. *Musi Imran,* (1917) 38 Ind Cas 669 (669): 15 All L J 21.

(3-a) *Kessowji Issur* v. *G I P Ry,* (1907) 31 Bom 381 (390): 9 Bom L R 671: 34 Ind App 115: 2 Mad L Tim 435: 11 Cal W N 721: 17 Mad L Jour 347: 6 Cal L Jour 5: 4 All L J 461 P C; *Parsotim Thakur* v. *Lal Mohar Thakur,* 1931 P C 143 (148, 149): 1931 All L J 513: 35 Cal W N 786: 33 Bom L R 1015: 58 Ind App 254: 34 Mad L W 76: 132 Ind Cas 721: 54 Cal L Jour 1: 12 Pat L Tim 683: 1931 Mad W N 929: 10 Pat 654: 61 Mad L Jour 489 P C; *Garden Reach* v. *Secretary of State,* (1915) 28 Ind Cas 865 (866): 19 Cal W N 401: 42 Cal 675.

(4) *Parsotim Thakur* v. *Lal Mohar Thakur,* 1931 P C 143 (149): 1931 All L J 513: 35 Cal W N 786: 33 Bom L R 1015: 58 Ind App 254: 34 Mad L W 76: 132 Ind Cas 721: 54 Cal L Jour 1: 12 Pat L Tim 683: 1931 Mad

O.41, R.27.
Notes
4—7.

It was held in the undermentioned cases[5] relying upon certain observations of the Privy Council in *Indrajit* v. *Amar Singh*[6] that additional evidence could be admitted in appeal for reasons independent of the existence of any *lacuna* or defect. These decisions are no longer good law since the decision of the Privy Council in *Parsotim Thakur* v. *Lal Mohar Thakur*[7] in which the said view has been definitely repudiated.

5. "**The appellate Court requires any document to be produced**".—Where a Court permits documentary evidence to be produced under this rule it should also permit oral evidence to be adduced in order to prove those documents.[1]

For meaning of the word "requires", *see* Note 4, above.

6. "**Where appellate Court requires any witness to be examined**".—The appellate Court should not take additional evidence which impugns the testimony of a witness who was called in the Court below unless that witness is given an opportunity to clear up the mistake. Otherwise, no witness, whatever his standing, would be safe from adverse judicial comment.[1]

7. "**To enable it to pronounce judgment.**"—When the appellate Court finds itself unable to pronounce judgment owing to a *lacuna* or defect in the evidence as it stands, it may, as has been seen in Note 4 above admit additional evidence.[1] The ability to pronounce a judgment refers not to the ability to pronounce *any* judgment but to the ability to pronounce a judgment *satisfactory to the mind of the Court* delivering it.[2] But the appellate Court should not, ordinarily, allow new evidence to be adduced in order to

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W N 929: 10 Pat 654: 61 Mad L Jour 489 P C; *Kalka* v. *Bharat*, (1911) 12 Ind Cas 332 (333): 14 Oudh Cas 327.

(5) *Rang Lal* v. *Lilawati*, 1929 All 375 (375, 376): 119 Ind Cas 561; *Badri Das* v. *Hoshiar Singh*, 1925 All 288 (289): 6 L R All (Civ) 85: 23 All L J 193: 86 Ind Cas 761: 47 All 412; *Eclipse Motor Co* v. *Warburton*, 1926 Lah 20 (21): 89 Ind Cas 721; *Umar Hayat* v. *Sardar*, 1926 Lah 80 (81): 89 Ind Cas 997; *B Subbayya* v. *K Ranga Rao*, 1925 Mad 181 (182): 48 Mad L Jour 32: 20 Mad L W 840: 85 Ind Cas 385. See also *Kutiyan* v. *Vaithilinga Pandaram*, 1930 Mad 343 (343): 120 Ind Cas 746 [Ordinarily, it is not desirable to hear application for further evidence under O 41, R 27, C P Code, until appellate Court has heard appeal and considered the evidence already on record].

(6) 1923 P C 128 (135): 21 All L J 554: 4 Pat L Tim 447: 1 Pat L R 345: 2 Pat 676: 50 Ind App 183: 25 Bom L R 1259: 28 Cal W N 277: 45 Mad L Jour 578: 33 Mad L Tim 233: 18 Mad L W 728: 4 L R P C 123: 74 Ind Cas 747: 5 L R P C 8: 39 Cal L Jour 318: 3 Pun L R 1924 P C.

(7) 1931 P C 143 (148, 149): 1931 All L J 513: 35 Cal W N 786: 33 Bom L R 1015: 58 Ind App 254: 34 Mad L W 76: 132 Ind Cas 721: 54 Cal L Jour 1: 12 Pat L Tim 683: 1931 Mad W N 929: 10 Pat 654: 61 Mad L Jour 489 P C.

Note 5.

(1) *Sukhdai* v. *Bhagwan Pershad*, (1913) 20 Ind Cas 542 (543) Oudh.

Note 6.

(1) *Jagrani* v. *Kuar Durga*, (1914) 22 Ind Cas 103 (107): 16 Oudh Cas 386: 12 All L J 125: 26 Mad L Jour 153: 15 Mad L Tim 125: 1914 Mad W N 137: 19 Cal L Jour 165: 18 Cal W N 521: 16 Bom L R 141: 36 All 93: 1 Oudh L J 57: 41 Ind App 76 P C.

Note 7.

(1) *Jathalal Girdhar* v. *Varajlal Bhai Shankar*, 1922 Bom 267 (269): 46 Bom 184: 23 Bom L R 769: 63 Ind Cas 478; *Ram Piari* v. *Sultan Baksh*, 1923 Lah 115 (116): 3 Lah 382: 77 Ind Cas 207; *Subba Naidu* v. *Ethirajammal*, (1911) 12 Ind Cas 673 (675, 676): 10 Mad L Tim 409: 22 Mad L Jour 14: 2 Mad W N 440; *Narasimharav* v. *Antaji*, (1870) 2 Bom H C R 61; *Bank of Bengal* v. *William Arratoon Lucas*, 1924 Cal 578 (581): 51 Cal 185: 28 Cal W N 497: 81 Ind Cas 471: 41 Cal L Jour 1. See *Murli Dhar* v. *Thakur Das*, (1919) 51 Ind Cas 50 (51) Cal.

(2) *Andiappa* v. *Muthukumara*, (1912) 14 Ind Cas 140 (142): 11 Mad L Tim 241: 1912 Mad W N 450: 36 Mad 477; *Radanath Dhubi* v. *Ram Gorind*, (1869) 3 Beng L R A C 218; *Radanath Dhubi* v. *Luckhee Khant Paul*, (1869) 12 Suth W R 224 (Note); *Bansi Lal* v. *Jhamman*, 1930 Lah 441 (442): 122 Ind Cas 485; *Rameshwar Mandar* v. *Badri Sahu*, 1930 Pat 105 (105, 106): 11 Pat L Tim 470: 124 Ind Cas 87; *Subba Naidu* v. *Ethirajammal*, (1915) 28 Ind Cas 640 (640) Mad; *Ambuja Ammal* v. *Appadurai Mudali*, (1915) 30 Ind Cas 402 (402, 403): 38 Mad 414; *Ramjoy* v. *Raja Puran*, 1864 Suth W R 124 (125) F B; *Mohesh Chunder* v. *Madhub Chunder*, (1870) 13 Suth W R 85 (86); *Srinivasa Chariar* v. *Rangammal*, (1895) 18 Mad 94 (97).

O.41, R.27, Notes 7—8.

enable a party to raise a new point in appeal.[3] Similarly, where a party on whom the *onus* of proving a certain point lies fails to discharge the *onus*, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment.[4]

8. **"Or for any other substantial cause."**—The words "for any other substantial cause" must be read with the word "requires" in the beginning of the sentence. So that, it is only, where, for any other substantial cause, the appellate Court *requires* additional evidence, that this rule will apply.[1] The words "or for any other substantial cause" need not be construed in the narrow sense suggested by the doctrine *ejusdem generis*[2] and power to allow additional evidence may be exercised when any point is required to be cleared up in the interest of justice.[3] But at the same time it should be remembered that it is a power to be exercised cautiously and sparingly[4] and only in exceptional cases.[5] Further, the new evidence should have a direct and important bearing on a main issue in the case.[6] Subject to these general rules, additional evidence may be admitted in the following cases:—

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(3) *Rahimuddin Munshi v. Bhabangana Debya*, (1913) 19 Ind Cas 572 (574) Cal; *Leslie v. Allendur*, (1872) 17 Suth W R 390 (391); *Hurpershad v. Sheo Dayal*, (1876) 3 Ind App 259 (279): 3 Sar 611: 3 Suth 309: 26 Suth W R P C 55 P C; *Kanahai Lal v. Suraj Kunwar*, (1899) 21 All 446 (448): 1899 All W N 164; *Dwarka Prasad v. Badri Lal*, 1930 All 220 (221): 127 Ind Cas 515; *Baikuntha Nath Roy v. Sheikh Nura*, (1910) 6 Ind Cas 196 (197) Cal.

(4) *Kulika Dutt Mandal v. Tulsi Mandar*, (1917) 44 Ind Cas 670 (671): 3 Pat L W 385: 37 Ind Cas 1008: 1 Pat L Jour 435. But see *Narain v. Gena*, 1929 Pat 324 (325): 10 Pat L Tim 356: 120 Ind Cas 291 [Obviously genuine documents not to be rejected on such technical grounds as that they were produced too late].

Note 8.

(1) *Parsotim Thakur v. Thakur Lal Mohar*, 1931 P C 143 (148, 149): 1931 All L J 513: 35 Cal W N 786: 33 Bom L R 1015: 58 Ind App 254: 34 Mad L W 76: 132 Ind Cas 721: 54 Cal L Jour 1: 12 Pat L Tim 683: 1931 Mad W N 929: 10 Pat 654: 61 Mad L Jour 489 P C; *Prem Chand Moonshi Upendra Mohan Ghose v. Gopalachandra Ghose*, (1894) 21 Cal 484 (486, 487); *Kalka v. Bharat*, (1911) 12 Ind Cas 332 (333): 14 Oudh Cas 327.

(2) *Andiappa Pillai v. Muthukaruppa Thevan*, (1912) 14 Ind Cas 140 (141, 142): 11 Mad L Tim 241: 1912 Mad W N 450: 36 Mad 477; *Kameswaramma v. Chelapathy*, (1914) 26 Ind Cas 50 (50): 1914 Mad W N 864; *Prabu Lal v. Gulzari Mal*, 1923 Lah 584 (585): 76 Ind Cas 474. But see *Badri Prasad v. Mukandi*, 1923 Oudh 109 (111): 9 Oudh L J 505: 26 Oudh Cas 66: 75 Ind Cas 331.

(3) *Bank of Bengal v. W A Lucas*, 1924 Cal 578 (581): 51 Cal 185: 28 Cal W N 497: 81 Ind Cas 471: 41 Cal L Jour 1; *Damodur Das v. Ritoo Singh*, (1875) 24 Suth W R 325 (326); *Kameshwar Singh Bahadur v. Hirday Singh*, 1931 Pat 181 (182): 12 Pat L Tim 79: 132 Ind Cas 363; *A L S K Kadappa Chetty v. R S S T Thirupathi Chetty*, 1925 Mad 444 (446): 21 Mad L W 210: 86 Ind Cas 576; *Jang Bahadur v. Raj Kumar*, (1920) 52 Ind Cas 289 (289): 17 All L J 945: 42 All 48.

(4) *Parsotim Thakur v. Lal Mohar Thakur*, 1931 P C 143 (148, 149): 1931 All L J 513: 35 Cal W N 786: 33 Bom L R 1015: 58 Ind App 254: 34 Mad L W 76: 132 Ind Cas 721: 54 Cal L Jour 1: 12 Pat L Tim 683: 1931 Mad W N 929: 10 Pat 654: 61 Mad L Jour 489 P C; *Muhammad Khaleel Shirazi v. Les Tanneries Lyonnaises*, 1926 P C 34 (36): 3 Oudh W N 568: 49 Mad 435: 94 Ind Cas 767: 1926 Mad W N 495: 24 Mad L W 115: 53 Ind App 84: 44 Cal L Jour 67: 28 Bom L R 1391: 31 Cal W N 1: 51 Mad L Jour 570 P C; *Sreemanchunder v. Gopaluchunder*, (1866) 11 Moo Ind App 28 (48, 49): 7 Suth W R 10: 2 Sar 215: 1 Suth 651 P C; *Bholla v. Chandi*, (1910) 5 Ind Cas 666 (667) All; *Raja Sreenath Roy v. Secretary of State for India*, 1923 Cal 233 (237): 36 Cal L Jour 345: 50 Cal 276: 70 Ind Cas 510; *Ambika Prasad v. Gopal Buksh Das*, (1905) 1 Cal L Jour 550 (555); *Joog Maya v. Ram Chunder*, (1868) 10 Suth W R 378 (378); *Juggobundhoo v. Goluck Chunder*, (1868) 10 Suth W R 228 (229); *Kutiyan v. Vithilinga Pandaram*, 1930 Mad 343 (343): 120 Ind Cas 746; *Ramarayanimgar v. Venkatalingama Nayanim Bahadur*, 1932 Mad W N 529 (534): 1932 Mad 709: 36 Mad L W 195: 139 Ind Cas 444; *Kazim Husain v. Shambhoo Nath*, 1931 Oudh 298 (300, 301): 132 Ind Cas 259: 8 Oudh W N 627; *Narandy Chetty v. Maun Kyu*, 1897-1901 U B R Vol II, 309; *Narain Das v. Tek Chand*, 1923 Sind 42 (43): 84 Ind Cas 137.

(5) *Imad Ali v. Habibunnissa*, (1912) 15 Ind Cas 250 (251): 15 Oudh Cas 253; *Shookrah Shaikh v. Nund Coomar Banerjee*, (1876) 25 Suth W R 246 (247); *Shib Chunder v. Kasheenath*, (1869) 12 Suth W R 245 (246).

(6) *Parsotim Thakur v. Lal Mohar Thakur*, 1931 P C 143 (148, 149): 1931 All L J 513: 35 Cal W N 786: 33 Bom L R 1015: 58 Ind App 254: 34 Mad L W 76: 132 Ind Cas 721: 54 Cal L Jour 1: 12 Pat L Tim 683: 1931 Mad W N 929: 10 Pat 654: 61 Mad L Jour 489 P C. See *Singar Kunwar v. Basdeo Prasad*, 1930 All 568 (572): 124 Ind Cas 717 [Additional evidence solely for shaking credit of witness not allowed]. See also *Dwarka Nath v. Ram Lochan*, (1868) 10 Suth W R 92 (92, 93) [Additional evidence merely for cross-examining—Witness not allowed].

O.41, R.27, Note 8.

(1) When the party wishing to produce the additional evidence was unable, through no fault of his, to produce it in the trial Court.[7]

(2) When evidence has been taken by the lower Court so imperfectly that the appellate Court cannot pass a satisfactory judgment.[8]

(3) When, through the negligence of the guardian of a minor party, an important document was not produced in the lower Court.[9]

(4) For other instances, *see* the following cases.[10]

But the provisions of this rule are not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up the omission in the Court of appeal.[11] It is not the business of the appellate Court to supplement the evidence adduced by one party or the other in the lower Court.[12] Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial Court additional evidence should not be admitted in appeal[13] as a party guilty of remissness in the lower

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(7) *Sheo Singh* v. *Raghubans*, (1905) 27 All 634 (651): 32 Ind App 203: 8 Oudh Cas 317: 2 Cal L Jour 194: 9 Cal W N 1009: 15 Mad L Jour 352: 8 Sar 791 P C; *Raza Husain* v. *District Board, Banda*, 1933 All 104 (106): 1932 All L J 1081 [Judge satisfied on affidavit that documents could not be discovered at earlier stage]; *Venkatachalla Pillai* v. *Ranga Pillai*, (1915) 28 Ind Cas 694 (695): 17 Mad L Tim 220: 28 Mad L Jour 334; *Kalka Singh* v. *Bharat Singh*, (1911) 12 Ind Cas 332 (333): 14 Oudh Cas 327; *Gunish* v. *Rohinee*, (1870) 14 Suth W R 236 (236).

(8) *Srinivasachariar* v. *Rangammal*, (1895) 18 Mad 94 (96); *Narayanasamy Iyer* v. *Vedambal Ammal*, 1927 Mad 1065 (1065): 39 Mad L Tim 399: 106 Ind Cas 498.

(9) *Tara Singh* v. *Siraj-ud-Din*, 1929 Lah 91 (92): 110 Ind Cas 447.

(10) *Secretary of State for India* v. *Maharaja Birendra Kishore Maikye*, 1916 P C 141 (145): 44 Cal 328: 43 Ind App 303: 14 All L J 1205: 18 Bom L R 1027: 25 Cal L Jour 425: 21 Cal W N 291: 20 Mad L Tim 549: 5 Mad L W 570: 1917 Mad W N 25: 38 Ind Cas 379 [Additional evidence allowed under sanction of costs]; *Nagina Singh* v. *Ramjanam Singh*, 1928 Pat 64 (65): 105 Ind Cas 83: 9 Pat L Tim 215 [Admission of certified copy of deposition by the trial Court—Certified copy incorrect—Admission of another correct certified copy by the appellate Court]; *Shah Mahomed* v. *Ramzan*, 1921 Sind 155 (157): 16 Sind L R 17: 66 Ind Cas 833 [Omission of parties to grasp questions arising out of pleadings—Additional evidence may be allowed]; *Bigsby* v. *Dickinson*, (1876) 4 Ch D 24: 46 L J Ch 280: 35 L T 679, 25 W R 89, 122 (C A) [Case of surprise, confusion, etc—Additional evidence may be allowed]; *Jaharlal Sadhukhan* v. *Chandra Kanta Pal*, 1928 Cal 265 (266) [Certified copy of a document not offered in evidence at the primary Court on account of the point not having been disputed—Such document may be admitted in appeal]; *Raja Sreenath Roy* v. *Secretary of State for India*, 1923 Cal 233 (238): 36 Cal L Jour 345: 50 Cal 276: 70 Ind Cas 510 [Matter involved in obscurity]; *Commuroodeen* v. *Money Mundul*, (1871) 16 Suth W R 220 (220) [Copy of defendant's deposition in former suit having been put in by plaintiff at late stage of case when defendant had no means of explaining away any supposed admission therein. *Held*, first Court was wrong in accepting same and lower appellate Court was right in sending for defendant and examining him on the subject]; *Maung Mo Hnaung* v. *Ma Shwe Mya*, 1921 U B 16 (18): 4 U B R 35: 4 U B R 38: 4 U B R 41 [Party taken by surprise at the ruling of the trial Court and omitting to give evidence—Opportunity to be given to adduce evidence]; *Mangal* v. *Rani Indar*, (1918) 48 Ind Cas 1007 (1008): 5 Oudh L J 745 [Party having reason to suppose that a certain document would be challenged]; *Shaikh Nura* v. *Baikuntha Nath*, (1915) 30 Ind Cas 398 (399): 21 Cal L Jour 596; *Marchala Narayana Murthy* v. *Perumetcha Venkatapathiraju*, (1916) 32 Ind Cas 711 (712) Mad [Admission of original document when secondary evidence of its contents had been given in the lower Court]; *Bakshi Ram* v. *Hiladhar*, (1913) 21 Ind Cas 619 (621): 11 All L J 371: 35 All 353 [Additional evidence as to attestation of mortgage deed—Effect of recent P C decision]; *Ahhyeswari* v. *Hatu*, (1918) 45 Ind Cas 645 (647) Cal [Elucidation of obsolete or provincial expression].

(11) *Parsotam Thakur* v. *Lal Mohir Thakur*, 1931 P C 143 (148, 149): 1931 All L J 513: 35 Cal W N 786: 33 Bom L R 1015: 58 Ind App 254: 34 Mad L W 76: 132 Ind Cas 721: 54 Cal L Jour 1: 12 Pat L Tim 683: 1931 Mad W N 929: 10 Pat 654: 61 Mad L Jour 489 P C; *Peda Manikyam* v. *Vantabattina Periyadu*, 1932 Mad 148 (151): 34 Mad L W 663: 135 Ind Cas 532; *Ramarayanimgar* v. *Venkata Lingam Nayanim Bahadur Varu*, 1932 Mad 709 (713): 1932 Mad W N 529: 36 Mad L W 195: 139 Ind Cas 444; *Ram Preshad Sookul* v. *Rajunder Sahoy*, (1866) 6 Suth W R 262 (265); *Satish Chandra Ghose* v. *Thakur Das Mandal*, (1917) 39 Ind Cas 886 (887): 25 Cal L Jour 473.

(12) *Hansraj* v. *Shiam Sunder Tewari*, 1921 All 408 (408): 19 All L J 407: 63 Ind Cas 423; *Velaet Ali* v. *Matadeen*, (1868) 10 Suth W R 402 (403); *Nihal Chand* v. *Dal Singh*, 1932 Lah 135 (136): 32 Pun L R 874: 136 Ind Cas 17; *Muzaffar Ali Khan* v. *Kedar Nath*, (1898) 20 All 266 (267): 1898 All W N 34; *Haridas Mukerji* v. *Radha Kishan Das*, 1890 All W N 166 (166); *Wali Mohamed* v. *Muhamed Bakhsh*, 1924 Lah 444 (447): 5 Lah 84: 80 Ind Cas 998.

(13) *Nadiar Chand* v. *Chunder Sikhur*, (1888) 15 Cal 765 (771) P C; *Jagadindra* v. *Bhaba Tarini*, (1870) 5 Beng L R App 54: 14 Suth

O 41, R 27 Notes 8—9.

Court is not entitled to the indulgence of being allowed to give further evidence under this rule.[14] So a party who had ample opportunity to produce certain evidence in the lower Court but failed to do so[15] or elected not to do so[16] cannot have it admitted in appeal.

The inadvertence of the party[17] or his inability to understand the legal issues involved[18] or the wrong advice of a pleader[19] or the negligence of a pleader[20] does not constitute a "substantial cause" within the meaning of this rule. For other cases in which additional evidence was not allowed, *see* the following cases.[21]

9. **Discovery of fresh evidence.**—The mere discovery of fresh evidence subsequent to the decision of the lower Court is no ground for its admission in appeal[1] unless the *appellate Court requires* the evidence to enable

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W R 19; *Seetharamanujacharlu* v. *Venkatasubbama*, 1930 Mad 824 (825): 1930 Mad W N 625: 59 Mad L Jour 485: 32 Mad L W 416: 127 Ind Cas 809: 54 Mad 132; *Kali Charan Sahu* v. *Jaldhari Kant*, 1929 Pat 98 (100): 10 Pat L Tim 10: 115 Ind Cas 674; *Ramien* v. *Veerappudian*, (1912) 14 Ind Cas 394 (396): 11 Mad L Tim 69: 22 Mad L Jour 217: 1912 Mad W N 117 and 530: 37 Mad 455; *Shintre* v. *Revappa*, 1915 P C 78 (78): 19 Cal W N 762: 1915 Mad W N 787: 29 Ind Cas 717 P C; *Natha Ram* v. *Nur Ilahi*, (1909) 4 Ind Cas 550 (551): 55 Pun W R 1909: 59 Pun L R 1909; *Baid Nath Sahay* v. *Nanku Mahton*, (1915) 29 Ind Cas 219 (220) Cal; *Bishan Singh* v. *Nathu*, (1909) 4 Ind Cas 892(893): 93 Pun W R 1909: 83 Pun L R 1909; *Bhairon* v. *Hindu*, 1922 Nag 119 (120): 67 Ind Cas 237; *Marimuthu Pillai* v. *Velu Pillai*, (1916) 32 Ind Cas 908 (912) Mad; *Kazim Husain* v. *Shamroo Nath*, 1931 Oudh 298 (300, 301): 132 Ind Cas 259: 8 Oudh W N 627; *Gowhur Ali Khan* v. *Sakheena Khanum*, (1871) 15 Suth W R 507 (510); *Wali Mohamed* v. *Mahomed Bakhsh*, 1924 Lah 444 (447): 5 Lah 84: 80 Ind Cas 998; *Kaki Mutyalu* v. *Kanigola Sira Raharayya*, (1916) 32 Ind Cas 826 (826): 3 Mad L W 168; *Imrat Khanum* v. *Muhammad Sarfaraz*, 1882 All W N 5; *Leslie* v. *Allender*, (1872) 17 Suth W R 390 (391).

(14) *Radakishen* v. *Khurshed*, (1920) 55 Ind Cas 959 (962): 18 All L J 401: 1920 Mad W N 308: 38 Mad L Jour 424: 11 Mad L W 518: 22 Bom L R 557: 47 Cal 662: 47 Ind App 11: 28 Mad L Tim 425: 25 Cal W N 417: 1920 P C 81 P C; *Gowhur Ali* v. *Sakeena Khanum*, (1871) 15 Suth W R 507 (510); *Kalika* v. *Tulsi*, (1917) 37 Ind Cas 1008 (1008): 1 Pat L Jour 435; *Motiram* v. *Tukaram*, 1926 Nag 486 (487): 96 Ind Cas 1006.

(15) *Bebee-Zahra* v. *Bhugwan Dass*, (1871) 16 Suth W R 211 (212); *Arasappa Pillai* v. *Manika Mudaliar*, (1914) 25 Ind Cas 587 (588): 16 Mad L Tim 301; *Narendra Nath* v. *Radha Charan*, (1918) 48 Ind Cas 314 (318): 22 Cal W N 943: 28 Cal L Jour 289: 46 Cal 119; *Ram Das* v. *Official Liquidator*, (1887) 9 All 366 (383): 1887 All W N 34; *Meharban Singh* v. *Raghunath Singh*, (1919) 49 Ind Cas 115 (117): 5 Oudh L J 768; *Moti Chand Raoji* v. *Manekchand Ram Chand Gojar*, 1922 Bom 147 (148): 77 Ind Cas 515; *Nohar Ahir* v. *Purtap Ahir*, 1924 All 231 (232): 21 All L J 899: 5 L R A (Rev) 1: 79 Ind Cas 367; *Bebee Zahrah* v. *Bhugwan Dass*, (1871) 16 Suth W R 211 (212); *Wadgooji Kalar* v. *Mahadeo*, 1927 Nag 398 (398): 102 Ind Cas 27; *Kazim Husain* v. *Shamboo Nath*, 1931 Oudh 298 (300, 301): 132 Ind Cas 259: 8 Oudh W N 627; *Muhammad Baksh* v. *Shadi Muhammad*, 1927 Lah 272 (273): 8 Lah 123: 27 Pun L R 768: 100 Ind Cas 60; *Gauri Shankar* v. *Madho Charan*, (1912) 16 Ind Cas 887 (889) Oudh; *Marimuthu Pillai* v. *Velu Pillai*, (1916) 32 Ind Cas 908 (912) Mad; *Ramarayanimgar* v. *Venkata Lingam Nayanim Bahadur*, 1932 Mad W N 529 (534): 1932 Mad 709: 36 Mad L W 195: 139 Ind Cas 444.

(16) *Monohar* v. *Lakhmiram*, (1888) 12 Bom 247 (257); *Sunder Singh* v. *Jallandar*, 1905 Pun Re No 51: 119 Pun L R 1905: 54 Pun W R 1905; *Arasappa Pillai* v. *Manika Mudaliar*, (1914) 25 Ind Cas 587 (588): 16 Mad L Tim 301.

(17) *Gaya Singh* v. *Name Singh*, (1920) 56 Ind Cas 983 (984): 5 Pat L Jour 263: 1 Pat L Tim 701.

(18) *Rameshra* v. *Kalpo Rai*, 1924 All 538 (539): 46 All 264: 22 All L J 159: 5 L R A (Civ) 112: 84 Ind Cas 84.

(19) *Malappa Minappa Patil* v. *Nenkaji Appaji Patil*, 1930 Bom 272 (272): 32 Bom L R 608: 125 Ind Cas 423.

(20) *Buta Singh* v. *Balwant Singh*, 1932 Lah 93 (94): 32 Pun L R 813: 136 Ind Cas 788; *Wali Muhammad* v. *Muhammad Buksh*, 1924 Lah 444 (447): 5 Lah 84: 80 Ind Cas 998; *Abdul Nabi Karim Dino* v. *Mazharali Nur Mahomed*, 1930 Sind 318 (324): 125 Ind Cas 33; *Veerasami Naidu* v. *Sivagurunatha Pillai*, 1925 Mad 793 (798): 21 Mad L W 111: 86 Ind Cas 234.

(21) *Serajool Huq* v. *Karamutoolah*, (1873) 19 Suth W R 88 (89) [Documents alleged to be burnt but one document sought to be admitted in appeal on the ground that it had escaped the general destruction—Not to be allowed without proof of its genuineness]; *Sangram* v. *Rajan*, (1886) 12 Cal 219 (224): 12 Ind App 183: 4 Sar 676 P C [Evidence as to special means of knowledge within S 32, Evidence Act]; *Nadiar Chand* v. *Chunder*, (1888) 15 Cal 765 (770, 771) [Additional evidence to prove genuineness of a document held by the lower Court to be fabrication]; *Kishore Chand* v. *Gurditta Mal*, (1911) 10 Ind Cas 315 (318): 165 Pun L R 1911: 52 Pun Re 1911: 162 Pun W R 1911 [Appellate Court suspecting that false evidence would be given].

Note 9.

(1) *Kessowji Issur* v. *G I P Ry*, (1907) 31 Bom 381 (390): 9 Bom L R 671: 34 Ind App 115: 2 Mad L Tim 435: 11 Cal W N 721: 17 Mad L Jour 347: 6 Cal L Jour 5: 4 All L J 461 P C; *Baldeo Ram* v. *Kunkun Ram*, 1925 All

it to pronounce judgment or requires it for any other substantial cause.[2] If the latter condition is not present the proper course is to apply for review of judgment and not for the admission of additional evidence in appeal.[3] Even where the appellate Court requires the evidence so discovered, it should not be admitted unless it is shown that the party had exercised due diligence.[4]

10. **Record of reasons.**—Whenever the appellate Court admits additional evidence it should record its reasons for doing so.[1] "It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation, and the statement of the reasons may inspire confidence and disarm objection".[1-a] But this provision is only directory and not mandatory[2] and the failure to record reasons does not make the evidence

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808 (809): 6 L R A (Civ) 393: 88 Ind Cas 586; *The Bombay Sizing and Stores Supplying Co* v. *Kusumgar and Co*, 1924 Bom 227 (228): 47 Bom 674: 25 Bom L R 310: 84 Ind Cas 74; *Ramachandra* v. *Krishnaji*, (1904) 28 Bom 4 (7): 5 Bom L R 615; *Lalbhai* v. *Naval Mir*, (1875) 12 Bom H C R 247; *Shamsuddin* v. *Molannessa Bibi*, 1926 Cal 941 (943): 95 Ind Cas 300; *Srimati Manmohini Debi* v. *Ramkishore*, 1923 Cal 273 (274): 68 Ind Cas 334; *Jadav Chandra Moulik* v. *Manik Sarkar*, (1919) 51 Ind Cas 652 (653): 29 Cal L Jour 313; *Kumar Sarat Kumar Roy* v. *Sripathy Chatterjee*, (1919) 50 Ind Cas 119 (122): 23 Cal W N 242; *Garden Reach Co* v. *Secretary of State*, (1915) 28 Ind Cas 865 (866): 19 Cal W N 401: 42 Cal 675; *Prem Singh* v. *Mohamed Khurshid*, 1927 Lah 574 (577): 108 Ind Cas 215; *Raman Menon* v. *Mammali*, (1917) 39 Ind Cas 954 (957): 1917 Mad W N 560; *Gurumurthy Chetty* v. *Archbold Read*, (1911) 9 Ind Cas 251 (252): 2 Mad W N 136: 9 Mad L Tim 328: 12 Cr L Jour 40; *Krishnamachariar* v. *Narasimhachariar*, (1908) 31 Mad 114 (116): 3 Mad L Tim 308; *Gangabaksh* v. *Narayan*, 1925 Nag 284 (288): 86 Ind Cas 505; *Bhairon Singh* v. *Hindu Singh*, 1922 Nag 119 (120): 67 Ind Cas 237; *Rajnath Singh* v. *Wahid Khan*, 1922 Pat 28 (28): 3 Pat L Tim 107: 1921 Pat H C C 296; *Uchant Ahir* v. *Basdwan Ahir*, (1920) 55 Ind Cas 226 (227) Pat; *Teju Bhagat* v. *Deoki Nandan Prasad*, (1918) 47 Ind Cas 141 (143) Pat.

(2) *Jagannath Marwari* v. *Kalidas Raha*, 1929 Pat 245 (247): 10 Pat L Tim 191: 8 Pat 776: 120 Ind Cas 626; *Mahant Rai* v. *Mt Lachmina Kunwar*, 1927 P C 123 (127): 101 Ind Cas 363: 1927 Mad W N 456: 26 Mad L W 94: 31 Cal W N 1087 P C; *Indra Bhusan Saha* v. *Janaradan Saha*, 1924 Cal 1071 (1072): 28 Cal W N 945: 82 Ind Cas 104; *Bhairab* v. *Kali*, 1923 Cal 606 (607): 37 Cal L Jour 491: 71 Ind Cas 453: 74 Ind Cas 1038; *Rahimudin Kazi* v. *Radha Govinda Bhowmik*, (1921) 64 Ind Cas 238 (239) Cal; *Ram Lall* v. *Rung Lall*, (1872) 17 Suth W R 47 (47); *Mehr Fazil* v. *Wali Muhammad*, (1931) 132 Ind Cas 6 (6) Lah: 1930 Notes 19 (e): 31 Pun L R 1012; *Venkatachalla* v. *Renga*, (1915) 28 Ind Cas 694 (694): 17 Mad L Tim 220: 28 Mad L Jour 334; *Gaddam Paramasivudu* v. *Mulakala Subbanna*, (1919) 52 Ind Cas 625 (627): 1919 Mad W N 455; *Abdul Rahman* v. *Noor Jahan*, 1926 Oudh 74 (75): 89 Ind Cas 359.

(3) *Kessowji* v. *G I P Ry*, (1908) 31 Bom 381 (390): 9 Bom L R 671: 34 Ind App 115: 2 Mad L Tim 435: 11 Cal W N 721: 17 Mad L Jour 347: 6 Cal L Jour 5: 4 All L J 461 P C; *Baldeo* v. *Kunkun*, 1925 All 808 (809): 6 L R A (Civ) 393: 88 Ind Cas 586; *Bombay Sizing Co* v. *Kusumgar and Co*, 1924 Bom 227 (228): 47 Bom 674: 25 Bom L R 310: 84 Ind Cas 74; *Ramachandra* v. *Krishnaji*, (1904) 28 Bom 4 (7): 5 Bom L R 615; *Jadav Chandra* v. *Manik Sarkar*, (1919) 51 Ind Cas 652 (653): 29 Cal L Jour 313; *Garden Reach Co* v. *Secretary of State*, (1915) 28 Ind Cas 865 (866): 19 Cal W N 401: 42 Cal 675; *Raman* v. *Mamali*, (1917) 39 Ind Cas 954 (957): 1917 Mad W N 560.

(4) *Skinner R H* v. *Veronica Skinner*, 1930 Lah 1004 (1007): 32 Pun L R 110: 12 Lah L Jour 172: 129 Ind Cas 6.

Note 10.

(1) *Manmohan Das* v. *Ram Dai*, 1931 P C 175 (177): 1931 All L J 550: 35 Cal W N 925: 34 Mad L W 7: 8 Oudh W N 936: 1931 Mad W N 931: 33 Bom L R 1251: 134 Ind Cas 669 P C; *Sreemanchunder* v. *Gopalchunder*, (1866) 11 Moo Ind App 28 (48): 7 Suth W R 10: 2 Sar 215: 1 Suth 651 P C; *Ali Ahmed* v. *Kishan Prasad*, 1924 All 303 (304): 71 Ind Cas 289; *Heneraj* v. *Shiam Sunder Tewari*, 1921 All 408 (408): 19 All L J 407: 63 Ind Cas 423; *Gauri Rai* v. *Bhaggina*, (1915) 31 Ind Cas 873 (875) All. **See** ***Mallappa Yellappa*** v. *Nagappa*, 1932 Bom 230 (231): 34 Bom L R 372: 138 Ind Cas 204; *Daji Abaji Sawant* v. *Sakharam Krishna Kulkarni*, (1915) 27 Ind Cas 33 (33): 16 Bom L R 641: 38 Bom 665; *Ahmed Ali* v. *Madhab Ram*, 1925 Cal 671 (672): 41 Cal L Jour 194: 86 Ind Cas 646; *Kebal Namadas* v. *Rajani Kanta Roy*, 1925 Cal 98 (100): 39 Cal L Jour 261: 81 Ind Cas 999; *Afsar Khan* v. *Shabu Mondal*, 1922 Cal 148 (149): 77 Ind Cas 556; *Ambika Charan Sen* v. *Girish Chandra Sen*, (1922) 68 Ind Cas 719 (720) Cal; *Isap Ali* v. *Satis Chandra Roy*, (1922) 65 Ind Cas 504 (505) Cal; *Gajadhar Pershad* v. *Lohia*, (1916) 35 Ind Cas 698 (700): 24 Cal L Jour 457; *Jugger Nath* v. *Kanai Das*, (1917) 6 Cal W N 31 (32); *Sadden* v. *Finlay & Co*, (1867) 7 Suth W R 313 (313); *Jugobundhoo* v. *Goluck Chunder*, (1868) 10 Suth W R 228 (229); *Lowa* v. *Bissesher*, (1869) 11 Suth W R 6 (7); *Shib Chunder* v. *Kasheenath*, (1869) 12 Suth W R 245 (246); *Mohesh* v. *Madhub*, (1870) 13 Suth W R 85 (86); *Gunput* v. *Ram Deour*, (1874) 21 Suth W R 416 (418); *Kali Kristo* v. *Mullick*, (1875) 24 Suth W R 20 (21); *Herpreshad* v. *Sheo Dyal*, (1877) 26 Suth W R 55 (76): 3 Ind App 259: 3 Sar 611: 3 Suth 309 P C; *Ramzan* v. *Nabi Bux*, 1924 Lah 638 (639): 6 Lah L Jour 234: 80 Ind Cas 530; *Kaki Mutyalu* v. *Kani Golla Sivaraghavayya*, (1916) 32 Ind Cas 826 (826): 3 Mad L W 163; *Muhamed Ismail Khan* v. *Abdul Gaffur Beg*, 1930 Oudh 110 (111): 6 Oudh W N 1060: 11 L R All (Rev) 28: 5 Luck 453: 124 Ind Cas 442.

(1-a) *Ganga Gobind Mundul* v. *The Collector of the 24 Parganas*, (1867) 7 Suth W R P C 21 (25): 11 Moo Ind App 345: 1 Suth 676: 2 Sar 284 P C.

(2) *Ganga Gobind* v. *Collector of the 24 Parganas*, (1866-67) 11 Moo Ind App 345 (368): 7 Suth W R P C 21: 1 Suth 676: 2 Sar 284

O.41, R.27, Notes 10—12.

inadmissible.[3] A contrary view has, however, been expressed in the undermentioned cases.[4] It is submitted that it is opposed to the decision of the Privy Council in *Gunga Gobind Mundal's* case[4-a] where it is laid down that the provision as to the record of reasons is not a condition precedent to the reception of the evidence, and cannot, therefore, be accepted as correct.

The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court.[5] A mere reference to the "peculiar circumstances of the case"[6] or a mere statement that the evidence is necessary to pronounce judgment[7] is not enough compliance with the requirement as to recording of reasons. The issue by the appellate Court of a commission for local investigation, is not the same thing as the admission of additional evidence, and no reasons need be recorded for issuing such commission.[8]

11. **Additional evidence by consent of parties.**—Where parties consent to the admission of additional evidence they cannot afterwards object to the reception of such evidence.[1] A party in whose favour an order for the admission of additional evidence is made, cannot subsequently attack it.[2] Similarly, a party who has taken advantage of the order for the admission of additional evidence and lets in such evidence, cannot himself subsequently question the order.[3]

12. **Procedure to be adopted under this rule.**—The formalities as regards the admission and recording of evidence in the original Court apply to additional evidence taken in the appellate Court.[1] The appellate Court is

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P C; *Rahimuddin Kazi* v. *Radha Govinda,* (1921) 64 Ind Cas 238 (239) Cal; *Iswar Chandra Agradani* v. *Jogendra Lal Roy,* 1927 Cal 126 (128): 98 Ind Cas 137 [Dissenting from 49 Ind Cas 510]; *Barha Mandari* v. *Megh Nath,* (1905) 2 Cal L Jour 4-N; *Gopal Singh* v. *Jhakir Rai,* (1886) 12 Cal 87 (88). See *Hafiz Abdul Kurrim* v. *Sri Kissen,* (1885) 11 Cal 139 (142, 143); *W Chardon* v. *Ajeet Singh,* (1869) 12 Suth W R 52 (53); *Banee Pershad* v. *Lalla Jogissur Das,* (1869) 11 Suth W R 47. See *Ganesh Ram* v. *Rohnee Dassi,* (1870) 14 Suth W R 236 (237).

(3) *Nabin Chandra Kapali* v. *Gour Mohun Mistiri,* 1926 Cal 369 (370): 90 Ind Cas 756; *Gopal Singh* v. *Jhakiri Rai,* (1885) 12 Cal 87 (38); *Bhagwan* v. *Raj Coomar,* (1870) 13 Suth W R 303 (304); *Neki* v. *Chajju Ram,* (1918) 48 Ind Cas 137 (138): 111 Pun W R 1918.

(4) *Kabul* v. *Kabul Singh,* 1923 All 413 (413, 414): 79 Ind Cas 408; *Hensraj* v. *Shiam Sunder,* 1921 All 408 (408): 19 All L J 407: 63 Ind Cas 423; *Ariyamuthu Pillai* v. *Sinnaya Pillai,* (1915) 28 Ind Cas 11 (11): 1 Mad L W 771: 1914 Mad W N 795; *Moniruddin Sarkar* v. *Mochhabin Mondal,* (1909) 2 Ind Cas 995 (995) Cal; *Juggut Indur Bunwaree* v. *Bhabo Tarinee,* (1870) 14 Suth W R 19 (20): 5 Beng L R App 54.

(4-a) (1867) 7 Suth W R P C 21 (25): 11 Moo Ind App 345: 1 Suth 676: 2 Sar 284 P C.

(5) *Ram Charan* v. *Lal Behari,* 1925 All 752 (753): 85 Ind Cas 676; *Subba Naidu* v. *Ethirajammal,* (1911) 12 Ind Cas 673 (676): 10 Mad L Tim 409: 22 Mad L Jour 14: 2 Mad W N 440. But see *Imdad Ali* v. *Habib Unnissa,* (1912) 15 Ind Cas 250 (250): 15 Oudh Cas 253.

(6) *Rahimuddin Munshi* v. *Bhabangana Debya,* (1913) 19 Ind Cas 572 (574) Cal.

(7) *Ali Ahmed* v. *Kishen Prasad,* 1924 All 303 (304): 71 Ind Cas 289. See also *Juggut Indur Bunwaree* v. *Bhubo Tarini,* (1870) 14 Suth W R 19 (20): 5 Beng L R 54. *But see the following cases decided under Code of* 1859:—*Radha Nath* v. *Ramgovind,* (1869) 3 Beng L R 218; *Shib Chunder* v. *Kashee Nath,* (1869) 12 Suth W R 245 (246); *Bibee Hafiza* v. *Ashur Hossein,* (1870) 13 Suth W R 328 (329).

(8) *Ram Dihal Lal* v. *Lakhpat Lal,* 1932 All 270 (271): 135 Ind Cas 243.

Note 11.

(1) *Jagarnath* v. *Hanuman,* (1909) 3 Ind Cas 465 (465): 13 Cal W N 830: 10 Cal L Jour 74: 6 Mad L Tim 7: 11 Bom L R 861: 19 Mad L Jour 435: 36 Cal 833: 36 Ind App 221 P C. See *Sayaji Rao* v. *Madhavrao Raghunatharao Dhavale,* 1929 Bom 14 (15): 30 Bom L R 1468: 53 Bom 12: 115 Ind Cas 869.

(2) *Durga Prasad Thakur* v. *Tarakeswar Moulik,* 1929 Cal 492 (493): 49 Cal L Jour 476: 120 Ind Cas 460.

(3) *Damoodur* v. *Rittoo,* (1875) 24 Suth W R 325 (326); *Bhairon Singh* v. *Hindu Singh,* 1922 Nag 119 (120): 67 Ind Cas 287.

Note 12.

(1) *Daji* v. *Sakharam,* (1915) 27 Ind Cas 33 (33): 16 Bom L R 641: 38 Bom 665; *Adam Sardar* v. *Bisweswar Das,* 1926 Cal 684 (684):

not authorised merely to send a document to the thumb impression bureau and act upon their report.[2] The issue of a general commission to try an issue is not warranted by this rule. If additional evidence is required, it should be taken by the appellate Court itself or the appellate Court should direct it to be taken by the lower Court.[3]

There is nothing illegal in an appellate Court first ordering additional evidence, and then cancelling the order and remanding the case for re-trial, for, there is no decision of finality in the exercise of the discretionary power conferred by the rule.[4]

13. **Application to put in evidence.**—The rule does not require an *application* for the admission of additional evidence. But such an application is not prohibited; for, although the test of admissibility of additional evidence under this rule is the *requirement of the appellate Court* on an appreciation of the evidence as it stands, it is open to a party to point out to the Court any defects in the evidence on the record. (*See* Note 4.) In fact, the existence or otherwise of such an application seems to have been regarded as an indication of whether the Court "required" the additional evidence.[1]

14. **Opportunity to opposite party to contest admissibility of, or rebut the fresh evidence.**—When additional evidence is sought to be admitted in appeal, the opposite party should be given an opportunity to contest the admissibility of the evidence[1] and to adduce rebutting evidence.[2] But failure to give such opportunity does not vitiate the proceedings if it has not caused any prejudice to the opposite party.[3]

15. **Remand for trial de novo.**—The rule contemplates a disposal of the case on the merits by the appellate Court itself.[1] Where the appellate

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92 Ind Cas 601; *Juggernath Barj* v. *Kanai Das Byragi*, (1902) 6 Cal W N 81 (82); *Gunpat* v. *Ram Deour*, (1874) 21 Suth W R 416 (418); *Allum Mahto* v. *Barka Manjhi*, 1929 Notes 11 (*c*): 118 Ind Cas 815 Pat.

(2) *Chajju* v. *Ayub Ahmad*, (1915) 28 Ind Cas 132 (132) All. See also *Ram Autar Shukul* v. *Baldeo Shukul*, 1932 Pat 352 (352): 11 Pat 782: 140 Ind Cas 895 [Suit on promissory note—Alleged alterations—Opinion obtained by appellate Court about date of stamp—Inadmissible].

(3) *Manbodh Sav* v. *Mt Bimba*, (1888) 1 C P L R 160 (161, 162).

(4) *Haji Bu Ali* v. *Husain Bukhsh*, 1887 All W N 145 (145).

Note 13.

(1) *Ariyamuthu Pillai* v. *Sinnaiya Pillai*, (1915) 28 Ind Cas 11 (11): 1 Mad L W 771: 1914 Mad W N 795; *Peruma* v. *Rama*, (1915) 28 Ind Cas 378 (379): 28 Mad L Jour 115, *Kaki Mutyalu* v. *Kanigola Siva Ragharayya*, (1916) 32 Ind Cas 826 (826): 3 Mad L W 163.

Note 14.

(1) *Manjuri Dassi* v. *Khetramani Dassi*, 1924 Cal 403 (404): 78 Ind Cas 96; *Labh Singh* v. *Ahmad Shah*, 1927 Lah 11 (12): 97 Ind Cas 369; *Man Singh* v. *Nawalakhbati*, (1923) 72 Ind Cas 239 (241) Pat.

(2) *Dwarka Prasad* v. *Badri Lal*, 1930 All 220 (21): 127 Ind Cas 515; *Ahmed Ali* v. *Madhab Ram*, 1925 Cal 671 (672): 41 Cal L Jour 194: 86 Ind Cas 646; *Kebal* v. *Rajani*, 1925 Cal 98 (100): 39 Cal L Jour 261: 81 Ind Cas 999; *Hriday Krishna Pal* v. *Rajanikantapal*, 1923 Cal 300 (302): 68 Ind Cas 293; *Secretary of State* v. *Ananda Mohan Roy*, 1921 Cal 661 (672): 34 Cal L Jour 205: 66 Ind Cas 287: *Gajadhar Prasad* v. *Mussamat Lohia*, (1916) 35 Ind Cas 698 (700): 24 Cal L Jour 457; *Ramzan* v. *Nabi Bux*, 1924 Lah 638 (639): 6 Lah L Jour 234: 80 Ind Cas 330; *Vaishno Das* v. *Hem Raj*, 1921 Lah 279 (280): 4 Lah L Jour 371: *Muhammad* v. *Ram Dial*, (1915) 28 Ind Cas 14 (15): 25 Pun L R 1915: 241 Pun W R 1915; *Brahma Subbayya* v. *Kania Ranga Rao*, 1925 Mad 181 (183): 48 Mad L Jour 32: 20 Mad L W 840: 85 Ind Cas 385; *Punja* v. *Bhadu*, (1913) 18 Ind Cas 857 (859): 9 Nag L R 11; *Imdad Ali* v. *Mussammat Habib-un-nissa*, (1912) 15 Ind Cas 250 (250): 15 Oudh Cas 253; *Muhammad Sadiq* v. *Malik Waizul Huq*, (1918) 43 Ind Cas 320 (320): 1917 Pat H C C 269; *Kandhdeo Narain Singh* v. *Dewa Singh*, (1916) 36 Ind Cas 955 (956) Pat. But see *Mahomed Wazir* v. *Sheikh Majid*, (1932) 56 Cal L Jour 246 (246): 1933 Cal 319.

(3) *Rahimuddin Khazi* v. *Radha Gorinda Bhoumik*, (1921) 64 Ind Cas 238 (239) Cal.

Note 15.

(1) *V R M S Vellayappa Chetty* v. *R Nellayappa Pillai*, (1911) 10 Ind Cas 675 (675): 9 Mad L Tim 317.

Court desires to take further evidence the proper course is to follow the procedure laid down in Rr. 27 and 28 and not to remand the whole case.[2] But in exceptional cases the appellate Court has an inherent power to remand the case for taking additional evidence.[3]

16. **Court, if can take notice of subsequent events.**—As a general rule, a Court of appeal in considering the correctness of the judgment of the Court below will confine itself to the state of the case at the time such judgment was rendered and will not take notice of any facts which may have arisen subsequently, but in exceptional cases, the Court will depart from this rule specially where by so doing it can shorten litigation and best attain the ends of justice.[1] *See also* Note 4 to O. 7, R. 7, *ante* and Note 4 to R. 33, *infra.*

17. **Party on whom onus is shifted by appellate Court if entitled to let in additional evidence.**—Such a party is not entitled to let in additional evidence if he is not taken by surprise by the action of the appellate Court.[1]

18. **Second appeal.**—An order of an appellate Court admitting or rejecting additional evidence is neither a decree nor an appealable order, and hence, no appeal lies therefrom.[1] But the order can be questioned in the appeal from the appellate decree (S. 105). As regards the grounds on which such an order can be attacked, the High Court will not ordinarily interfere with the discretion of the lower appellate Court[2] in admitting[3] or refusing to admit[4] additional evidence. But an objection can be raised on the ground that

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(2) *Venkatarama Iyer* v. *Sundaram Iyer*, 1926 Jour 102 (2): 1926 Mad W N 48: 92 Ind Cas 1045; *Ram Sarup* v. *Ratan Sen*, (1916) 35 Ind Cas 239 (240) All; *Dhondo* v. *Panhalal*, (1899) 1 Bom L R 110 (112); *Parvati Shankar* v. *Bai Naval*, (1893) 17 Bom 733 (734); *Haripada Saha* v. *Deb Nath Mandal*, 1928 Cal 749 (749, 750): 110 Ind Cas 427; *Muffizuddin Bepari* v. *Jalaluddin*, 1928 Cal 748 (748): 110 Ind Cas 448; *Rajani Kanta Dey* v. *Khatir Mahomed*, 1926 Cal 897 (898): 94 Ind Cas 893; *Raja Jote Kumar Mukherjee* v. *Juda Nath Bose*, 1921 Cal 122 (123): 34 Cal L Jour 160: 26 Cal W N 1022: 64 Ind Cas 693. See *Chandra Kumar* v. *Nabi Bux*, (1918) 48 Ind Cas 959 (959) Cal; *Bejoy* v. *Jibon*, (1918) 46 Ind Cas 333 (334): 27 Cal L Jour 596; *Jadu Nath Mukerjee* v. *Hari Pada Mukerjee*, (1897) 1 Cal W N lxxx; *Gooroo Pershad* v. *Sreenath*, (1871) 15 Suth W R 314 (314); *Bansi Lal* v. *Jhamman*, 1930 Lah 441 (442): 122 Ind Cas 485; *Kachi Raghuramiah* v. *Vajjala Mahalakshmamma*, (1909) 4 Ind Cas 1062 (1062): 6 Mad L Tim 278; *Seshan Pattar* v. *Seshan Pattar*, (1900) 23 Mad 447 (448); *Rochiram Gianchand* v. *Kalachand Deumal*, 1929 Sind 159 (160): 116 Ind Cas 586; *Fida Abbas* v. *Rahim Bakhsh*, (1918) 45 Ind Cas 832 (832): 5 Oudh L J 139. See also *Chandramani* v. *Halijennessa*, (1909) 4 Ind Cas 168 (169): 9 Cal L Jour 464.

(3) *Venkamma* v. *Goparaju Perraju*, 1928 Mad 991 (992): 1928 Mad W N 164: 112 Ind Cas 1; *Mohun Munder* v. *Brij Bhukun*, (1868) 9 Suth W R 127 (129). Compare *Mallappa Chettiar* v. *Alagiri Naicker*, (1931) 60 Mad L Jour 475 (477): 1931 Mad 791: 1931 Mad W N 710: 133 Ind Cas 205.

Note 16.

(1) *Ram Ratan Sahu* v. *Mohant Sahu*, (1907) 6 Cal L Jour 74 (78): 11 Cal W N 732; *Babu Harihar Prasad Singh* v. *Gharbaran Koeri*, 1925 Pat 612 (613): 8 Pat L R 174: 88 Ind Cas 553; *Sashi Bhuson* v. *Prasulla*, (1922) 64 Ind Cas 721 (722) Cal; *Neki* v. *Chajju Ram*, (1918) 48 Ind Cas 187 (188): 111 Pun W R 1918; *James Henry George Hill* v. *Satan Singh*, (1919) 50 Ind Cas 857 (860): 4 Pat L Jour 812: 1920 Pat H C C 4.

Note 17.

(1) *Muhammad Hussain* v. *Lalji Singh*, (1914) 25 Ind Cas 648 (656, 657): 1 Oudh L J 366. See also *Punnu Ram* v. *Ghulam Hussain*, 1926 Lah 494 (495): 7 Lah 297: 27 Pun L R 463: 96 Ind Cas 680.

Note 18.

(1) *Piyari* v. *Jagannath Kuar*, (1917) 37 Ind Cas 84 (85): 3 Oudh L J 538: 19 Oudh Cas 314.

(2) *Narandi Chetty* v. *Maung Kyu*, 1897-1901 U B R 309; *Upendra Mohan* v. *Gopal Chandra*, (1894) 21 Cal 484 (486, 487); *Jitan Dusadh* v. *Jawahir Singh*, 1925 Pat 504 (504): 85 Ind Cas 459; *Kali Charan Saku* v. *Jaldahri Raut*, 1929 Pat 98 (100): 10 Pat L Tim 10: 115 Ind Cas 674; *Sewa Singh* v. *Bholi*, (1916) 36 Ind Cas 882 (883): 129 Pun Re 1916: 83 Pun L R 1917 [High Court will interfere only if the discretion has been *improperly* exercised].

(3) *Thirthamayi Dassi* v. *Atikulla*, 1927 Cal 140 (145): 98 Ind Cas 129; *Bhulan* v. *Wazir*, (1915) 27 Ind Cas 827 (828) All.

(4) *Thaman Singh* v. *Jiwan Singh*, (1931) 131 Ind Cas 228 (229): 1931 Lah 506; *Buta Singh* v. *Balwant Singh*, 1932 Lah 93 (94): 32 Pun L R 813: 136 Ind Cas 788; *Ram Lal* v. *Rang Lal*. (1872) 17 Suth W R 47 (47); *Kulpo Singh* v. *Thakoor Singh*, (1871) 15 Suth W R 429 (429); *Ram Piari* v. *Kallu*, 1900 All W N 194 (195, 196); *Golam Mukdoon* v. *Hafeezoonissa*, (1867) 7 Suth W R 489 (490); *Mohesh* v. *Shoshee*, (1866) 6 Suth W R 196 (196); *Ram Piari* v. *Kallan*, (1901) 23 All 121 (122, 123):

the lower appellate Court has admitted additional evidence in contravention of this rule[5] or has refused to exercise the discretion vested in it by that rule.[6] (Such objection being covered by S. 100.)

Additional evidence admitted in contravention of this rule should be disregarded as inadmissible.[7] But the decree should not be reversed or varied on that ground unless the decision, on the merits, has been affected thereby.[8] (*See* C.P.C., S. 99 and Evidence Act, S. 167.)

Where the lower appellate Court has admitted additional evidence, the second appeal cannot, on that account, be treated as a first appeal so as to enable questions of fact to be gone into.[9]

19. Privy Council.—There is no restriction on the powers of the Privy Council to admit additional evidence in appeals before it.[1] The rejection of an application for the admission of additional evidence does not involve any substantial question of Law within S. 110 so as to give a right of appeal to the Privy Council.[2]

20. Revision.—Where an appellate Court admits additional evidence which it is not competent to receive in accordance with the provisions of the Code, the defect in its order amounts only to an error of law, and not a want of jurisdiction and hence, no revision lies from such an order.[1]

1901 All W N 11; *Badri Das* v. *Hoshiar Singh*, 1925 All 288 (289): 6 L R All (Civ) 85: 23 All L J 193: 86 Ind Cas 761: 47 All 412; *Nayajan Ali* v. *Midnapore Zamindary Company*, 1923 Cal 285 (286): 67 Ind Cas 770; *Santa Singh* v. *Bhan Singh*, 1923 Lah 30 (31): 70 Ind Cas 880; *Bassa Chinna Reddy* v. *Gengavram Govinda Reddy*, 1927 Mad 1099 (1099): 38 Mad L Tim 24: 1927 Mad W N 68: 99 Ind Cas 669; *Badri Prasad* v. *Mukund*, 1928 Oudh 109 (111): 9 Oudh L J 605: 26 Oudh Cas 66: 75 Ind Cas 331; *Durga Prasad* v. *Jai Narain*, (1911) 9 Ind Cas 265 (266): 8 All L J 175: 33 All 379; *Vaithinatha Pillai* v. *Kuppa Thevar*, (1919) 53 Ind Cas 274 (281): 10 Mad L W 122: 37 Mad L Jour 125: 1919 Mad W N 525: 26 Mad L Tim 246: 42 Mad 737 F B.

(5) *Abdu Karrim* v. *Sri Kissen*, (1885) 11 Cal 139 (142, 143). See also *Hriday Krishna Pal* v. *Rajanikant Pal*, 1923 Cal 300 (301): 68 Ind Cas 293.

(6) *Ram Piari* v. *Kalu*, (1901) 23 All 121 (122, 123): 1901 All W N 11. See also *Jetalal* v. *Varajlal*, 1921 Bom 267 (269): 45 Bom 377: 58 Ind Cas 1004: 22 Bom L R 1012.

(7) *Manmohan Das* v. *Ram Dei*, 1931 P C 175 (177): 1931 All L J 550: 35 Cal W N 925: 34 Mad L W 7: 8 Oudh W N 936: 1931 Mad W N 931: 33 Bom L R 1251: 134 Ind Cas 669 P C; *Municipal Board, Etah* v. *Asghari Jan*, 1932 All 264 (268): 1932 All L J 117: 139 Ind Cas 804; *Kessowji Issur* v. *G I P Ry Co*, (1907) 31 Bom 381 (391): 9 Bom L R 671: 34 Ind App 115: 2 Mad L Tim 435: 11 Cal W N 721: 17 Mad L Jour 347: 6 Cal L Jour 5: 4 All L J 461 P C; *Harcharan Singh* v. *Sarup Singh*, 1930 Lah 750 (752): 126 Ind Cas 437; *Kazan Singh* v. *Pannal Lal*, (1912) 13 Ind Cas 131 (132): 9 All L J 59; *Sitti* v. *Narpet*, (1898) 1 Oudh Cas 199 (204); *Ariyamuthu Pillai* v. *Sinnia Pillai*, (1915) 28 Ind Cas 11 (11): 1 Mad L W 771: 1914 Mad W N 795; *Mahomed* v. *Ram Dial*, (1915) 28 Ind Cas 14 (15): 25 Pun L R 1915: 241 Pun W R 1915; *Ratna* v. *Harnam Singh*, (1918) 47 Ind Cas 12 (13): 150 Pun W R 1918.

(8) *Peddibotla Kameswaramma* v. *Bezwada Chelapathi*, (1915) 26 Ind Cas 50 (51): 1914 Mad W N 864; *Shah Muhammad* v. *Ramzan*, 1921 Sind 155 (157): 16 Sind L R 17: 66 Ind Cas 833; *Jagadindra Banwari* v. *Bahbatarini*, (1870) 14 Suth W R 19 (20): 5 Beng L R App 54.

(9) *Beni Prasad* v. *Nand Lal*, (1897) 24 Cal 98 (101); *Gopal Singh* v. *Jhakri Rai*, (1886) 12 Cal 37 (38); *Mahommad Kamil* v. *Abdul Luteef*, (1875) 23 Suth W R 51 (51).

Note 19.

(1) *Indrajit* v. *Amar Singh*, 1923 P C 128 (136): 21 All L J 554: 4 Pat L Tim 447: 1 Pat L R 345: 2 Pat 676: 50 Ind App 183: 25 Bom L R 1259. 28 Cal W N 277: 45 Mad L Jour 578: 33 Mad L Tim 233: 18 Mad L W 728: 4 L R P C 123: 74 Ind Cas 747: 5 L R P C 8: 39 Cal L Jour 318: 3 Pun L R 1924 P C. Compare *Gobind Sundari Debia* v. *Jagadamba Debia*, (1869) 3 Beng L R 25 P C.

(2) *Upendra Mohan* v. *Gopal Chandra*, (1894) 21 Cal 484 (486, 487).

Note 20.

(1) *Gaya Singh* v. *Name Singh*, (1920) 56 Ind Cas 983 (984): 5 Pat L Jour 263: 1 Pat L Tim 701; *Havenchal* v. *Kanhai Lal*, (1909) 4 Ind Cas 878 (880): 12 Oudh Cas 405.

O.41, R.28, Note 1.

Mode of taking additional evidence.

R. 28. [S. 569.] *Wherever* additional evidence is allowed to be *produced*, the Appellate Court may either take such evidence, or direct the Court *from* whose decree the appeal is *preferred*, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

[1877—S. 569; 1859—S. 356.]

1. **Mode of taking additional evidence.**—This rule permits the appellate Court to either take the additional evidence itself or direct the lower Court to take it.[1] The lower Court taking evidence under this rule acts in a ministerial capacity. The parties may object to the admissibility of the evidence before the appellate Court, though they may not have taken any such objection before the lower Court.[2]

Where pending proceedings for taking additional evidence before the lower Court (directed by the appellate Court) one of the parties to the appeal dies, the application for substitution of legal representatives can be entertained only by the appellate Court and not by the lower Court.[3] The appellate Court may under this rule send the case back to the first Court to have a local enquiry made.[4] (Cf. O. 41, R. 27, Note 1.).

O.41, R 29, Note 1.

Points to be defined and recorded.

R. 29. [S. 570.] Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

[1877—S. 570; 1859—S. 357.]

1. **Points to be defined and recorded.**—When additional evidence is allowed to be given this rule requires that the appellate Court should specify and record on the proceedings the points to which the evidence should be confined.[1]

Order 41, Rule 28—Note 1.

[1] *Ramjoy* v. *Puran Kishen,* 1864 Suth W R Sup No 124 (125); *Jote Kumar Mukerjee* v. *Jadu Nath Bose,* 1921 Cal 122 (123): 34 Cal L Jour 160: 26 Cal W N 1022: 64 Ind Cas 693.

[2] *Ram Joy Sarmah* v. *Parankishen Singh,* (1866) 2 Suth W R 80 (83).

[3] *Tikam Singh* v. *Likhi Singh,* 1929 All 319 (320): 115 Ind Cas 610.

[4] *Rajani Kanta Dey* v. *Khatir Mahomed,* 1926 Cal 897 (899): 94 Ind Cas 898; *Roy Sooltan* v. *Laloo Kooer,* (1872) 17 Suth W R 300 (301).

Order 41, Rule 29—Note 1.

[1] *Mohun Mundur* v. *Brij Bhookun Singh,* (1868) 9 Suth W R 127 (129).

JUDGMENT IN APPEAL.

Judgment when and where pronounced.

R. 30. [S. 571.] The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court *from* whose decree the appeal is *preferred*, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders.

[1877—S. 571; 1859—S. 349.]

Synopsis.

1. "After hearing the parties or their pleaders."
2. "In open Court, etc."

Death of party pending appeal. See Note 1, Pts. (1) and (2).

1. "**After hearing the parties of their pleaders.**"—Compare O. 20, R. 1, *ante*.

The rule authorises a judgment to be pronounced only after hearing the parties or their pleaders.[1] A judgment pronounced without hearing them is unauthorised by the Code. Hence, where, before the hearing of an appeal, a party to the appeal dies and it is heard and disposed of without his legal representatives being brought on the record, the decree is a nullity whether it is adverse to the deceased[1-a] or is in his favour.[2]

Where a party dies after the hearing but before the judgment is pronounced it is not vitiated by the absence of his legal representatives on the record. (*See* O. 22, R. 6.)

2. "**In open Court, etc.**"—Where the provisions of this rule as to the judgment being pronounced in open Court and after notice to the parties were not complied with, it was held that an appeal filed within 90 days of the appellant coming to know of the decision against him was within time and that in any case there was "sufficient cause" for the delay within the meaning of S. 5 of the Limitation Act.[1] The judgment may be given at once after the hearing is over or on some future day.[2] (*See also* Notes on O. 20, R. 1.)

Order 41, Rule 30—Note 1.

[1] *Juggessur* v. *Gopal Lall*, (1871) 15 Suth W R 54 (55, 56).

[1-a] *Janardhan* v. *Ramachandra*, (1902) 26 Bom 317 (319): 4 Bom L R 23: *Amanat Khan* v. *Miyan Khan*, (1920) 55 Ind Cas 498 (499): 7 Oudh L J 20.

[2] *Balaram Pal* v. *Kanysha*, (1919) 53 Ind Cas 548 (549) Cal. See also *Abhoya Charan* v. *Raj Kumar*, (1917) 42 Ind Cas 506 (507) Cal; *Vellaiyyan Chetty* v. *Jothi Mahalinga Iyer*, (1915) 28 Ind Cas 83 (84): 28 Mad L Jour 138: 2 Mad L W 166: 1915 Mad W N 201: 39 Mad 386; *Amanat Khan* v. *Miyan Khan*, (1920) 55 Ind Cas 498 (499): 7 Oudh L J 20

Note 2.

[1] *Lalli* v. *Sain Ditta*, (1919) 51 Ind Cas 239 (240): 27 Pun Re 1919.

[2] *Juggessur Sahoy* v. *Gopal Lall*, (1871) 15 Suth W R 54 (55).

Contents, date and signature of judgment.

R. 31. [S. 574.] The judgment of the Appellate Court shall *be in writing and shall* state—

(*a*) the points for determination;[5]

(*b*) the decision thereon;[6]

(*c*) the reasons for the decision;[7] and,

(*d*) *where* the decree appealed *from* is reversed or varied, the relief to which the appellant is entitled;[8]

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

[1877—S. 574; 1859—S. 359.]

Local Amendment.

MADRAS.

The following is substituted for O. 41, R. 31:—

31. The judgment of the Appellate Court shall be in writing and shall state—(*a*) the points for determination; (*b*) the decision thereon; (*c*) the reasons for the decision; and (*d*) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled; and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein; provided that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand-writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge.

Synopsis.

1. Object and applicability of Rule.
2. Contents of judgment of appellate Court—General.
   3. Judgment of affirmance.
   4. Judgment of reversal.
   5. Points for determination.
   6. "Decision thereon."
   7. Reasons for decision.
   8. "Where the decree appealed from is reversed, etc."—Cl. (d).
9. Summary dismissal of appeal under O. 41, R. 11.
10. Non-compliance with Rule—Effect—General.
    11. Second appeal—Maintainability of on ground of non-compliance.
    12. Non-compliance with the Rule by lower appellate Court—Procedure of High Court.
13. Appeal in proceedings under S. 476 of the Criminal Procedure Code.
14. Applicability of Rule to High Court.
15. Privy Council Appeal.

Consideration of evidence. See Notes 7 and 3, Pt. (3).

Consideration of grounds of appeal. See Note 5, Pt. (4).

1. **Object and applicability of rule.**—The objects of requiring an appellate Court to record in its judgment the particulars mentioned in this rule are twofold, namely: (*a*) to afford the parties an opportunity of knowing and understanding the grounds of the decision with a view to enable them to exercise, if they see fit and are so advised, the right of second appeal conferred

by S. 100[1] and (*b*) to enable the High Court in second appeal to Judge whether the lower appellate Court has properly appreciated the case and has decided it after applying its mind to it and considering the evidence.[2] *See also* Note 3 to O. 20, R. 3.

The provisions of this rule as also R. 30, *supra* apply also to proceedings under the Agra Tenancy Act, III of 1926, but a judgment of the Board need not be dated, signed or pronounced in open Court. *See* List II. Sch. 2 of that Act.

2. **Contents of judgment of appellate Court—General.**—A judgment of the first appellate Court must be complete and self-contained[1] and must state the points for determination, the decision thereon and the reasons for the decision.[2] Compare O. 20, R. 3.

3. **Judgment of affirmance.**—The rule makes no distinction between affirming judgments and reversing judgments, and in either case it is obligatory upon the appellate Court to comply with the requirements of the rule. Hence, where an appellate Court affirms the decision of the trial Court, a mere general expression of concurrence with the trial Court's judgment without giving any reasons, is not a sufficient judgment under the law.[1] But an affirming judg-

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Order 41, Rule 31—Note 1.

(1) *Assanullah* v. *Hafiz Mahomed Ali,* (1884) 10 Cal 932 (935); *Mi Nyin Tha Me* v. *Mi Ngo Mun Me,* (1915) 31 Ind Cas 896 (896): 9 Bur L Tim 59.

(2) *Gupta Nand* v. *Behari Lal,* 1924 All 100 (100): 21 All L J 567: 5 L R All (Civ) 21: 74 Ind Cas 827.

Note 2.

(1) *Lal Jugudish Bahadur Singh* v. *Ragho Ram,* 1926 Oudh 458 (459): 13 Oudh L J 265: 3 Oudh W N 892: 94 Ind Cas 349: 29 Oudh Cas 271.

(2) *Kuber Saithwar Ramatohal Upadhia* v. *Gupatai Saithwar,* (1916) 35 Ind Cas 237 All; *Habibullah* v. *Abdullah,* (1911) 9 Ind Cas 804 All; *Hira Rodhiani* v. *Sokhyono Pattojoshii,* (1910) 8 Ind Cas 157 (157): 8 Mad L Tim 330 [Nature of case and grounds urged in appeal to be stated]; *Periyammal* v. *Vaithilinga Udayar,* (1915) 28 Ind Cas 354 (354) Mad; *Phulraj Singh* v. *Abhilakh Singh,* 1928 Oudh 374 (375): 5 Oudh W N 689: 112 Ind Cas 845; *Nga Tun Min* v. *Nga Lu Gyi,* 1905 U B R Civ Pro 34; *My Nyin Tha Me* v. *Mi Ngo Wun Me,* (1915) 31 Ind Cas 896 (896): 9 Bur L Tim 59; *Gungaram* v. *Javahar Singh,* 1890 Pun Re No 72; *Shurbessur* v. *Sadhoo Churn,* (1875) 15 Suth W R 130 (131); *Raj Chander Burmun* v. *Rama Kant Chuckerbutty,* (1871) 15 Suth W R 324 (326).

Note 3.

(1) *Dharam Dass* v. *Shankar Ahir,* 1931 All 589 (589): 53 All 528: 132 Ind Cas 200; *Gupta* v. *Behari,* 1924 All 100 (100, 101): 21 All L J 567: 5 L R All (Civ) 21: 74 Ind Cas 827; *Baban Singh* v. *Jaimangal Singh,* 1906 All W N 86 (86); *Jaganath* v. *Surawan Dulaiya,* (1888) 8 All W N 61 (62); *Kolahal* v. *Nanku,* 1886 All W N 285 (286); *Sahawan* v. *Babu Nand,* (1887) 9 All 26 (27, 28, 31): 1886 All W N 284; *Raghubeer Sahai* v. *Chattrapat,* (1866) 1 Agra 73; *Ganapati Ram* v. *Sevakaram Mansukhram,* (1918) 46 Ind Cas 161 (161): 20 Bom L R 461; *Gundappa* v. *Lobosa,* (1899) 1 Bom L R 490 (491); *Jabbar Ali Sardar* v. *Monmohan Pandey,* 1929 Cal 110 (114): 55 Cal 1216: 49 Cal L Jour 70: 114 Ind Cas 485; *Nilmani Mondal* v. *Chekan Mondal,* 1928 Cal 408 (408): 108 Ind Cas 245 [Judgment of an appellate Court which merely affirms the decision of the lower Court without deciding questions of fact raised in the case is not a proper judgment]; *Pertap Narain* v. *Maigh Lal Singh,* (1909) 2 Ind Cas 656 (659): 36 Cal 927 (934): 13 Cal W N 949; *Saharulla Mondul* v. *Bangoo Mandul,* (1909) 2 Ind Cas 404 (404): 13 Cal W N 143; *Haimabati* v. *Govinda,* (1898) 2 Cal W N 695 (697); *Srikant Dey* v. *Hari Dasspal,* (1882) 11 Cal L Rep 131 (132); *Rohimont* v. *Zamiruddin,* (1881) 8 Cal L Rep 597 (599); *Kristo Chunder Chuckerbutty* v. *Brohmo Chuckerbutty,* (1873) 20 Suth W R 403 (404); *Hossein Buksh* v. *Ameena Khatoon,* (1871) 16 Suth W R 280 (280, 281); *Tatur Khawas* v. *Loke Nath,* (1871) 15 Suth W R 131 (132): 7 Beng L R App 14; *Adheen Misser* v. *Jograj Misser,* (1869) 11 Suth W R 312 (313); *Radha Govind* v. *Ram Kishore,* (1867) 8 Suth W R 340 (341); *Shumbhoonath* v. *Prakash,* (1867) 8 Suth W R 272 (273); *Mt Rajoo* v. *Raj Coomar,* (1867) 7 Suth W R 137 (138); *Korban Ali* v. *Ashan Ali,* (1865) 4 Suth W R 4 (4); *Bhagput Khan* v. *Puddo Bewa,* (1865) 3 Suth W R 192 (193); *Khettur Mohun Gossain* v. *Bhyrut Chunder Sheet,* (1865) 3 Suth W R 126 (126); *Khelluck Chunder* v. *Nund Ram Sein,* (1865) 2 Suth W R 7 (8); *Ommutul Patima* v. *Jonee,* (1864) 1 Suth W R 294 (296): *Harnama* v. *Ghania Lal,* 1930 Lah 152 (152): 124 Ind Cas 346; *Ram Chand* v. *Ram Rattan,* 1928 Lah 655 (657): 10 Lah L Jour 257: 112 Ind Cas 670; *Qasim Ali* v. *Hans Raj,* (1928) 112 Ind Cas 698 Lah: 1928 Notes 85 (*j*): *Mt Bhagan* v. *Buta Mal,* 1927 Lah 418 (419): 9 Lah L Jour 174: 102 Ind Cas 280: 28 Pun L R 330; *Mihan Lal* v. *Indar Singh,* 1925 Lah 246 (247): 6 Lah L Jour 506: 84 Ind Cas 946: *Mt Aisha Bibi* v. *Mt Sughra Jan,* 1923 Lah 658 (659): 75 Ind Cas 1013; *Man Singh* v. *Bhup Singh,* 1882 Pun Re No 91; *Malik Oujal Khan* v. *Sultan Muhamad,* 1873 Pun Re No 49; *Jey Gobind* v. *Ram Pershad,* 1870 Pun Re No 6; *Sri Renganatha Thatha-*

O.41, R.31, Notes 3—4. ment need not enter into detailed reasons to the *same extent* as a judgment of reversal.[2] Further, where the case is comparatively a simple one, and the trial Court has dealt with it fully and accurately, and it is evident from the appellate Court's judgment, that it has appreciated the case properly and has decided it after considering the evidence, the mere fact that it has not repeated the reasons given by the trial Court which it approves of, does not vitiate the judgment.[3] *See also* Note 10, *infra*.

4. **Judgment of reversal.**—It is specially important that an appellate judgment reversing the judgment of the lower Court should be adequate and satisfactory.[1] It must contain definite findings on the questions involved[2] and must give reasons for reversing the decision of the trial Court.[3] It must

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chariar v. *Veeravalli Rajagopalachariar*, 1928 Mad 16 (17); *Abbas Ali* v. *Kaliki Runga Reddi*, (1912) 16 Ind Cas 382 (383) Mad; *Chikkanna Chetty* v. *Chinnathoyeeammal*, (1912) 16 Ind Cas 354 (355) Mad; *Hira Rodhiami* v. *Sokyono Patto Joshi*, (1910) 8 Ind Cas 157 (157): 8 Mad L Tim 380; *Saravana Pillai* v. *Sesha Reddi*, (1908) 31 Mad 469 (470): 3 Mad L Tim 71: 18 Mad L Jour 34 F B; *Sitarama Sastrulu* v. *Suriyanarayana Sastrulu*, (1899) 22 Mad 12 (13): 8 Mad L Jour 183; *Krishna Reddi* v. *Srinivasa Reddi*, (1869-70) 5 Mad H C R 174 (175); (1868-69) 4 Mad H C R lvi; *Phulraj Singh* v. *Abhilath Singh*, 1928 Oudh 374 (375): 5 Oudh W N 689: 112 Ind Cas 845 [Though nothing is shown to prove the judgment of the lower Court to be wrong simply dismissing appeal not legal]: *Anandpal Singh* v. *Mahabal Singh*, 1927 Oudh 95 (96): 29 Oudh Cas 330: 3 Oudh W N 352: 95 Ind Cas 925: 13 Oudh L J 586: 1 Luck 458; *Baij Nath* v. *The Kayastha Patshala*, (1919) 49 Ind Cas 56 (56): 21 Oudh Cas 309; *Jagan Nath* v. *Bindeshwari Prasad*, (1917) 37 Ind Cas 435 (435, 436): 3 Oudh L J 620; *Beni Madho* v. *Ram Harakh*, (1914) 25 Ind Cas 596 (596): 1 Oudh L J 334; *Surji Singh* v. *Kurwar Durga Prasal*, (1905) 8 Oudh Cas 290 (292); *Sakalbati Misrain* v. *Munshi Munder*, (1919) 49 Ind Cas 733 (733); *Maung Yar Wee* v. *N N Firm*, 1927 Rang 208 (208): 6 Bur L Jour 82: 103 Ind Cas 766; *Maung Pu* v. *Ma Gyauk Thay*, (1912) 17 Ind Cas 898 (899): 5 Bur L Tim 269; *Mg Po* v. *Ramanatha*, (1911) 11 Ind Cas 915 (915): 4 Bur L Tim 201; *Maung Kyaw Zan Hla* v. *Maung San Nyun*, 14 Bur L Rep 156; *Kanusawmy Pillai* v. *Maung Chit Pu*, (1900-02) 1 L B R 204: *U Bein* v. *Aretche Chetty*, 1893-1900 Vol II, L B R, p 590.

(2) *Mahomed Husan* v. *Rabia Khatan*, 1923 Cal 163 (163, 164): 68 Ind Cas 467; *Mahendra* v. *Asutosh*, 1926 Cal 545 (545): 91 Ind Cas 478.

(3) *Rohimoni* v. *Zumirudin*, (1882) 8 Cal L Rep 597 (599); *Mahendra Nath* v. *Asutosh*, 1926 Cal 545 (545): 91 Ind Cas 478; *Surja Coomar Roy Chowdhry* v. *Kamakhya Charan Chatterji*, 1927 Cal 323 (324): 97 Ind Cas 760; *Muhamed Hossain* v. *Rabia Khatun*, 1923 Cal 163 (163, 164): 68 Ind Cas 467; *Rajendra Narain Saha* v. *Ashutosh Sanyal*, (1912) 13 Ind Cas 194 (196) Cal; *Imirit Lall Thakoor* v. *Nuckshed Suhaye*, (1868) 10 Suth W R 100 (101): 1 Beng L R A C 68; *Tatur Khawas* v. *Lokenath*, (1871) 15 Suth W R 131 (132): 7 Beng L R App 14; *Khethur Mohan* v. *Bhyrub Chunder*, (1865) 3 Suth W R 126 (126); *Shah Ekbal Hossein* v. *Bunsee Sahoo*, (1876) 25 Suth W R 12 (13); *Shumshuroddy* v. *Jan Mahomed*, (1874) 21 Suth W R 260 (260, 261); *Doolee Chund* v. *Oomda Begum*, (1872) 18 Suth W R 473 (473); *Juggessur* v. *Gopal*, (1871) 15 Suth W R 54 (55); *Kulumutee Koer* v. *Jowahur Lall*, (1869) 11 Suth W R 318 (319); *Ganapathi Ram* v. *Sevakram Mansu Kharn*, (1918) 46 Ind Cas 161 (161, 162): 20 Bom L R 461; *Zahid Ali* v. *Shahr Banu*, 1928 Oudh 480 (480): 5 Oudh W N 893; *Jagadamba Prasad Lala* v. *A V Sham*, (1919) 49 Ind Cas 504 (507): 1919 Pat H C C 88; *Pollard* v. *Muhammad Sadik*, 1886 Pun Re No 28. See also *Sunder Bibi* v. *Bisheshar Nath*, (1887) 9 All 93 (95): 1886 All W N 302 [Judgment of High Court].

Note 4.

(1) *Bibi Saleha* v. *Antu Ram*, (1918) 43 Ind Cas 973 (975) Pat; *Basrat Ali* v. *Mahomed Roshain*, (1910) 7 Ind Cas 421 (421) Cal; *Suttroghur* v. *Manick Ram Gangooly*, (1864) 1 Suth W R 199 (199) [Appellate Court cannot decide the case upon a mere allegation in the plaint disregarding the evidence]. *See also* the cases cited in Note 3, F-N 2.

(2) *T S Palaniappa Mudaliar* v. *Syed Gulam Ghouse Madni Sahib*, 1928 Mad 489 (490): 1928 Mad W N 98: 110 Ind Cas 21; *Basarat Ali* v. *Mahomed Roshan*, (1910) 7 Ind Cas 421 (421) Cal; *Hari Kishen* v. *Raghuban Dayal*, 1926 Oudh 578 (587): 3 Oudh W N 645: 97 Ind Cas 853: 13 Oudh L J 696.

(3) *Rai Mohan* v. *Horendra*, (1920) 56 Ind Cas 816 (817, 818) Cal; *Ram Rangini Chandra Chowdhrani* v. *Chandra Benode*, (1897) 1 Cal W N 691 (692); *Mahadev Ojha* v. *Parameswar Pandey*, (1869) 2 Beng L R 20 (a); *Kartick* v. *Personomoyee*, (1865) 2 Suth W R 77 (77); *Imirit Singh* v. *Koylashoo*, (1869) 11 Suth W R 559 (560); *Hoynobutty* v. *Sreekissen*, (1870) 14 Suth W R 58 (59); *Munsoob Bibi* v. *Ali Meah*, (1872) 17 Suth W R 357 (358); *Kristo Chunder* v. *Ram Brohmo*, (1873) 20 Suth W R 403 (404); *Shaikh Mahomed* v. *Nusseerooddeen*, (1874) 21 Suth W R 284 (285); *Nobin* v. *Bungochunder*, (1876) 25 Suth W R 363 (364); *Gopee Nath* v. *Bodhumint*, (1876) 25 Suth W R 26 (27) [Question of simple credit to be given to a witness opinion of Court of first instance not to be lightly disturbed]; *Anisul Fatwa* v. *Mt Chando*, (1871) 8 Beng L R App 3; *Hargobind Singh* v. *Kishun Dayal Gope*, 1926 Pat 436 (438): 95 Ind Cas 966: 7 Pat L Tim 671; *Bhikhu* v. *Bhikebakar*, 1923 Pat 275 (276): 2 Pat L R (Civ) 32: 75 Ind Cas 780; *Genga Ram Rai* v. *Sheikh Maula Baksh*, (1916) 34 Ind Cas 185 (185) Pat; *Madhav* v. *Venkatesh*, (1892) 16 Bom 540 (545); *Habib Ullah Shah* v. *Bakhat Bali Singh*, (1915) 30 Ind Cas 292 (293): 2 Oudh L J 299; *Moung Nge* v. *Maung Lal*, 1872-1892 L B R Vol II, p 653.

See the following cases showing that there is a prima facie presumption in favour of the correctness of the lower Court's judgment:—*Tah-*

come into close quarters with the judgment appealed from,[4] and must express an opinion on all the points on which the lower Court has based its conclusions.[5] It has, however, been held in the cases cited below[6] that it is not necessary for an appellate Court when reversing the decision of the trial Court, to meet the reasons given by such Court, and that it is enough if the appellate Court gives its own reasons for its own decision.

5. **Points for determination.**—This rule requires the appellate Court to state in its judgment the points that arise for determination.[1] These points must cover all the important questions involved in the case[2] and must not be general and vague.[3] The object of the legislature in making it incumbent on an appellate Court to raise points for determination, is to clear up the pleadings, and focus the attention of the Court and of the parties, on the specific and rival contentions of the parties.[3-a] But an appellate Court is not bound to decide a point which although taken in the grounds of appeal, has been abandoned[4] or is not urged at the hearing of the appeal.[5] Similarly, a new

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boonissa v. *Sham Kishore*, (1871) 15 Suth W R 228 (229): 7 Beng L R 621; *Shetabdee* v. *Molamdee*, (1876) 25 Suth W R 80 (31); *Naba Kishore* v. *Upendra Kishore*, 1922 P C 39 (40): 20 All L J 22: 35 Cal L Jour 116: 42 Mad L Jour 253: 1922 Mad W N 95: 65 Ind Cas 305: 26 Cal W N 322: 3 Pat L Tim 311: 24 Bom L R 346: 15 Mad L W 417: 30 Mad L Tim 234 P C; *Fakrunissa* v. *Izarus Sadik*, 1921 P C 55 (56): 25 Cal W N 866: 17 Nag L R 72: 63 Ind Cas 898 P C; *Wise* v. *Sunduloonissa*, (1867) 11 Moo Ind App 177 (181): 7 Suth W R P C 13: 1 Suther 667: 2 Sar 249 P C.

(4) *Shahabuddin* v. *Vilayat Ali Khan*, 1926 Nag 435 (439): 95 Ind Cas 614; *Dattatraya* v. *Amrit*, 1926 Nag 55 (56): 89 Ind Cas 763.

(5) *Wise* v. *Sunduloonissa*, (1866-67) 11 Moo Ind App 177 (188): 7 Suth W R P C 13: 1 Suth 667: 2 Sar 249. *Shathuk* v. *Gudadhur*, (1865) 4 Suth W R 100 (100).

(6) *Indrabate* v. *Mahadev*, (1868) 1 Beng L R S N 2 (c); *Jatindra Mohan Nandi* v. *Pitambar Mistri*, (1914) 25 Ind Cas 543 (544): 19 Cal L Jour 385; *Krishendro Roy* v. *Digumburee*, (1871) 16 Suth W R 15 (16); *Dabee Pershad* v. *Joy Lall Chowdhry*, (1869) 12 Suth W R 361 (362); *Golam Hossein* v. *Ram Doyal*, (1869) 12 Suth W R 152 (152); *Shumshurooddy* v. *Jan Mahammad*, (1874) 21 Suth W R 260 (260, 261) [First Court believing defendant's witnesses—Appellate Court believing plaintiff's witnesses. No reasons necessary to be given].

Note 6.

(1) *Govind Datta* v. *Yesuji Khandoji*, (1908) 10 Bom L R 492 (494); *Dhun Rae* v. *Ramphul*, (1870) 2 N W P 109.

(2) *Jabbar Ali Sardar* v. *Monmohan Pandey*, 1929 Cal 110 (114): 55 Cal 1216: 45 Cal L Jour 70: 114 Ind Cas 485; *Lachho* v. *Hari Sahai*, (1890) 12 All 46 (49): 1888 All W N 43; *Lachman Das* v. *Sadhu*, 1926 Lah 351 (352): 93 Ind Cas 829 [Lower appellate judgment dealing with part only of subject-matter—Remand should be ordered]; *Nather Bai* v. *Bai Honsguari*, (1915) 15 Ind Cas 818 (818): 14 Bom L R 418: 36 Bom 379; *Ram Nath* v. *Natabar Maiti*, (1918) 46 Ind Cas 328 (329) Cal; *Narayan Prasad* v. *Gajo Mahton*, (1917) 42 Ind Cas 838 (839): 2 Pat L W 181: 2 Pat L Jour 701; *Palaniandy* v. *Kambaraya*, (1914) 24 Ind Cas 87 (88): 1 Mad L W 416; *Bhiwani Das* v. *Jhanda Ram*, (1914) 23 Ind Cas 352 (352): 4 Pun W R 1914: 27 Pun L R 1914; *Johri* v. *Jowahra*, (1919) 58 Ind Cas 67 (68): 91 Pun L R 1919; *Sagar Nath* v. *Rukhal*, (1910) 7 Ind Cas 912 (913) Cal [Finding of fact without considering the material questions involved therein is not conclusive in second appeal]; *Mangru Rai* v. *Bishundial Rai*, 1884 All W N 99 (99); *Harisadhan Patari* v. *Dinnanath Banerjee*, 1925 Cal 316 (317): 82 Ind Cas 318.

(3) *Soharan* v. *Babu Nand*, (1887) 9 All 26 (31, 32): 1886 All W N 284 [Not sufficient to state, "the point to be determined on appeal is whether or not the decision is consistent with the merits of the case"]; *Mhasu Bhauji* v. *Davalat*, (1905) 7 Bom L R 174 (175) [Has lower Court erred in holding that land at *D* was not liable to plaintiff's claim? This is not sufficient].

(3-a) *Mhasu Bhauji* v. *Davalat*, (1905) 7 Bom L R 174 (174).

(4) *Mariam Begum* v. *Syed Mohammad*, (1900) 3 Oudh Cas 279 (280). See also *Muhammad Aslam* v. *F Mehr Singh Attar Singh*, 1927 Lah 768 (769): 9 Lah L Jour 309: 28 Pun L R 339: 102 Ind Cas 841 [Appellate judgment silent as to certain points in the grounds—Presumption is that they were abandoned]; *Korban Ali* v. *Makbul*, (1919) 50 Ind Cas 743 (744) Cal [A statement in a judgment that a point is not seriously pressed in the first Court must be taken to be proof of its having been abandoned]; *Ponnusamy Pillai* v. *Pasupathy Mudaliar*, (1910) 5 Ind Cas 813 (814) 7 Mad L Tim 106 [No issue is raised on a point covered by the pleadings—Parties must be presumed to have given up the point].

(5) *Biswanath Singh* v. *Jugal Kishore*, 1923 P C 90 (92): 18 Mad L W 88: 45 Mad L Jour 215: 73 Ind Cas 244: 26 Oudh Cas 228: 50 Ind App 179: 1923 Mad W N 620: 38 Cal L Jour 299: 33 Mad L Tim 289: 10 Oudh L J 379: 28 Cal W N 790 P C; *Kali Charan Singh* v. *Bageshara Kunwari*, 1925 All 585 (586): 23 All L J 653: 89 Ind Cas 374: 47 All 929. See *Yousuf Ali* v. *Fyzoonnissa*, (1871) 15 Suth W R 296 (297) [The fact that appellate Court's judgment does not refer to a certain point is *prima facie* proof that it was not pressed]. See also *Chandra Nath Misser* v. *Sirdar Khan*, (1872) 18 Suth W R 218 (221) [Objection as to value and maintainability of appeal taken after argument was over].

O.41, R.31,
Notes
5—7.

point[6] or a point not raised by the parties[7] or not necessary for the disposal of the appeal,[8] need not be decided.

6. "**Decision thereon**".—There must be a finding on each point raised for determination,[1] and it must be definite,[2] especially on questions of fact.[3]

7. **Reasons for decision.**—*See also* O. 20, R. 3, *ante.*

Under this rule, the appellate Court must state in its judgment the reasons for its decision.[1] It must set forth the evidence relied upon[2] and must come to its own independent conclusion on a *consideration of such evidence.* It must not proceed on the assumption that it is, in any way, bound by the views of the trial Court, though it must not forget that the trial Court has had the opportunity of watching the demeanour of the witnesses in Court.[3] A mere statement that a point is proved or not proved,[4] or that counsel admits that certain evidence is the best evidence,[5] or that the arguments of plaintiff's counsel represent the correct view of the case,[6] or that a point is absurd, or ridiculous, or worthless,[7] is not a proper judgment. Nor should the judgment

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(6) *Deokram* v. *Debi Chand,* 1923 Lah 259 (259): 5 Lah L Jour 97: 73 Ind Cas 817.

(7) See *Kalyan Das* v. *Maqbul Ahmad,* (1918) 46 Ind Cas 548 (551): 22 Cal W N 866: 16 All L J 693: 5 Pat L W 159: 35 Mad L Jour 169: 28 Cal L Jour 181: 8 Mad L W 179: 1918 Mad W N 535: 24 Mad L Tim 110: 20 Bom L R 864: 40 All 497: 1918 P C 53 P C; *Mt Ritooraj* v. *Gojagur Singh,* (1871) 15 Suth W R 227 (227).

(8) *Ismail Khan Muhammad* v. *Hari Charan Pal,* (1905) 9 Cal W N 60 (69).

Note 6.

(1) *Jagannath* v. *Rambharosa,* 1933 P C 33 (35): 37 Cal W N 321: 64 Mad L Jour 142: 1933 Mad W N 117: 141 Ind Cas 520: 35 Bom L R 230: 16 Nag L J 50: 57 Cal L Jour 51 P C; *Sookh Raj* v. *Tuffazool,* (1865) 2 N W P 142.

(2) *Jugdeo Narain Singh* v. *Bhagwan Mahto,* (1920) 54 Ind Cas 672 (672): 1 Pat L Tim 27 [It is not sufficient to say "There is much force in the contention"]; *Maung Shwe Hmon* v. *Maung Aung Ban,* (1893-1900) L B R Vol II, p 1.

(3) *Hasmatullah* v. *Harimohan Sarma,* (1916) 34 Ind Cas 942 (945) Cal.

Note 7.

(1) *U Pa* v. *Mya Myaing,* 1893-1900 L B R Vol II, p 343; *Anandpal Singh* v. *Mahabal Singh,* 1927 Oudh 95 (96): 29 Oudh Cas 330: 3 Oudh W N 352: 95 Ind Cas 925: 13 Oudh L J 586: 1 Luck 458; *Habib Ullah Shah* v. *Bakht Bali Singh,* (1915) 30 Ind Cas 292 (293): 2 Oudh L J 299; *Imrit* v. *Koyalshoo,* (1869) 11 Suth W R 559 (560); *Hossein Buksh* v. *Ameena Khatoon,* (1871) 16 Suth W R 280 (280, 281); *Sheoambar Singh* v. *Lallu Singh,* 9 All 30-N (31-N): 1882 All W N 158 [Saying that a suit is a bit of wanton litigation is not enough]; *Mehnga* v. *Mihan Singh,* (1917) 42 Ind Cas 244 (244): 87 Pun L R 1917: 83 Pun W R 1917 [Suit not to be dismissed on ground that it related to a worthless piece of land].

(2) *Santishwar* v. *Lakhikanta Mahant,* (1909) 1 Ind Cas 321 (322): 35 Cal 818: 3 Cal W N 177: 5 Mad L Tim 89; *Trilochun* v. *Inshur Chunder,* (1865) 3 Suth W R 176 (177); *Upendra Nath* v. *Adhar Chandra,* (1921) 68 Ind Cas 436 (437).

(3) *The Glannibanta,* (1876) 1 P D 283 (287): 34 L T 934: 24 W R 1033 (C A); *Bigsby* v. *Dickinson,* (1876) 4 Ch D 24 (29): 46 L J Ch 280: 35 L T 679: 25 W R 89 (122) (C A); *Sarodasoondery* v. *Tincowry Nundy,* (1862) 1 Hyde 223; *Mahadeo* v. *Sarju,* 1886 All W N 171 (171); *Bharat Bhai* v. *Jai Narain,* 1928 All 102 (103): 25 All L J 1102: 108 Ind Cas 129; *Sitarama* v. *Suryanarayana,* (1899) 22 Mad 12 (13): 8 Mad L Jour 183; *Kirani* v. *Subabhat,* (1884) 8 Bom 28 (30); *Kanhaiya* v. *Asimullah,* 1922 Oudh 122 (123): 25 Oudh Cas 69; *Maung Pu* v. *Ma Gyank,* (1912) 17 Ind Cas 898 (899): 5 Bur L Tim 269; *N L C N Chakappa Chetty* v. *Maung Shwe Pa,* 1893-1900 L B R Vol II, p 64; *Dina Nath Law* v. *Metharam Navalrai,* (1921) 64 Ind Cas 785 (794): 33 Cal L Jour 577; *Lallah Jha* v. *Mt Bibee Tullebmatool Zuhra,* (1874) 21 Suth W R 436 (437); *Doibo Chunder Roy* v. *Wooma Moyee Debia,* (1873) 19 Suth W R 321 (321). See also *Nand Lal Chaube* v. *Kesho Prasad Singh,* 1924 Pat 245 (247, 248): 1923 Pat H C C 339: 78 Ind Cas 593 [Several suits disposed of by common judgment—Appellate Court should consider evidence in each case separately]. But see *Heera Loll* v. *Mohesh Chunder,* (1862) 1 Hyde 105.

(4) *Karim Baksh* v. *Lucas,* (1898) 2 Cal W N cccxxxix (cccxl); *Assanullah* v. *Hafiz Mahomed Ali,* (1884) 10 Cal 932 (935); *Ningappa* v. *Shivappa,* (1895) 19 Bom 323 (326, 327); *Lalloo Singh* v. *Thabal Gope,* (1917) 38 Ind Cas 814 (814): 1 Pat L W 193; *Mubarak Hussain* v. *Shah Ahmed Hussain,* (1917) 38 Ind Cas 509 (510): 1 Pat L W 186; 2 Pat L Jour 8: 1917 Pat H C C 308; *Ganga Ram Rai* v. *Sheikh Maula Baksh,* (1916) 34 Ind Cas 185 (185) Pat; *Mangar Singh* v. *Babu Bharat Prasad,* (1919) 51 Ind Cas 46 (46) Pat.

(5) *Kuber Saithwar Ram Thal Upadhia* v. *Gupati Saithwar,* (1916) 35 Ind Cas 237 (237) All.

(6) *Balwant Singh* v. *Baldeo Singh,* 1921 Lah 119 (120): 2 Lah 271: 64 Ind Cas 929.

(7) *Hem Chunder* v. *Ahmed Reza,* (1863) Marsh 332: 2 Hay 429; *Kanusami Pillai* v. *Maung

be based on mere conjectures and presumptions[8] or on evidence not legally admitted.[9]

But the whole evidence on the record need not be reviewed. It is enough if the evidence discussed is reasonably adequate for a proper decision of the case.[10] Nor is it necessary to discuss a document not brought to the notice of the appellate Court.[11]

In the undermentioned case[12] it was remarked by Markby, J., that reasons in S. 359 of the Code of 1859 (now O. 41, R. 31) meant not the reasons for any conclusion of fact, but reasons showing the points of fact or of law upon which the decision runs. Having regard to the foregoing discussion this view seems to be wrong.

Where a judgment does not discuss a document of obvious importance, it may be presumed that the Court has not considered it.[13]

8. **"Where the decree appealed from is reversed, etc.", Cl. (d).**—Where an appellate Court reverses or modifies the decree appealed from, it must specify in its judgment the *relief* to which the appellant is entitled: it is not enough merely to say, that the appeal is decreed, or that the decree is reversed.[1] Where the conclusions in the appellate judgment differ in important points from those of the trial Court, the appellate Court must specify in its decree the modifications necessitated by its conclusions.[2]

9. **Summary dismissal of appeal under O. 41, R. 11.**—There is a conflict of decisions as to the applicability of this rule to cases of summary dismissal of an appeal under R. 11, *ante*. On the one hand it has been held by High Courts of Calcutta,[1] Madras,[2] Allahabad,[3] Rangoon,[4] the Chief Court of

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Ohn Pu, 1902 L B R 204; *Hossein Buksh* v. *Ameena Khatoon*, (1871) 16 Suth W R 280 (281); *Juggissuree* v. *Gudadhur*, (1866) 6 Suth W R Act X 21 (21).

(8) *Bhagwan Das* v. *Shamsher Singh*, (1918) 44 Ind Cas 433 (434): 55 Pun W R 1918: 33 Pun L R 1918; *Johari* v. *Jowhara*, (1919) 58 Ind Cas 67 (68): 91 Pun L R 1919.

(9) *Juggernath* v. *Kanai Das*, (1901) 6 Cal W N 31 (32); *Kali Sahu* v. *Kedar Mal*, (1917) 38 Ind Cas 561 (562).

(10) *Noor Muhammad* v. *Zuhoor Ali*, (1869) 11 Suth W R 34 (34).

(11) *Ram Udit* v. *Bisheshwar*, (1920) 54 Ind Cas 353 (355): 6 Oudh L J 551: 22 Oudh Cas 312: 2 U P L R (Oudh) 22.

(12) *Ramessur* v. *Sheikh Bhanoo*, (1869) 12 Suth W R 272 (272).

(13) *Ram Udit* v. *Bisheshwar*, (1920) 54 Ind Cas 353 (355): 6 Oudh L J 551: 22 Oudh Cas 312: 2 U P L R (Oudh) 22. But see *Motiwar Rasuk* v. *Dhanu Molla*, (1921) 59 Ind Cas 963 (964) Cal.

Note 8.

(1) *Hursarun* v. *Pursun Singh*, (1870) 2 N W P 415; *Bell* v. *Guru Dass*, (1868) 1 Beng L R (A C) 50.

(2) *Lacho* v. *Har Sahai*, (1887) 12 All 46 (48): 1888 All W N 43.

Note 9.

(1) *Rami Deka* v. *Brojo*, (1897) 25 Cal 97 (98): 1 Cal W N 692; *Surendra Nath* v. *Raghunath*, 1923 Cal 558 (558): 27 Cal W N 501: 76 Ind Cas 1052; *Bipin Behari Chattopadhya* v. *Jogendra Nath Bandophadhya*, (1922) 65 Ind Cas 479 (480) Cal; *Hari Dasi Devi* v. *Gadadar Roy*, 1926 Cal 992 (992): 96 Ind Cas 136: 43 Cal L Jour 499. But see *Pachi Dasi* v. *Bala Das*, (1909) 2 Ind Cas 405 (406, 407, 408): 13 Cal W N 1031 [Dismissal of appeal under S 551—Whether judgment should be written Cox, C J—No. Richardson, J—Yes].

(2) *Rayal Reddi* v. *Linga Reddi*, (1881) 3 Mad 1 (2): 5 Ind Jur 518.

(3) *Durga Thathera* v. *Narain Thathera*, 1931 All 597 (599): 1931 All L J 875 F B [Overruling *Samin Hasan* v. *Piran*, 30 All 319]; *Dharam Dass* v. *Shankar Ahur*, 1931 All 589: 53 All 528: 132 Ind Cas 200 (200).

(4) *Mg Saw* v. *Maw Buin Byu*, 1926 Rang 129 (131): 4 Rang 66: 5 Bur L J 60: 95 Ind Cas 881; *Maung Yar Wee* v. *N N Firm*, 1927 Rang 208 (208): 6 Bur L Jour 82: 103 Ind Cas 766. But see *Nga San Baw* v. *Nga Lu E*, (1916) 33 Ind Cas 666 (667, 668): 1915 U B R 11, 92 [Rule does not apply in entirety. But judgment must at least show that judge has understood case].

O. 41, R. 31, Notes 9—10.

Punjab[5] and the Judicial Commissioner's Court of Oudh,[5-a] that the rule applies to such cases and the appellate Court is not exempt from writing a judgment in the manner prescribed by R. 31. In the special circumstances of any case, however, a short judgment merely expressing concurrence with the views of the lower Court without entering into reasons may be held sufficient.[6] On the other hand, it has been held by the Judicial Commissioner's Court of Nagpur[7] and Sind[8] that the rule does not apply and that the appellate Court is not bound to write a formal judgment in such cases. The Bombay High Court inclines to the latter view[9] but holds that under Civil Circular No. 51 of 1890 of that Court issued under the Indian High Courts Act, appellate Courts are bound to comply with the requirements of R. 31 even in cases falling under R. 11.[10]

10. Non-compliance with Rule—Effect—General.—This rule is imperative and a judgment which is not in accordance with it, is not one according to law.[1] But a substantial compliance with the rule is enough. What is substantial compliance depends on the facts and circumstances of each case.[2] The important point is that it must be evident from the judgment of the appellate Court that it has properly appreciated the case, has applied its mind to it and has decided it after considering the evidence on the record.[3] If the judgment satisfies this requirement, the appellate Court will be deemed

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(5) *Jiwan* v. *Dhir Singh*, 1879 Pun Re No 100; *Suba* v. *Karam*, 1875 Pun Re No. 45; *Badruddin* v. *Fatteh Muhammad*, 1881 Pun Re No 24; *Khushala* v. *Khushwaqt Rai*, 1888 Pun Re No 7.

(5-a) *Pandit Maiku Lal* v. *Mussammat Gulkandi*, (1906) 9 Oudh Cas 32 (32).

(6) *Pachi Dasi* v. *Bala Das*, (1909) 2 Ind Cas 405 (407, 408): 13 Cal W N 1031; *Rakal Chander Tewari* v. *Satindra Deb Rai*, (1907) 5 Cal L Jour 348 (349). See also *Surendra* v. *Raghunath*, 1923 Cal 558 (558): 27 Cal W N 501: 76 Ind Cas 1052.

(7) *Mt Gawrajabai* v. *Hariram*, 1929 Nag 68 (69): 25 Nag L R 55: 115 Ind Cas 168.

(8) *Abdul Rahim* v. *Khanumal*, (1910) 8 Ind Cas 941 (941): 4 Sind L R 184.

(9) *Tanaji Dagde* v. *Shankar Khasam*, (1911) 12 Ind Cas 564 (566): 13 Bom L R 1002: 36 Bom 116. See also *Hanmat Rukhmanji* v. *Annaji Hanmant*, (1913) 20 Ind Cas 966 (967): 15 Bom L R 765: 37 Bom 610 F B; *Puttappa* v. *Yellappa*, (1903) 5 Bom L R 233 (233); *Takhastsanaji* v. *Bai Sundarabai*, 1891 Bom P J 58 (58); *Narayan* v. *Lala*, 1894 Bom P J 113 (113). But see *Raghunath Gopal* v. *Nilu Nathaji*, (1885) 9 Bom 452 (453, 454) [Rejection of appeal as time-barred—Circumstances showing reasonable cause for delay pleaded—Reasons for rejection of appeal must be given]; *Khusal* v. *Supdu*, 1891 Bom P J 239 (239) [But if appellant not prejudiced appellate decree not to be reversed].

(10) *Hanmat Rukhmanji* v. *Annaji Hanmant*, (1913) 20 Ind Cas 966 (967): 15 Bom L R 765: 37 Bom 610 F B.

Note 10.

(1) *Sohawan* v. *Babu Nand*, (1887) 9 All 26 (27, 28, 31): 1886 All W N 284; *Mahadeo* v. *Sarju*, (1886) 6 All W N 171 (172); *Nivath* v. *Bhikki*, (1885) 7 All 649 (656): 1885 All W N 151: 10 Ind Jur 84; *Umed Ali* v. *Salima Bibi*, (1884) 6 All 383 (385): 1884 All W N 127; *Surji Singh* v. *Kunwar Durga Prosad*, (1905) 8 Oudh Cas 290 (292); *Lakhambai* v. *Devibai*, (1921) 59 Ind Cas 678 (674): 14 Sind L R 132; *Kolahal* v. *Nanku*, 1886 All W N 285 (286); *Harnandan Misr* v. *Sheo Ghulam Misser*, 1889 All W N 178 (179); *Jagannath* v. *Sarawan*, 1888 All W N 61 (62); *Mahadeo* v. *Sarju*, 1886 All W N 171 (171, 172); *Bhikhu* v. *Bhikehakar*, 1923 Pat 275 (276): 2 Pun L R (Civ) 32: 75 Ind Cas 780; *Shaharulla Mondal* v. *Bangoo Mondal*, (1909) 2 Ind Cas 404 (404): 13 Cal W N 143; *Gupta Nand* v. *Behari Lal*, 1924 All 100 (100, 101): 21 All L J 567: 5 L R All (Civ) 21: 74 Ind Cas 827.

(2) *Mahamed Hussain Chaudhry* v. *Babia Khatun*, 1923 Cal 163 (163, 164): 68 Ind Cas 467; *Gangaram Rai* v. *Moula Baksh*, (1916) 34 Ind Cas 185 (185) Pat; *Durga* v. *Narain*, 1931 All 597 (600): 1931 All L J 875 F B; *Shumshuroody* v. *Jan Mahomed Sikdar*, (1874) 21 Suth W R 260 (260, 261).

(3) *Surja Kumar Roy Chaudhry* v. *Kamakhya Charan Chatterji*, 1927 Cal 323 (324): 97 Ind Cas 760; *Mahendra Nath Bhunia* v. *Ashutosh Pradhan*, 1926 Cal 545 (545): 91 Ind Cas 478; *Lalloo Singh* v. *Tahbal Gope*, (1917) 38 Ind Cas 814 (814): 1 Pat L W 193; *Ladha Ram* v. *Gurdas*, (1916) 36 Ind Cas 6 (7): 108 Pun L R 1916: 132 Pun W R 1916; *Beni Madho* v. *Ram Harakh*, (1914) 25 Ind Cas 596 (596): 1 Oudh L J 334; *Krishnendro Roy* v. *Digumburee Debia*, (1871) 16 Suth W R 15 (16); *Chunder Kant* v. *Hurish Chunder*, (1864) 1 Suth W R 214 (215); *Rangu Mandal* v. *Chatternath Chowdhury*, (1919) 51 Ind Cas 11 (12) Pat; *Jagdamba* v. *Sham*, (1919) 49 Ind Cas 504 (507): 1919 Pat H C C 88; *Harisadhan Patari* v. *Dinanath Banerjee*, 1925 Cal 316 (317): 82 Ind Cas 318; *Mathra Dass* v. *Muharram Din*, (1915) 27 Ind Cas 561 (562): 4 Pun W R 1915: 36 Pun L R 1915; *Maula Dad* v. *Begam*, (1919) 51 Ind Cas 751 (752): 100 Pun W R 1919: 100 Pun L R 1919; *Baldeo Ram* v. *Kunkun Ram*, 1925

O.41, R.31, Notes 10—12.

to have substantially complied with the rule, and its judgment will not be interfered with merely because it does not strictly fulfil the formalities laid down therein.[4]

11. Second appeal—Maintainability of, on ground of non-compliance.—A second appeal will lie on the ground that the judgment of the lower appellate Court does not substantially comply with this rule, and is therefore not a judgment according to law.[1] A contrary view has, however, been taken in some cases, on the ground, that the non-compliance with this rule cannot be considered to be an irregularity which may possibly have affected the decision on the merits within S. 100, Cl. (*c*).[2] This view is against the general trend of opinion. Further, at least some of the cases[3] laying down the view are cases in which the non-compliance with the rule was not of a substantial nature.

Findings of fact of the lower appellate Court for which reasons are not given are not conclusive in second appeal.[4]

12. Non-compliance with the rule by lower appellate Court—Procedure of High Court.—Where the lower appellate Court has not substantially complied with this rule, the High Court may reverse the decree and remand the case for disposal according to law.[1] It has however been held in the cases

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All 808 (809): 6 L R All (Civ) 393: 88 Ind Cas 586; *Habibullah Khan* v. *Abdullah Khan*, (1911) 9 Ind Cas 804 (804) All; *Robert Wilson* v. *Radha Dulari*, (1898) 2 Cal W N 63 (64).

(4) *Sohawan* v. *Babu Nand*, (1887) 9 All 26 (31): 1886 All W N 284; *Musst Lachambai* v. *Musst Devibai*, (1921) 59 Ind Cas 673 (674): 14 Sind L R 132; *Durga* v. *Narain*, 1931 All 597 (600): 1931 All L J 875 F B.

Note 11.

(1) *Saravana Pillai* v. *Sesha Reddi*, (1908) 31 Mad 469 (470, 471): 3 Mad L Tim 71: 18 Mad L Jour 34 F B; *Rami Deka* v. *Brojo*, (1898) 25 Cal 97 (98): 1 Cal W N 692; *Gupta Nand* v. *Behari Lal*, 1924 All 100 (100, 101): 21 All L J 567: 5 L R All (Civ) 21: 74 Ind Cas 827; *Nivath* v. *Bhikki*, (1885) 7 All 649 (656): 1885 All W N 151: 10 Ind Jur 34; *Surji Singh* v. *Kunwar Durga Prasad*, (1905) 8 Oudh Cas 290 (292); *Ma Po* v. *Ramnathan*, (1911) 11 Ind Cas 915 (915): 4 Bur L Tim 201; *Saharulla Mandal* v. *Bangu Mandal*, (1909) 2 Ind Cas 404 (404): 13 Cal W N 143; *Nga San Gaw* v. *Aya Lu E*, (1916) 33 Ind Cas 666 (667, 668): 1915 U B R 11, 92 [Error may possibly have affected decision on merits]; *Haradhan Mahto* v. *Litto Manjhi*, (1919) 49 Ind Cas 832 (833) Pat [See also *Jey Gobind* v. *Ram Pershad*, 1870 Pun Re No 6.

(2) *Bisvanath* v. *Baidyanath*, (1886) 12 Cal 199 (203); *Doolee Chand* v. *Oomda Begum*, (1872) 18 Suth W R 473 (473); *Bhagvat Sangji* v. *Pratab Sangji*, (1866-67) 4 Bom H C R (A C J) 105. See *Ganpatram* v. *Jaichand*, (1866-67) 4 Bom H C R 109.

(3) See *Bisvanath Maiti* v. *Baidyanath Mundal*, (1886) 12 Cal 199 (203).

(4) *Kamat* v. *Kamat*, (1884) 8 Bom 368 (371): 8 Ind Jur 687; *Gopal Rao Ganesh* v. *Kishor Kalidas*, (1885) 9 Bom 527 (529): *Purushotham Sakharam* v. *Durgoji Tukaram*, (1890) 14 Bom 452 (454); *Babu Mahdav* v. *Venkatesh*, (1891) 16 Bom 540 (545); *Ningappa* v. *Shirappa*, (1895) 19 Bom 323 (326); *Santishwar Mahanta* v. *Lakhikanta Mahanta*, (1908) 35 Cal 813 (816): 13 Cal W N 177: 4 Ind Cas 321: 5 Mad L Tim 89; *Mt Bhagan* v. *Buta Mal*, 1927 Lah 418 (419): 9 Lah L Jour 174: 102 Ind Cas 280: 28 Pun L R 330; *Appa Kalga Naik* v. *Mallu*, (1891) 16 Bom 477 (479): *Anandpal Singh* v. *Mahabal Singh*, 1927 Oudh 95 (96): 29 Oudh Cas 330: 3 Oudh W N 352: 95 Ind Cas 925: 13 Oudh L J 586: 1 Luck 458; *Sultan Ahmad* v. *Pala*, (1918) 45 Ind Cas 800 (802): 102 Pun W R 1918; *Kali Sahu* v. *Kedar Mal*, (1917) 38 Ind Cas 561 (562) Pat; *Ladha Ram* v. *Gurdas*, (1916) 36 Ind Cas 6 (7): 108 Pun L R 1916: 132 Pun W R 1916; *Sheikh Goburdhan* v. *Sheik Sadhoo*, (1864) 1 Suth W R 244 (244). See also *Anund* v. *Rutnessur*, (1875) 25 Suth W R 50 (51) [Finding based on no evidence is not binding in second appeal].

Note 12.

(1) *Sohawan* v. *Babu Nand*, (1887) 9 All 26 (28): 1886 All W N 284; *Mahadeo Prasad* v. *Sarju Prasad*, (1886) 6 All W N 171 (171, 172): *Bhagwan* v. *Kesur Kuverji*, (1892) 17 Bom 428 (430); *Rami Deka* v. *Brojo Nath Saikia*, (1897) 25 Cal 97 (98): 1 Cal W N 692; *Royal Reddi* v. *Linga Reddi*, (1878-81) 3 Mad 1 (2): 5 Ind Jur 518; *Kunhi Marakkar Haji* v. *Kutti Umma*, (1897) 20 Mad 496 (497, 498); *Sitaram* v. *Suriyanarayana*, (1898) 22 Mad 12 (13): 8 Mad L Jour 183; *Subbayya* v. *Rami Reddi*, (1899) 22 Mad 344 (345); *Saravana Pillai* v. *Sesha Reddi*, (1907) 31 Mad 469 (470, 471): 18 Mad L Jour 34: 3 Mad L Tim 71 F B; *Srikant Dey* v. *Huri Das*, (1882) 11 Cal L Rep 131 (132); *Rai Charan Purkait* v. *Amrita Lal Gain*, 5 Ind Cas 98: 11 Cal L Jour 131; *Umed Ali* v. *Salima Bibi*, (1884) 6 All 383 (385): 1884 All W N 127; *Gupta Nand* v. *Behari Lal*, 1924 All 100 (100, 101): 21 All L J 567: 5 L R All (Civ) 21: 74 Ind Cas 827; *Mikam Mal* v. *Indar Singh*, 1925 Lah 246 (247): 6 Lah L Jour 506: 84 Ind Cas 946; *Lachhman Dass* v. *Sadhu*, 1926 Lah 351 (352): 93 Ind Cas 829; *Mt Aisha Bi* v. *Mt Sughra Jan*, 1923 Lah 658 (659): 75 Ind Cas 1013; *Balwant Singh* v. *Baldev Singh*, 1921 Lah 119 (120): 2 Lah 271: 64 Ind Cas 929;

O.41, R.31, Notes 12—14.

cited below[2] that the High Court cannot do so but can only require the Judge in the lower Court, if he is still in service and in the same district, to state his reasons for his conclusions. This view is against the general trend of opinion. Further, some of the cases[3] expressing such a view will, on examination, be found to be not cases of *substantial* non-compliance with the rule.

The High Court may, instead of remanding the whole case call for fresh findings from the lower appellate Court.[4]

13. **Appeal in proceedings under S. 476 of the Criminal Procedure Code.**—The judgment in an appeal in proceedings under S. 476, Criminal Procedure Code, must, according to the general rule, give reasons for the decision.[1]

14. **Applicability of rule to High Court.**—In the undermentioned case[1] the High Court confirmed the decree of the lower Court but failed to give in its judgment any reasons for its decision. An application was made to the High Court for leave to appeal to the Privy Council on the ground that the requirements of the present rule were not complied with. On this application, Edge, C. J., said that the present rule was not intended to apply to cases where the High Court, after hearing the judgment of the lower Court and the arguments thereon comes to the conclusion that both the judgment and reasons given by the lower Court for its decision are complete and satisfactory. The learned Chief Justice gives no reason for his view, and it is not clear why the present rule or at least the principle thereof

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Suranderanath v. *Raghunath*, 1928 Cal 558 (558): 27 Cal W N 601: 76 Ind Cas 1052; *Sheoambar* v. *Lallu Singh*, (1886) 9 All 30 (Note) (31-N): 1882 All W N 158; *Mahadeo* v. *Sarju*, (1886) 6 All W N 171 (171, 172); *Chikkanna Chetty* v. *Chinnathayeeammal*, (1912) 16 Ind Cas 354 (355) Mad; *Maung Yar Wee* v. *N N Firm*, 1927 Rang 208 (208): 6 Bur L Jour 82: 103 Ind Cas 766; *Mg Saw* v. *Maw Bwin Byu*, 1926 Rang 129 (131): 4 Rang 66: 5 Bur L Jour 60: 95 Ind Cas 881; *Bhikhu* v. *Bhikehakar*, 1929 Pat 275 (276): 2 Pat L R (Civ) 32: 75 Ind Cas 780; *Phulraj Singh* v. *Abbulakh Singh*, 1928 Oudh 874 (875): 5 Oudh W N 689: 112 Ind Cas 845; *Anandpal Singh* v. *Mahabal Singh*, 1927 Oudh 95 (97): 29 Oudh Cas 330: 3 Oudh W N 352: 95 Ind Cas 925: 13 Oudh L J 586: 1 Luck 458; *Sri Ranganath Thathachariar* v. *Rajagopalachariar*, 1928 Mad 16 (17); *Mt Bhagan* v. *Buta Mal*, 1927 Lah 418 (419): 9 Lah L Jour 174: 102 Ind Cas 280: 28 Pun L R 330; *Ram Chand* v. *Ram Ratan*, 1928 Lah 655 (657): 10 Lah L Jour 257: 112 Ind Cas 670; *Abbas Ali* v. *Kaliki Runga Reddi*, (1912) 16 Ind Cas 382 (383) Mad; *Jagan Nath* v. *Bindeshwari*, (1917) 37 Ind Cas 435 (436): 3 Oudh L J 620; *Ladha Ram* v. *Gurdas*, (1916) 36 Ind Cas 6 (7): 108 Pun L R 1916: 182 Pun W R 1916; *Nga San Baw* v. *Nga Lu E*, (1916) 33 Ind Cas 666 (668): 1915 U B R 11, 92; *Mi Nyin Tha Me* v. *Mi Nyo Wun Me*, (1915) 31 Ind Cas 896 (896): 9 Bur L Tim 59; *Beni Madho* v. *Ram Harak*, (1914) 25 Ind Cas 596 (596): 1 Oudh L J 334; *Maung Pu* v. *Ma Gyauk Thay*, (1912) 17 Ind Cas 898 (899): 5 Bur L Tim 269; *Rajchunder* v. *Ramakant*, (1871) 15 Suth W R 324 (326); *Korban Ali* v. *Ashan Ali*, (1863) 4 Suth W R 4 (4); *Trilochun Dutt* v. *Ishun Chunder*, (1875) 3 Suth W R 176 (177); *Haimabati Dasi* v. *Govinda Chandra*, (1898) 2 Cal W N 695 (697); *Babban Singh* v. *Jaimangal Singh*, 1906 All W N 86 (86); *Harnandan Misr* v. *Sheo Ghulam Misr*, (1889) 9 All W N 178 (179); *Mangru Rai* v. *Bishundial Rai*, 1884 All W N 99 (99); *Jagannath* v. *Surawan Dulaiya*, 1888 All W N 61 (62); *Pertap Narain* v. *Maigh Lal Singh*, (1909) 2 Ind Cas 656 (659): 13 Cal L N 949: 36 Cal 927; *Desai Kuppusami* v. *Seshadri Iyengar*, (1910) 5 Ind Cas 829 (830): 7 Mad L Tim 120; *Santishwar* v. *Lakhikanta*, (1909) 4 Ind Cas 321 (322): 35 Cal 813: 3 Cal W N 177: 5 Mad L Tim 89. See also *Tatur Khawas* v. *Lokenath*, (1871) 15 Suth W R 131 (132): 7 Beng L R App 14; *Saravana Pillai* v. *Sesha Reddi*, (1908) 31 Mad 469 (470, 471): 3 Mad L Tim 71: 18 Mad L Jour 34 F B; *Mg Po Gaing* v. *Ramanathan Chetty*, (1911) 11 Ind Cas 915 (915): 4 Bur L Tim 201; *Mirbaz* v. *Makhana*, 1906 Pun L R 158 [Remand was made in revision].

(2) *Bisvanath Maiti* v. *Baidyanath Mundul*, (1885) 12 Cal 199 (203); *Assanullah* v. *Hafiz Mahamood Ali*, (1884) 10 Cal 932 (935, 936); *Doolee Chand* v. *Oomda Begum*, (1872) 18 Suth W R 473 (473); *Kristo Chunder* v. *Ram Bromho*, (1873) 20 Suth W R 403 (404). See also *Jiwan* v. *Dhir Singh*, 1879 Pun Re No 100. See also *Gulam Hussain* v. *Ram Doyal Ghose*, (1869) 12 Suth W R 152 (152).

(3) See *Bisvanath Maiti* v. *Baidyanath Mundal*, (1885) 12 Cal 199 (203).

(4) *Periammal* v. *Vaithilinga Udayar*, (1915) 28 Ind Cas 354 (354) Mad.

Note 13.

(1) *Nitya Gopal Rov* v. *Nani Gopal Karmakar*, 1931 Cal 454 (454, 455): 35 Cal W N 660: 1931 Cr Cas 606: 133 Ind Cas 672: 32 Cr L Jour 1045; *Hamid Ali* v. *Madhu*, 1927 Cal 284 (284, 285): 31 Cal W N 281: 100 Ind Cas 351: 54 Cal 355.

Note 14.

(1) *Sundar Bibi* v. *Bisheshar Nath*, (1887) 9 All 93 (95): 1886 All W N 302 F B.

O.41, R.31, Notes 14—15.

should not apply to the High Court.[2] On the other hand, the Privy Council itself has held that the High Court must give reasons for its decision in its judgments.[3] *See also* Cl. 42, Letters Patent. But under O. 49, R. 2, where at the commencement of the present Code there were, in force, any rules for the recording of judgments by Chartered High Courts, the present rule cannot, in any way, affect the operation of such rules.[4]

15. **Privy Council appeal.**—Where the trial Court by its decree decides two points against a party and he appeals to the High Court only on one of them, and the High Court dismisses his appeal, he cannot in his appeal to the Privy Council attack the decree of the High Court on the ground of its having wrongly accepted the decision of the trial Court on the other point.[1] *See also* Note 14, above.

O.41, R.32, Notes 1—2.

What judgment may direct.

R. **32**. [S. 577.] The judgment may be for confirming, varying or reversing the decree *from* which the appeal is *preferred*, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be *made* in appeal, the Appellate Court may pass a decree or *make an* order accordingly.

[1877—S. 577; 1859—S. 350.]

Synopsis.

1. Confirming, varying or reversing decree. 2. Compromise decree in appeal.

1. **Confirming, varying or reversing decree.**—Under this rule, an appellate Court has no power to "dismiss" an appeal. The judgment must be one for confirming, varying or reversing the decree appealed from. But an appeal may be "dismissed" under R. 11, *ante* or as being incompetent, as where it is time-barred or is barred under S. 102.[1]

2. **Compromise decree in appeal.**—Where an agreement set up by one party is denied by the other, there was a conflict of decisions under the old Code, as to whether the Court had the power to determine the question as to the factum and validity of the alleged agreement and pass a decree if it finds such agreement to have been validly made. In O. 23, R. 3 of the present

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(2) See *Savitri* v. *Savi*, 1921 P C 80 (82): 48 Cal 481: 19 All L J 281: 23 Bom L R 681: 33 Cal L Jour 307: 40 Mad L Jour 308: 14 Mad L W 362: 1921 Mad W N 153): 60 Ind Cas 274: 48 Ind App 76 P C.

(3) *Mumtaz Ahmad* v. *Zubaida Jan*, (1889) 11 All 460 (470): 16 Ind App 205: 5 Sar 433 P C; *Katchekaleyana Rengappa* v. *Kachirijaya Rengappa*, (1869) 12 Moo Ind App 495 (502): 2 Beng L R P C 72: 11 Suth W R P C 33: 2 Suth 206: 2 Sar 461 P C. See also *Muhammad Ahmad* v. *Zubaida Jan*, (1889) 11 All 460 (470): 16 Ind App 205: 5 Sar 433 P C [Appellant is fairly entitled to an expression of the High Court's opinion on the grounds taken in the memorandum of appeal].

(4) *Banarsi Das* v. *Sagar Mal*, 1929 All 403 (403): 1929 All L J 713: 116 Ind Cas 23. [*See also* 9 All 93 F B].

Note 15.

(1) *Kalyan Das* v. *Maqbul Ahmad*, 1918 P C 53: 46 Ind Cas 548 (551): 22 Cal W N 866: 16 All L J 693: 5 Pat L W 159: 35 Mad L Jour 169: 28 Cal L Jour 181: 8 Mad L W 179: 1918 Mad W N 535: 24 Mad L Tim 110: 20 Bom L R 864: 40 All 497 P C.

Order 41, Rule 32—Note 1.

(1) *Kailash* v. *Girija Sundari*, (1912) 14 Ind Cas 299 (300): 16 Cal W N 658: 39 Cal 925. See also *Kristo Kinkar* v. *Baroda Kant*, 14 Moo Ind App 465 (490, 491, 492): 10 Beng L R 101: 17 Suth W R 292. See also *Kaung Hla* v. *Kati*, (1909) 2 Ind Cas 357 (357): 5 L B R 11.

O.41, R.32, Note 2.

Code (corresponding to S. 375 of the former Code) the Legislature has given effect to the view that the Court has such a power. This view has been applied to compromises entered into during the pendency of appeals,[1] as well as those entered into in the lower Court. *See* O. 23, R. 3, Note 6.

O.41, R.33.

Power of Court of Appeal.

R. 33. [New.] *The Appellate Court shall have power to pass any decree and make any order which ought to have been passed*[2] *or made and to pass or make such further or other decree or order as the case may require*[3], *and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree*[5] *and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection*[6]:

[Provided that the Appellate Court shall not make any order under section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order][12].

Illustration

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The appellate Court decides in favour of X. It has power to pass a decree against Y.

Synopsis.

1. Scope, object and applicability of rule.
2. "Any decree or order which ought to have been passed."
3. "Such further or other decree or order as the nature of the case may require."
4. Power of appellate Court to take cognizance of subsequent events.
5. Power may be exercised notwithstanding that appeal is as to part only of the decree.
6. Power may be exercised in favour of respondents or parties who have not filed appeal or cross-objections.
7. Power if can be exercised in favour of persons not parties to appeal.
8. Decree against several persons—Appeal by one—Power of appellate Court to set aside decree against all.
9. Power if can be exercised against person not party to appeal.
10. Addition of parties in appeal.
11. Illustration to the rule.
12. Proviso.
13. Limitation.
14. Res judicata.
15. Remand.
16. Second appeal.
17. Privy Council appeal.
18. Revision.

Alternative relief. See Note 6, Pts. (5) and (8).
Applicability of the rule to partition suits. See Note 1, F.-N. (7).
Cross-objection against co-respondent. See

Note 2.

[1] *Appaswami v. Manikkam,* (1886) 9 Mad 103 (106, 107); *Kelu Nair v. Meenakshi,* (1913) 21 Ind Cas 639 (641): 25 Mad L Jour 586: 14 Mad L Tim 574; *Jnanendra Nath Dutt v. Nasea Dasi,* 1924 Cal 991 (992): 39 Cal L Jour 526: 83 Ind Cas 948; *Ramijas Marwari v. Baruni Mahton,* 1929 Pat 102 (102): 116 Ind Cas 524.

Note 6, F.-N. (19); also O. 41, R. 22, Note 14.

Power to grant relief to respondent who has filed appeal or cross-objection and failed therein. See Note 6, Pt. (23).

1. Scope, object and applicability of rule.—This rule is new and is based on O. 58, R. 4 of the rules of the Supreme Court in England. It is wider than O. 41, R. 4. Its object is to enable the Appellate Court to do complete justice between the parties[1] and to avoid contradictory and inconsistent decisions on the same questions in the same suit.[2] For this purpose, a discretionary[3] power is conferred on the appellate Court to pass such decree or order as ought to have been passed or as the nature of the case may require notwithstanding that the appeal is as to part only of the decree or that the party in whose favour the power is proposed to be exercised has not filed any appeal or cross-objection. The discretion conferred is wide[4] and, in a proper case, the appellate Court should not hesitate to exercise it.[4-a] But as the power is in derogation of the general principle that a party cannot avoid a decree against him without filing any appeal or cross-objection, it must be exercised with care and caution.[5] No hard and fast rule, can however be laid down as to the circum-

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But see *Bandu Bhagat* v. *Shah Muhammad Taqi*, (1892) 14 All 350 (352) [This view is against the weight of authority and seems to be also against the views of the Legislature as shown in the changes in old S 375].

Order 41, Rule 33—Note 1.

(1) *Mahammad Hasan* v. *Lauti Ram*, 1927 All 453 (454): 49 All 224: 97 Ind Cas 65; *Rangam Lal* v. *Chandu*, (1911) 11 Ind Cas 640 (641): 8 All L J 1111: 34 All 32 F B; *Rao Vinayak* v. *Laxman*, (1918) 44 Ind Cas 51 (55): 14 Nag L R 56; *Maksud Ali* v. *Sheikh Abdullah*, 1928 All 77 (80): 25 All L J 1017: 108 Ind Cas 728: 50 All 218. *See also* Report of the Special Committee.

(2) *Ram Tahal* v. *Sukeswar*, (1916) 35 Ind Cas 547 (548): 1 Pat L Jour 143. See also *Somasundara Chettiar* v. *Vithilinga Mudaliar*, (1917) 41 Ind Cas 546 (551, 554): 6 Mad L W 253: 40 Mad 846; *Kulaikada Pillai* v. *Visvanatha Pillai*, (1905) 28 Mad 229 (234): 15 Mad L Jour 212; *Mukku Venkataramiah* v. *Mukku Chinniah*, (1919) 53 Ind Cas 201 (202): 10 Mad L W 357: 1919 Mad W N 807.

(3) *Ilahi Baksh* v. *Javinda Mal*, (1920) 54 Ind Cas 971 (974): 38 Pun W R 1920: 1 Lah 396; *Rukia* v. *Mewa Lal*, 1928 All 746 (751, 752): 26 All L J 1139: 111 Ind Cas 751; *Bhattachargee* v. *Nagendra*, (1920) 54 Ind Cas 822 (826): 30 Cal L Jour 217: 24 Cal W N 44 [Court not *bound* to take action under R 33]; *Ilahi Baksh* v. *Jawindamal*, (1920) 54 Ind Cas 971 (972, 973, 974): 38 Pun W R 1920: 1 Lah 396, (Do.); *Chockalingam Chetty* v. *Seethai Ache*, 1927 P C 252 (256): 27 Mad L W 1: 1928 Mad W N 20: 4 Oudh W N 1231: 54 Mad L Jour 88: 47 Cal L Jour 186: 32 Cal W N 281: 30 Bom L R 220: 107 Ind Cas 237: 6 Rang 29: 26 All L J 371 P C, (Do.); *Probhat Chandra* v. *Gopal Chandra*, 1922 Cal 398 (399): 49 Cal 379: 69 Ind Cas 981, (Do.); *Rukia* v. *Mewa Lal*, 1928 All 746 (752): 26 All L J 1139: 111 Ind Cas 751, (Do.); *Punjab National Bank, Ltd. Kasur* v. *Umadatt Hans Rai*, 1928 Lah 599 (601): 9 Lah 291: 29 Pun L R 477: 112 Ind Cas 425, (Do.); *Subramanian Chettiar* v. *Sinnammal*, 1925 Mad 266 (268): 20 Mad L W 761: 85 Ind Cas 312, (Do.); *Ma San Nyun* v. *Maung Tint*, 1930 Rang 190 (191): 127 Ind Cas 597, (Do.); *Gangama Naick* v. *Veerappa Chetty*, 1931 Mad 513 (518, (519): 131 Ind Cas 833, (Do.); *Narasimham* v. *Narasinga Rao*, 1930 Mad 707 (707): 123 Ind Cas 39, (Do.); *Kali Dayal Bhattacharji* v. *Nagendra Nath Pakrashi*, (1920) 54 Ind Cas 822 (826): 30 Cal L Jour 217: 24 Cal W N 44.

(4) *Gangadhar Muradi* v. *Banabashi Padihari*, (1914) 24 Ind Cas 208 (208): 22 Cal L Jour 390; *Mathura Mohan Saha* v. *Ramkumar Saha and Chittagong District Board*, (1916) 35 Ind Cas 305 (320): 23 Cal L Jour 26: 20 Cal W N 370: 43 Cal 790; *Abjal* v. *Intu*, (1916) 32 Ind Cas 494 (495): 22 Cal L Jour 394: 20 Cal W N 542; *Hari Mal* v. *Ayasingh*, (1911) 9 Ind Cas 825 (826): 65 Pun W R 1911: 103 Pun L R 1911; *Kshum Chand Bhuturia* v. *Ghane Muhammad Shah*, (1917) 38 Ind Cas 361 (363) Cal; *The Official Trustee of Bengal* v. *Charles Joseph Smith*, (1920) 56 Ind Cas 262 (266): 1920 Pat H C C 161: 5 Pat L Jour 328: 1 Pat L Tim 434; *Maruti Babaji Vadekar* v. *Ramachandra Balvant Punekar*, 1931 Bom 288 (294): 33 Bom L R 396: 133 Ind Cas 248; *Nand Lal Roy Chowdhury* v. *Mukundo Lalde*, 1926 Cal 57 (58): 89 Ind Cas 24; *Rukia* v. *Mewa Lal*, 1928 All 746 (750): 26 All L J 1139: 111 Ind Cas 751; *Ramalingam Chettiar* v. *Subramania Chettiar*, 1927 Mad 620 (621): 52 Mad L Jour 612: 38 Mad L Tim 323: 25 Mad L W 699: 103 Ind Cas 394: 50 Mad 614.

(4-a) *Rangam Lal* v. *Chandu*, (1911) 11 Ind Cas 640 (641): 8 All L J 1111: 34 All 32 F B; *Shib Chandra Kar* v. *Dulcken*, (1918) 48 Ind Cas 78 (82): 28 Cal L Jour 123; *Subramania Chettiar* v. *Sinnammal*, 1930 Mad 801 (805, 806): 32 Mad L W 395: 1930 Mad W N 798: 59 Mad L Jour 634: 53 Mad 881: 127 Ind Cas 624; *Qamaruddin* v. *Mathra*, 1925 Lah 155 (156): 6 Lah L Jour 464.

(5) *Imbichunni Nair* v. *Narayana*, (1913) 21 Ind Cas 767 (768): 1913 Mad W N 1024; *Akimannessa Bibi* v. *Repin Behari Mitter*, (1916) 32 Ind Cas 499 (500): 22 Cal L Jour 397: 20 Cal W N 544; *Gangadhar Muradi* v. *Banabashi Padihari*, (1914) 24 Ind Cas 208 (208): 22 Cal L Jour 390; *Rangam Lal* v. *Chandu*, (1911) 11 Ind Cas 640 (641): 8 All L J 1111: 34 All 32 F B; *Shibchandra* v. *Dulcken*, (1918) 48 Ind Cas 78 (82): 28 Cal L Jour 123; *Official Trustee* v. *Smith*, (1920) 56 Ind Cas 262 (266): 1920 Pat H C C 161: 5 Pat L Jour 328: 1 Pat L Tim 434; *Nandalal Roy Chowdhury* v. *Mukundalal De*, 1926 Cal 57 (58, 59): 89 Ind Cas 24; *Rukia* v. *Mewa Lal*, 1928 All 746 (751): 26 All L J 1139: 111 Ind Cas 751; *Feroze A*

O.41, R.33, Notes 1—2.

stances under which the power may or may not be exercised and each case must depend on its own facts.[6] (*See also* Note 6.)

There is no restriction as to the class of suits to which the rule applies[7]. The principle of the rule applies also to applications for revision.[8] It also applies to a suit to set aside a decree. Thus, where a decree is passed against several defendants, some of whom sue to have the decree set aside, the decree may be set aside as against all.[9] *See also* the following cases.[10]

2. **"Any decree or order which ought to have been passed".**—The rule enables the appellate Court to pass any decree or order which ought to have been passed.

Illustrations.

1. Three out of four trustees bring a suit for rent against the lessee, of the trust properties, adding the other trustee as the second defendant in the suit. The trial Court passes a decree for three-fourths of the rent in favour of the plaintiffs, and for one-fourth, in favour of the second defendant. The first defendant appeals. The appellate Court considers that the appeal must be dismissed, but that the trial Court should not have passed a decree for one-fourth in favour of the second defendant as he was a defendant and not a plaintiff. The appellate Court, therefore, in dismissing the appeal passes a decree for the entire sum in favour of the plaintiffs declaring at the same time, that, as to one-fourth, it is for the second defendant's share. Held that the appellate Court has power to do so.[1]
2. Plaintiffs sue for a declaration that the proceedings taken against them by the defendants are *ultra vires* and null and void. The trial Court passes an order of *mandamus* against them instead of giving a declaratory decree. The defendants appeal. The appellate Court considers that an order of *mandamus* should not have been passed but that a decree for a declaration should have been passed. It has power to pass such a decree.[2] For other instances, *see* the undermentioned cases.[3]

Cooper v. *Secretary of State*, 1928 Lah 947 (948): 111 Ind Cas 692; *Punjab National Bank, Ltd* v. *Uma Datt Hans Raj*, 1928 Lah 599 (601): 9 Lah 291: 29 Pun L R 477: 112 Ind Cas 425.

(6) *Gangadhar Muradi* v. *Banabashi Padihari*, (1914) 24 Ind Cas 208 (208): 22 Cal L Jour 390; *Rangam Lal* v. *Chandu*, (1911) 11 Ind Cas 640 (641): 8 All L J 1111: 34 All 32 F B; *Mahmud Hasan* v. *Laute Ram*, 1927 All 453 (454): 49 All 224: 97 Ind Cas 65; *Subramanian Chettiar* v. *Sinnammal*, 1930 Mad 801 (806): 32 Mad L W 395: 1930 Mad W N 798: 59 Mad L Jour 634: 53 Mad 881: 127 Ind Cas 624 F B.

(7) *Probhat Chandra Biswas* v. *Gopal Chandra*, 1922 Cal 398 (399): 49 Cal 379: 69 Ind Cas 981 [Rule applies to partition suits].

(8) *Rangrao* v. *Pandurang*, 1924 Nag 154 (155): 78 Ind Cas 736.

(9) *Suryaprakasa Rao* v. *Sreeramulu*, 1931 Mad 6 (8): 32 Mad L W 662: 59 Mad L Jour 918: 129 Ind Cas 249.

(10) *Abdul Aziz* v. *Momin*, (1911) 9 Ind Cas 815 (816) Cal [Rule applies to appeals pending at commencement of present Code]; *Chandramathy* v. *Narayanaswami*, (1910) 5 Ind Cas 23 (26): 19 Mad L Jour 760: 7 Mad L Tim 369: 33 Mad 241, (Do.).

Note 2.

(1) *Tricomdas Cooverji Bhoja* v. *Gopinathji Thakur*, 1916 P C 182: (1917) 39 Ind Cas 156 (160): 1 Pat L Jour 262: 15 All L J 217: 25 Cal L Jour 279: 32 Mad L Jour 857: 21 Mad L Tim 262: 21 Cal W N 577: 1917 Mad W N 363: 5 Mad L W 654: 19 Bom L R 450: 44 Cal 759: 44 Ind App 65 P C. See also *Nrityamoni Dasi* v. *Lakhan Chundra Sen*, 1916 P C 96 (101): 43 Cal 660: 18 Bom L R 418: 24 Cal L Jour 1: 20 Cal W N 522: 30 Mad L Jour 529: 20 Mad L Tim 10: 3 Mad L W 471: (1916) 1 Mad W N 332: 33 Ind Cas 452 P C [*A* suing *B* and *C*—Decree in favour of *A* and *C*—Appeal by *B*—Appellate Court can transpose *C* as plaintiff and maintain decree in his favour].

(2) *Rangoon Development Trust* v. *Behara and Sons*, 1932 Rang 123 (128): 10 Rang 412: 139 Ind Cas 566 F B.

(3) *Rama Charan Das* v. *Gadadhar Das*, 1929 Cal 322 (325): 56 Cal 21 [Appeal from *ex parte* decree—Power of the appellate Court in appeal from *ex parte* decree is not confined only to the investigation of the cause of non-appearance]; *Afzal Khan* v. *Mussamat Mahtab Bibi*, (1919) 51 Ind Cas 819 (822): 59 Pun W R 1919 [In dismissing appeal, appellate Court can amend decree]; *Raghunath Kurmi* v. *Deo Rai*, (1919) 51 Ind Cas 981 (984): 1919 Pat H C C 393, (Do.); *Dileshwar Ram Brahman* v. *Nohar Singh*, (1918) 48 Ind Cas 193 (196) Nag, (Do.); *Venkata-*

O.41, R.33, Note 3.

3. **"Such further or other decree or order as the nature of the case may require".**—The appellate Court has power to pass not only any decree or order which ought to have been passed but also such further or other decree or order as *the nature of the case may require.* Accordingly the appellate Court has power to deal with the case in any way that may seem equitable to all the parties concerned.[1]

Illustrations.

1. A property, the subject of two mortgages, one in favour of *S* and the other in favour of *B*, is sold for arrears of revenue and purchased by *T*. *S* sues for the enforcement of his mortgage against the surplus sale-proceeds and makes *B*, a defendant to the suit claiming priority over him. The suit is decreed. *B* appeals against the decree. In the meanwhile there is a suit by *B* for setting aside the revenue sale and this suit is also decreed. *T*, (the purchaser at the revenue sale), appeals against this decree. Both appeals are heard together and are dismissed. The appellate Court can, in dismissing the appeals, direct that *S's* rights should be enforced against the *property* instead of against the *sale-proceeds.*[2]
2. A suit is erroneously dismissed on the merits, instead of for default. An appeal is filed by the plaintiff. The appellate Court can, not only pass the order which the lower Court ought to have passed, *viz.*, an order of dismissal for default, but also a further order that the suit do stand restored and that the lower Court do proceed to try the suit according to law.[3]
3. Where on an application to set aside an execution sale on the ground of the price being less than that payable under certain rules, the lower Court refuses to set aside the sale, and, on appeal, the appellate Court considers that the sale should be set aside, it has power to accept the purchaser's offer of a higher price, and to leave the sale undisturbed.[4] *See also* the undermentioned cases.[5]

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chala Pillai v. *Ranga Pillai*, (1915) 28 Ind Cas 694 (695): 17 Mad L Tim 220: 28 Mad L Jour 334, (Do.); *Tejpal Jamunadas* v. *Nathmal & Co*, (1920) 54 Ind Cas 668 (669): 46 Cal 1059 [Even though appeal may not be from refusal to extend time, appellate Court can in appeal from order setting aside award extend time for making award]; *Biswanath Gorain* v. *Surendro Mohan Ghose*, (1915) 29 Ind Cas 429 (433): 19 Cal W N 102 [Plaintiff claiming reliefs in alternative—Trial Court granting one relief—Appellate Court can grant the other one, instead]; *Subiha Pillai* v. *Velappa Naicken*, (1911) 13 Ind Cas 176 (176): 10 Mad L Tim 524: (1911) 2 Mad W N 560: 22 Mad L Jour 124 [Suit for specific performance of contract to sell immoveable property—Proper decree—Appellate Court has power in dismissing defendant's appeal and to pass a decree in the proper form]; *Gudur Ranga Reddi* v. *Gundala Pitchi Reddi*, (1914) 25 Ind Cas 973 (975): 1 Mad L W 879, (Do.); *Gobind Singh* v. *Jaigopal Singh*, 1924 Pat 322 (324): 72 Ind Cas 96 [In dismissing defendant's appeal, appellate Court can modify the details in the decree]; *Meeran Baksh* v. *Allah Wasaya*, 1929 Lah 256 (256): 118 Ind Cas 437 [Appeal by defendant —Appellant's contention was that *suit* had abated —Appellate Court can hold so]; *Arjun* v. *Jug Lal*, 1923 Lah 422 (423): 85 Ind Cas 95; *Sawataram* v. *Ganeshlal*, 1923 Nag 30 (31): 69 Ind Cas 521 [Trial Court rejecting plaint for want of Court-fee—Appellate Court reversing order, may reject plaint on another ground, viz, on the ground of suit being barred by limitation]; *Maung Sein* v. *Ngwe Nu*, (1913) 19 Ind Cas 2 (2): 6 L B R 144: 6 Bur L Tim 72 [Trial Court decreeing suit on a particular ground—Appellate Court can reverse decision on that point but may maintain the decree on another ground].

Note 3.

(1) *Hari Mal* v. *Aya Singh*, (1911) 9 Ind Cas 825 (826): 65 Pun W R 1911: 103 Pun L R 1911; *Srinivasa Ayyangar* v. *Thiruvengadatha Ayyangar*, (1914) 23 Ind Cas 264 (268): 1913 Mad W N 1034: 25 Mad L Jour 644: 15 Mad L Tim 307: 38 Mad 556: 1914 Mad W N 282; *Mathura Mohan Saha* v. *Ramkumar Saha and Chittagong District Board*, (1916) 35 Ind Cas 305 (320): 23 Cal L Jour 26: 20 Cal W N 370: 43 Cal 790: *Rama Ayyar* v. *Vanamamalai Iyer*, (1915) 27 Ind Cas 336 (337) Mad.

(2) *Tarini Charan* v. *Bishunchand*, (1918) 44 Ind Cas 304 (308): 23 Mad L Tim 147: 7 Mad L W 315: 27 Cal L Jour 303: 34 Mad L Jour 361: 4 Pat L W 249: 16 All L J 271: 22 Cal W N 505: 1918 Mad W N 295: 20 Bom L R 553 P C.

(3) *Chandramathi* v. *Narayanaswami Iyer*, (1910) 5 Ind Cas 23 (26): 19 Mad L Jour 760: 7 Mad L Tim 369: 33 Mad 241.

(4) *Mahomed Abdulla* v. *Sakharam*, 1930 Bom 290 (292): 32 Bom L R 436: 54 Bom 348: 125 Ind Cas 908.

(5) *Panchanan Singha Roy* v. *Dwarka Nath Roy*, (1906) 3 Cal L Jour 29 (36) [Order appointing guardian—Appeal against—Appellate Court can appoint (another) *ad interim* guardian pending appeal, as ancillary to the power which it possesses of appointing another guardian in

O.41, R.33, Notes 4—5.

4. **Power of appellate Court to take cognisance of subsequent events.**—*See also* Note 4 to O. 7, R. 7 and Note 16 to O. 41, A. 27 for a full discussion. As a general rule, a Court of appeal, in considering the correctness of the judgment of the Court below, will confine itself to the state of the case at the time such judgment was rendered, and will not take notice of any facts which may have arisen subsequently.[1] But the Court will, in exceptional cases, depart from this rule, especially where, by so doing, it can shorten litigation and best attain the ends of justice. In such cases it is not only competent to a Court of appeal, but it may be its *duty* to take notice of events which have happened subsequently to the passing of the decree or order appealed against.[2]

5. **Power may be exercised notwithstanding that appeal is as to part only of the decree.**—This rule expressly empowers the appellate Court on an appeal from one part of the decree, to reverse or modify the other part.[1]

But where there are several suits and a separate decree is passed in each of them, the appellate Court has no jurisdiction in an appeal against one of them to set aside the other decrees.[2]

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supersession of the one appointed by the lower Court]; *Nanjundier* v. *Venkata Rao*, (1910) 7 Ind Cas 797 (797): 8 Mad L Tim 199 [Court of appeal has the power to allow the appellant to amend the heading of an appeal]; *Rao Vinayak* v. *Laxman*, (1918) 44 Ind Cas 51 (55): 14 Nag L R 56 [Appellate Court not to grant relief not asked for in plaint]; *Khebani* v. *Gulab*, (1918) 43 Ind Cas 463 (463, 464): 2 Pat L Jour 698, (Do.); *Govind Dass* v. *Ram Charan Lonia*, 1923 All 235 (241, 242): 68 Ind Cas 307, (Do.); *Gopala Ayyar* v. *Sannasi*, (1916) 32 Ind Cas 401 (402): 3 Mad L W 29: 19 Mad L Tim 137 [Appellate Court has no jurisdiction under R 33 to grant extension of time, fixed for payment of the price in its decree for specific performance]; *Surendra Narain* v. *Hafijur Rahman*, (1915) 30 Ind Cas 379 (379, 380) Cal [Amendment of plaint should not be allowed where it would prejudice the other party]; *Hardeo Prasad* v. *Damodar Prasad*, 1923 All 119 (120): 20 All L J 980: 71 Ind Cas 424: 4 L R A (Civ) 53 [Appellate Court has no power after passing decree to alter the same]; *Jethalal* v. *Girdhar* v. *Varajlal Bhaishan Kar*, 1922 Bom 267 (268, 269): 46 Bom 184: 23 Bom L R 769: 63 Ind Cas 478 [Decree *ex parte*—Appeal—Appellate Court has power to remand for retrial]; *Kuttappa Nair* v. *Poophil*, 1925 Mad 735 (735): 1925 Mad W N 209: 49 Mad L Jour 385: 88 Ind Cas 828 [Appellate Court can amend its own decree]; *Kamal Kamini Debi* v. *H T S Forest*, (1910) 6 Ind Cas 446 (447) Cal [Appellate Court can try case only on issues on which parties went to trial]; *Ram Piari* v. *Sultan Baksh*, 1923 Lah 115 (116): 3 Lah 382: 77 Ind Cas 207 [Appellate Court may issue a fresh commission for the purpose of examining accounts and remedying certain mistakes and omissions made by another commissioner]; *Marakaruti* v. *Veeran Kutti*, 1923 Mad 647 (648, 649): 44 Mad L Jour 673: 18 Mad L W 21: 32 Mad L Tim 382: 1923 Mad W N 471: 73 Ind Cas 1050: 46 Mad 679 [If the record of a case under appeal is lost, the appellate Court has power to reconstruct the record].

Note 4.

(1) *Anundmoyee* v. *Sheeb Chunder*, (1862) 2 Suth W R P C 19: 9 Moo Ind App 287: Marsh 455: 1 Suth 485: 1 Sar 854 P C; *Mt Nandan* v. *Wazira*, 1927 Lah 198 (199): 100 Ind Cas 84: 8 Lah 215: 28 Pun L R 341.

(2) *Sakharam Mahadev* v. *Hari Krishna*, (1881-82) 6 Bom 113 (115); *Rustomji* v. *Purshotam Das*, (1901) 25 Bom 606 (618): 3 Bom L R 227; *Ahmadjee* v. *Mahamadjee*, (1899) 1 Bom L R 218 (219); *Amrit Lal Vadilal* v. *Kantilal*, 1931 Bom 280 (282): 33 Bom L R 266: 133 Ind Cas 244; *Maruti Babaji Vadekar* v. *Ramachandra Balyant Punekar*, 1931 Bom 288 (294): 33 Bom L R 396: 133 Ind Cas 248; *Hanmant Ramachandra Kulkarni* v. *Secretary of State*, 1930 Bom 254 (260): 54 Bom 125: 32 Bom L R 155: 129 Ind Cas 391; *Nuri Miah* v. *Ambica Singh*, (1916) 34 Ind Cas 869 (873): 20 Cal W N 1099: 44 Cal 47: 24 Cal L Jour 140; *Vellayappa Chetty* v. *Nellaya Pillai*, (1911) 10 Ind Cas 675 (676): 9 Mad L Tim 317. See also *Tarini Charan* v. *Bishun Chand*, (1918) 44 Ind Cas 304 (308): 23 Mad L Tim 147: 7 Mad L W 315: 27 Cal L Jour 303: 34 Mad L Jour 361: 4 Pat L W 249: 16 All L J 271: 22 Cal W N 505: 1918 Mad W N 295: 20 Bom L R 553 P C; *Govinda* v. *Bothasi*, (1910) 7 Ind Cas 74 (75): 20 Mad L Jour 528: 1910 Mad W N 331: 8 Mad L Tim 135; *Thenirkulam Muthuswami Iyer* v. *Kalyani Ammal*, (1917) 38 Ind Cas 223 (225): 21 Mad L Tim 93: 5 Mad L W 334: 40 Mad 818 [Appellate Court can take note of subsequent legislative enactment affecting the rights of parties]; *Suresh Chandra Chatterjee* v. *Kanti Chandra Bhattacharjee*, 1928 Cal 436 (437): 47 Cal L Jour 530: 110 Ind Cas 715; *Subramanian Chettiar* v. *Sinnammal*, 1925 Mad 266 (268): 20 Mad L W 761: 85 Ind Cas 312. See also *Ma San Nyun* v. *Maung Tint*, 1930 Rang 190 (191): 127 Ind Cas 597.

Note 5.

(1) *Debendra* v. *Narendra*, (1919) 54 Ind Cas 636 (641): 30 Cal L Jour 417: 24 Cal W N 110; *Ambika Charan* v. *Sasitara Debi*, (1915) 30 Ind Cas 868 (869): 22 Cal L Jour 61; *Bhutnath* v. *Sashimuki*, 1926 Cal 1042 (1044): 30 Cal W N 885: 96 Ind Cas 474; *Subramania Chettiar* v. *Sinnammal*, 1925 Mad 266 (267, 268): 20 Mad L W 761: 85 Ind Cas 312. *See also* Note 6, Point 7, 8 and 9 and Note 8, Point 5.

(2) *Amarsinghji* v. *S Desai Umed*, 1925 Bom 290 (291): 27 Bom L R 91: 86 Ind Cas 81; *Govind Ram* v. *Pali*, (1919) 53 Ind Cas 883 (884): 116 Pun Re 1919; *Compare also Note 8, Point 4.*

O.4 , R.33, Note 6.

6. Power may be exercised in favour of respondents or parties who have not filed appeal or cross-objections —The general principle is that a decree is binding on the parties to it, until it is set aside in appropriate proceedings.[1] A party who wishes to have a decree against him modified or reversed, must comply with certain requirements as to filing of appeals, objections and so forth.[2] Hence *as an ordinary rule*, an appellate Court must not reverse or vary a decree in favour of a party who has not preferred any appeal or cross-objection against it, and this general rule holds good notwithstanding the enactment of R. 33.[3] But in *exceptional cases*, the rule enables an appellate Court to pass such decree as ought to have been passed, or as the nature of the case may require, even if such decree would be in favour of parties who have not filed any appeal or cross-objections against the lower Court's decree.[4] Ordinarily the power conferred by this rule will be confined to those cases where, *as a result of interference in favour of the appellant*, further interference with the decree of the lower Court is rendered necessary, in order to adjust the rights of the parties according to justice, equity and good conscience.[4-a]

Illustrations.

(a) A claims Rs. 500 as due to him either from *B* or from *C* and, in a suit against both of them claiming relief in the alternative, obtains a decree against *B*. *B* appeals making *A* and *C* respondents. The appellate Court comes to the conclusion that *C* and not *B* is liable to *A*. It has jurisdiction while allowing *B's* appeal, to pass a decree in favour of *A* against *C*.[5]

Note 6.

[1] *Indar Sain* v. *Prabhu Lal*, 1922 Lah 277 (278): 3 Lah 88: 66 Ind Cas 4.

[2] *Subramanian Chettiar* v. *Sinnammal*, 1925 Mad 266 (267): 20 Mad L W 761: 85 Ind Cas 812.

[3] *Rangam Lal* v. *Chandu*, (1911) 11 Ind Cas 640 (641): 8 All L J 1111: 34 All 32 F B; *Maung Chit Pu* v. *Maung Pyaung*, (1917) 39 Ind Cas 380 (381): (1916) 2 U B R 144: 11 Bur L Tim 19; *Budhwanti* v. *Amar Nath*, 1925 Lah 2 (9, 10): 17 Pun W R 1923: 79 Ind Cas 670. See also *Jagubandu* v. *Rajani Kanta*, (1917) 37 Ind Cas 790 (791) Cal.

[4] *Naresh Chandra Basu* v. *Hayader Sheikh Khan*, 1929 Cal 28 (31): 49 Cal L Jour 83: 115 Ind Cas 180; *Ambika* v. *Sastra*, (1915) 30 Ind Cas 868 (869): 22 Cal L Jour 61; *Imbichunni Nair* v. *Narayana Nambudri*, (1913) 21 Ind Cas 767 (768): 1913 Mad W N 1024; *Abinash Chandra* v. *Dasarath*, 1929 Cal 123 (126): 48 Cal L Jour 281: 32 Cal W N 1228: 114 Ind Cas 84: 56 Cal 598; *Tamizan* v. *Nanhey Lal*, 1929 All 334 (335): 117 Ind Cas 111; *Debendra* v. *Narendra*, (1920) 54 Ind Cas 636 (641): 30 Cal L Jour 417: 24 Cal W N 110; *Ganga Prasad* v. *Hardei*, 1932 All 32 (33): 1931 All L J 601: 133 Ind Cas 536; *Balram Singh* v. *Bal Deo Singh*, (1917) 42 Ind Cas 443 (446, 447): 168 Pun W R 1917; *Tricomdas* v. *Gopinath*, 1916 P C 182: (1917) 39 Ind Cas 156 (160): 1 Pat L Jour 262: 15 All L J 217: 25 Cal L Jour 279: 32 Mad L Jour 357: 21 Mad L Tim 262: 21 Cal W N 577: 1917 Mad W N 363: 5 Mad L W 654: 19 Bom L R 450: 44 Cal 759: 44 Ind App 65 P C; *Tulsi* v. *Nabi Bux*, (1916) 32 Ind Cas 193 (194) Cal; *Nagalla Kotayya* v. *Nagalla Malayya*, (1910) 8 Ind Cas 337 (338): 1910 Mad W N 719: 9 Mad L Tim 39; *Venkitasami Naicker* v. *Muthuswami Pillai*, (1918) 45 Ind Cas 949 (952): 34 Mad L Jour 177: 23 Mad L Tim 280; *Iswarayya* v. *Swarnam Iswarayya*, 1931 P C 234 (239): 8 Oudh W N 980: 61 Mad L Jour 367: 35 Cal W N 1185: 1931 All L J 808: 33 Bom L R 1402: 34 Mad L W 518: 133 Ind Cas 716: 58 Ind App 350: 54 Mad 774. See also *C T A M Chettiar Firm* v. *Ko Yin Gyi*, 1929 Rang 158 (159, 160): 7 Rang 88: 117 Ind Cas 585; *Kuldip* v. *Raghunandan*, 1921 Pat 502 (503): 2 Pat L Tim 386: 60 Ind Cas 844. But see *Ram Mohan* v. *Mahmud Alam*, (1920) 57 Ind Cas 555 (556): 23 Oudh Cas 110 [This case makes no reference to R 33 and follows a decision under the old Code].

The following decisions under the old Code (which did not contain any provision corresponding to R 33) holding that the appellate Court had no power to reverse or modify in favour of a respondent, a portion of a decree against which he had not appealed, or preferred cross-objections, are no longer good law:—*Farzand Ali* v. *Bismillah*, (1905) 27 All 23 (25): 1 All L J 358: 1904 All W N 155; *Lohre* v. *Deo Hans*, (1908) 30 All 48 (49): 1908 All W N 4: 4 All L J 772: 3 Mad L Tim 176; *Ramditta* v. *Mokham*, 1892 Pun Re No 46; *Kulaikada* v. *Visvanath*, (1905) 28 Mad 229 (232): 15 Mad L Jour 212; *Greesh* v. *Gour*, (1867) 7 Suth W R 49 (49); *Qudadhur* v. *Mun Mohanee*, (1867) 7 Suth W R 366 (366).

[4-a] *Rangam Lal* v. *Chandu*, (1911) 11 Ind Cas 640 (641): 8 All L J 1111: 34 All 32; *Maksud Ali Khan* v. *Abdullah Khan*, 1928 All 77 (80): 25 All L J 1017: 108 Ind Cas 728: 50 All 218; *Mahomed Hasan* v. *Lauti Ram*, 1927 All 453 (454): 49 All 224: 97 Ind Cas 65; *Ganga Dhar Muradi* v. *Banabashi Padihari*, (1914) 24 Ind Cas 208 (208): 22 Cal L Jour 390; *Abjal Majni* v. *Intu Bepani*, (1916) 32 Ind Cas 494 (495): 22 Cal L Jour 391: 20 Cal W N 542; *Kishan Chand* v. *Ghani Muhammad*, (1917) 38 Ind Cas 361 (362) Cal; *Mahab Shaikh* v. *Mahomed Golam Nabi*, 1928 Cal 488 (489): 113 Ind Cas 32.

[5] *Bhawani Das* v. *Babu Singh*, (1914) 25 Ind Cas 273 (273) All; *Imbichunni Nair* v.

O.41, R.33, Note 6.

(*b*) *A* sues *B* and *C* for a certain sum of money. The suit is decreed against *B* and dismissed against *C*. *B* appeals making *A* and *C* respondents to the appeal. *A* neither appeals nor files cross-objection against the decree dismissing his suit against *C*. The appellate Court considers that *C* and not *B* is liable. It can, while reversing the decree against *B* pass a decree against *C*.[6]

(*c*) A suit is brought on behalf of the public for a declaration (*a*) that the public are entitled to use the locks on a certain river without paying tolls to the defendant, and (*b*) that the defendant is under an obligation to keep the locks in repair. The trial Court holds that the plaintiff is entitled to use the locks without paying tolls but the defendant is under no obligation to keep the locks in repair and a decree is accordingly passed. The defendant appeals but the plaintiff neither appeals nor files cross-objections against the decree. The appellate Court comes to the conclusion that the plaintiff is not entitled to use the locks without paying the tolls, but that the defendant is under an obligation to keep the locks in repair. The appellate Court has jurisdiction to pass a decree declaring that the public are liable to pay tolls and also declaring that the defendant is under an obligation to keep the locks in repair.[7]

(*d*) *A* is the vendee of certain lands from *B*. *B* fails to deliver possession of the lands to *A*. *A* sues *B* for possession, or in the alternative for the return of the purchase-money. The trial Court awards *A*, a decree for possession. *B* appeals. The appellate Court considers that *A* is not entitled to sue for possession, but is entitled to the return of the purchase-money. The appellate Court can vary the decree accordingly.[8]

Narayana, (1913) 21 Ind Cas 767 (768): 1913 Mad W N 1024; *Sarat Chandra* v. *Zamindari Syndicate,* (1917) 42 Ind Cas 548 (549, 550) Cal; *Iswardhari* v. *Sahebzadi,* (1908) 35 Cal 538 (540): 12 Cal W N 720; *Ananga Mohun Chakravarthy* v. *Bejoy Chandra Dutta,* (1916) 32 Ind Cas 491 (491): 22 Cal L Jour 391.

(6) *Krishnier* v. *Sarvothama Royar,* (1910) 8 Ind Cas 366 (367): 1910 Mad W N 640: 8 Mad L Tim 377; *Bikram Kumar Bose* v. *Mohit Krishna Kundu,* (1921) 64 Ind Cas 178 (180) Cal; *Kanji Mal* v. *Durga Prasad,* 1925 All 555 (555): 23 All L J 501: 6 L R All (Civ) 346: 88 Ind Cas 438: 47 All 597; *Neelamani Patnaik* v. *Sukaduva,* (1921) 60 Ind Cas 255 (257): 12 Mad L W 269: 43 Mad 803; *Bibi Kaniz* v. *Sarban Lal,* (1917) 42 Ind Cas 414 (416) Pat [Suit for rent, impleading tenants and plaintiff's co-sharers]; *Suraj Narain Singh* v. *Sugra,* (1917) 37 Ind Cas 842 (842, 843) Pat [Suit for rent]; *Kushi Ram* v. *Balak Ram Mehar Chand,* 1931 Lah 370 (371): 130 Ind Cas 774 [Suit for price of goods sold]; *Majar Ali* v. *Nabin Chandra Das,* 1931 Notes 17 (*d*): 35 Cal W N 1079; *East Indian Railway Co* v. *Chinmay Charan Sanyal,* 1926 Pat 395 (396): 1926 Pat H C C 220: 96 Ind Cas 1037 [Suit against two Railway companies, for damages]; *Padrath Mahton* v. *Hitan Singh,* 1924 Pat 773 (774, 775): 5 Pat L Tim 509: 1924 Pat H C C 249: 82 Ind Cas 600; *Harimal* v. *Ayasingh,* (1911) 9 Ind Cas 825 (826): 65 Pun W R 1911: 103 Pun L R 1911; *Narain Singh* v. *Kaiwan Bahu Nawab Khusru Begam,* 1926 Oudh 304 (305): 3 Oudh W N 299: 95 Ind Cas 957: 13 Oudh L J 648 [Suit for rent]; *Patira* v. *Sadasheo,* 1931 Nag 97 (98): 132 Ind Cas 459 [Assignee of debt suing assignor and debtor]; *Soiru* v. *Narayanrao,* (1894) 18 Bom 520 (521, 522) [Suit on promissory note]; *Upendra* v. *Girinda,* (1898) 25 Cal 565 (568): 2 Cal 425 [Suit for contribution]; *Hudson* v. *Basdeo Bajpye,* (1899) 26 Cal 109 (112, 113): 3 Cal W N 76 [Suit on hundi]; *Karviraya* v. *Laxmibai,* (1901) 3 Bom L R 172 (178); *Rup Jaun* v. *Abdul Kadir,* (1904) 31 Cal 643 (645, 646): 8 Cal W N 496 F B [Suit for contribution]; *Muhammad Bashir-uz-zaman* v. *Suraj Narayan,* (1909) 3 Ind Cas 917 (918): 12 Oudh Cas 260; *Arokiam Asary* v. *Vavana Rowthan,* 1927 Mad 349 (350): 52 Mad L Jour 135 [Suit on mortgage]. See also *Maung Po Thu* v. *Maung Po Min,* (1917) 39 Ind Cas 149 (151) Rang [Suit by *A* against *B* and *C*—Suit dismissed against *B* and decreed against *C*—Appeal by *A*—Appellate Court, can, while passing decree against *B* exempt *C* from liability, though he has not filed appeal or cross-objection].

(7) *Attorney-General* v. *Simpson,* (1901) 2 Ch D 671; *Mohamad Hasan* v. *Lauti Ram,* 1927 All 453 (454): 49 All 224: 97 Ind Cas 65 [Plaintiff succeeding partly in trial Court—Appeal by defendant—No cross-appeal or cross-objections by plaintiff—Appellate Court reversing in favour of defendant the finding of trial Court, but finding that the finding of the trial Court against plaintiff on the other point was wrong, may pass decree in plaintiff's favour on that point]; *Balram Singh* v. *Bal Deo Singh,* (1917) 42 Ind Cas 443 (446, 447): 168 Pun W R 1917, (Do.); *Maksud Ali Khan* v. *Sheikh Abdullah Khan,* 1928 All 77 (80): 25 All L J 1017: 108 Ind Cas 728: 50 All 218 [Decree against mother and minor son —Direction that properties in one village to be sold—Appeal—Minor son found not liable—Decree against mother can be directed to be enforced against properties in another village also]; *Iswarayya* v. *Iswarayya,* 1931 P C 234 (239): 8 Oudh W N 980: 61 Mad L Jour 367: 35 Cal W N 1185: 1931 All L J 808: 33 Bom L R 1402: 34 Mad L W 518: 133 Ind Cas 716: 58 Ind App 350: 54 Mad 774 P C [Confirming 1930 Mad 154 (154)].

(8) *Kuppuswami Chetty* v. *Samudra Vijia Nainar,* (1908) 18 Mad L Jour 586 (587, 588): 4 Mad L Tim 266; *Qamar-ud-din* v. *Mathra,* 1925 Lah 155 (156): 6 Lah L Jour 464 [Where plaintiff made alternative claims on one of which the trial Court decreed the claim, the appellate Court in reversing the decree is bound to see whether the paintiff is not entitled to the alternative relief]; *Arjun* v. *Jug Lal,* 1923 Lah 422 (423): 85 Ind Cas 95 [Decree passed by trial Court in plaintiff's favour—Appellate Court reversing decree, may grant the alternative relief to which he is entitled].

(*e*) *A*, an auction-purchaser sues *B*, the judgment-debtor for possession or in alternative *C*, the decree-holder for refund of the purchase-money. The trial Court decrees possession. *B* appeals making *A* and *C* respondents. The appellate Court comes to the conclusion that *A* is not entitled to recover possession from *B* but is entitled to the refund of the purchase-money from *C*. A decree may be passed to this effect.[9]

(*f*) *A* and *B* sue *C* for recovery of certain property. The trial Court passes a decree in *A's* favour but dismisses *B's* suit. *C* appeals. *B* neither appeals nor prefers cross-objection. The appellate Court holds that *B* and not *A* is the person entitled. It can pass a decree in *B's* favour.[10] *See also* Note 8.

The cases given in the above illustrations were cases in which there was interference by the appellate Court in *appellant's favour*. Suppose there is *no* interference in appellant's favour in a certain case, can the appellate Court reverse or modify the decree in favour of parties who have not filed any appeal or cross-objection. For instances *A* sues *B* for Rs. 1,000. A decree is passed in *A's* favour for Rs. 400 only. *A* appeals from the decree. *B* files neither an appeal nor prefers cross-objections against the decree. The appellate Court finds that *A* is not entitled to *any amount*. Can it dismiss his suit *in toto* or can it merely dismiss his appeal leaving untouched the decree for Rs. 400 in his favour? Similarly in the above case, *B* (the defendant) appeals and *A* (the plaintiff) neither appeals nor files any cross-objection. The appellate Court finds that *B* is liable for the whole amount claimed by the plaintiff and not merely for the portion of it decreed against him. Has it the power, under such circumstances to pass a decree against *B* for the whole amount or can it merely dismiss his appeal leaving untouched the decree which exempts him from the liability for the balance of the amount? On this question there is a divergence of opinion. The decisions fall into three classes:—

(*a*) Those which hold that the appellate Court has *no jurisdiction* to pass a decree in *B's* favour in such a case.[11]

(*b*) Those which do not advert to the question of jurisdiction but simply say that the appellate Court should not pass a decree

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[9] *Premraj* v. *Javarmal*, (1913) 18 Ind Cas 881 (382): 15 Bom L R 41; *Charu Bala Dassee* v. *Srimathi Nihar Kumari Dasi*, 1927 Cal 831 (832): 46 Cal L Jour 247: 105 Ind Cas 600.

[10] *Ravaneswar Prasad Singh* v. *Chandi Prasad Singh*, 1915 P C 57 (59): 43 Cal 417: 36 Ind Cas 499 [Confirming 12 Ind Cas 931 (936)]. See also *Baij Nath Singh* v. *Bahadur Singh*, 1926 Oudh 101 (108): 12 Oudh L J 571: 2 Oudh W N 872: 91 Ind Cas 583 [But see *Rukia* v. *Mewa Lal*, 1928 All 746 (752): 26 All L J 1139: 111 Ind Cas 751].

[11] *Ramlal* v. *Dip Chand*, 1921 Lah 211 (212): 3 Lah L Jour 231: 60 Ind Cas 705 [Suit partly decreed in plaintiff's favour and partly against defendant—Appeal by *plaintiff*—No cross-objections by defendant—Appellate Court dismissing appeal cannot dismiss suit]; *Prasad Singh* v. *Narayan Dayal*, 1925 Pat 285 (287): 4 Pat 87: 82 Ind Cas 984, (Do.); *Marotrao* v. *Municipal Committee, Nagpur*, 1926 Nag 281 (285): 92 Ind Cas 796, (Do.); *Dwarka Nath* v. *Mohima Charan*, (1911) 9 Ind Cas 121 (122) Cal, (Do.); *Cheda Lal* v. *Badullah*, (1889) 11 All 35 (38): 1888 All W N 284: 13 Ind Jur 190, (Do.); *Ram Chandra* v. *Madho Prasad*, (1918) 36 Ind Cas 537 (539): 1918 Pat H C C 26: 5 Pat L W 213; *Faiz Ali* v. *Ashraf Khatun*, 1929 Lah 177 (178): 118 Ind Cas 464: 30 Pun L R 600 [Trial Court leaving parties to bear own costs—Plaintiff appealing and defendant not appealing on question of costs—Appellate Court cannot make appealing party pay non-appealing party's costs in trial Court]; *Pitam* v. *Gaya Prasad*, (1914) 23 Ind Cas 886 (887) All [Where plaintiff obtained a mortgage decree subject to paying a certain amount to a prior mortgagee and in an appeal by the latter the sum was reduced. *Held*, that the amount could not be so reduced]; *Vithoba* v. *Bhangi*, 1928 Nag 322 (323): 112 Ind Cas 893 [Appellate Court has no power to reverse mortgage decree and pass money decree only when defendant has not appealed or filed cross-objection]; *Nyan Chandra* v. *Narayan*, (1879-80) 4 Bom 293 (294); *Apee* v. *Heeranand*, (1870) 2 N W P H C R 44 (45); *Raghu Nath Singh Manku* v. *Pareshram Mahata*, (1883) 9 Cal 635 (636, 637): 13 Cal L Rep 89 [Application for execution allowed—Appeal by decree-holder claiming higher rate of interest—Application for execution not to be dismissed as barred by limitation].

O.41, R.33, Note 6.

in *B's* favour in such circumstances.[12]

(*c*) Those which say that the appellate Court has *jurisdiction* to pass a decree in *B's* favour even in such cases though the question whether the power should be exercised in a given case depends on its own circumstances.[13]

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[12] *Abjal Majhi* v. *Intu Bepari*, (1916) 32 Ind Cas 494 (495): 22 Cal L Jour 394: 20 Cal W N 542 [Suit partly decreed and partly dismissed—Appeal by plaintiff no cross-objection by defendant—Suit not to be wholly dismissed]; *Ganga Dhar* v. *Banabashi*, (1914) 24 Ind Cas 208 (208): 22 Cal L Jour 390, (Do.); *Kishun Chand* v. *Ghane Muhammad*, (1917) 38 Ind Cas 361 (363) Cal, (Do.); *Rangam Lal* v. *Chandu*, (1911) 11 Ind Cas 640 (641, 642): 8 All L J 1111: 34 All 32, (Do.); *Basant Lal* v. *Nural Hasan*, (1913) 18 Ind Cas 530 (531) All [Suit by *A* against *B* and *C*—Decree partly against *B* and partly against *C*—Appeal by *B*—No cross-objection or appeal by *C*—Appellate Court not to exonerate *C* completely and make *B* liable for the whole amount—But *see* 58 Ind Cas 114 (115)]; *Sheonarain* v. *Nathu*, 1922 Nag 1 (9): 65 Ind Cas 786: 5 Nag L J 114: 19 Nag L R 81 F B [Foreclosure asked for—Only sale decreed—Appeal by defendant—Decree for foreclosure not to be passed, in absence of cross-appeal or cross-objections by plaintiff]; *Gopal Chandra Das* v. *Nadir Chand*, (1918) 46 Ind Cas 142 (144): 22 Cal W N 526; *Maung Chit* v. *Maung Pyaung*, (1917) 39 Ind Cas 380 (381): (1916) 2 U B R 144: 11 Bur L Tim 19; *Mukund* v. *Shantaram*, 1927 Bom 128 (128): 28 Bom L R 627: 98 Ind Cas 383; *Nandalal* v. *Mukundalal*, 1926 Cal 57 (59): 89 Ind Cas 24.

[13] *Subramanian* v. *Sinnammal*, 1930 Mad 801 (806): 32 Mad L W 395: 1930 Mad W N 798: 59 Mad L Jour 634: 53 Mad 881: 127 Ind Cas 624 [Plaintiff, dissatisfied with decree, appealing—In proper case appellate Court *can* dismiss plaintiff's suit *in toto* though respondent has not preferred cross-appeal or memorandum of objections. *Confirming* 1925 Mad 266 (267, 268)]; *Jogendra Kishore* v. *Nasimuddin Sarkar*, (1921) 62 Ind Cas 623 (624) Cal, (Do.); *Gangamma Naik* v. *N L V R Veerappa Chetty*, 1931 Mad 513 (518, 519): 131 Ind Cas 833, (Do.). See *Ganeshdas* v. *Nimbi*, (1912) 17 Ind Cas 638 (639): 8 Nag L R 174 [Suit partly decreed and partly dismissed—Appeal by plaintiff—No appeal or cross-objection by defendant—Appellate Court can dismiss whole suit as barred by limitation]; *C T A M Chettiar Firm* v. *Ko Yin Gyi*, 1929 Rang 158 (159): 7 Rang 88: 117 Ind Cas 585 [Decree for mesne profits—Appeal by plaintiff for enhancing amount—Appellate Court *can* modify decree in defendant's favour]; *Jawahar Bano* v. *Shujat Husain Beg*, (1920) 58 Ind Cas 114 (115): 18 All L J 925: 2 U P L R (A) 309: 43 All 85 [Suit by *A* against *B* and *C*—Decree partly against *B* and partly against *C*—Appeal by *B*—No appeal or cross-objection by *C*—Appellate Court *can* exonerate *C* completely and make *B* liable for the whole claim—But see *Basant Lal* v. *Nurul Hasan*, 18 Ind Cas 530 (531)]; *Masan Nyun* v. *Maung Tint*, 1930 Rang 190 (191): 127 Ind Cas 597 [Suit partly decreed and partly dismissed—Appeal by defendant—Whole suit may be decreed, though plaintiff has not appealed or filed cross-objections]; *Dayal Ram* v. *Ladha Ram*, (1932) 140 Ind Cas 22 (23): 1933 Lah 40, (Do.); *Manab Shaik* v. *Mahomed Gholam Nabi*, 1928 Cal 488 (489): 113 Ind Cas 32, (Do.); *Mordhaj* v. *Jahangir*, (1915) 28 Ind Cas 428 (429) All, (Do.); *Afzal Husain* v. *Huran Bibi*, 1929 All 398 (399): 1929 All L J 589: 116 Ind Cas 16 [Suit for pre-emption decreed partly—Appeal by defendant—Appellate Court may decree whole claim, though plaintiff has not filed appeal or cross-objection]: *Onnakota Viraju* v. *Vatsvaya Bangaraju*, 1926 Mad 631 (633): 91 Ind Cas 519 [Suit dismissed but defendant wrongly ordered to pay Court-fee payable on a previous suit filed by him—Appeal by plaintiff—Appeal dismissed—Appellate Court has power, to set aside the erroneous order against the defendant]; *Naresh Chandra Basu* v. *Hayder Sheikh Khan*, 1929 Cal 28 (31): 49 Cal L Jour 83: 115 Ind Cas 180 [Suit for declaration and possession of a portion of disputed land decreed—Appeal by plaintiff—No cross-objection by defendant—Appellate Court can affirm decision of lower Court subject to modification that plaintiff should get *joint* possession of the portion decreed]; *Ganga Prasad* v. *Mt Hardei*, 1932 All 32 (33): 1931 All L J 601: 133 Ind Cas 536 [Trial Court passing money decree—Appeal by defendant contending that simple *money* decree was wrong—No appeal or cross-objection by plaintiff—Appellate Court can grant plaintiff respondent mortgage decree in lieu of money decree—Suit for declaration and possession—Court holding plaintiff was not entitled to the property and passing money decree for amount paid by him towards a certain encumbrance on the property—Appeal by defendant—Appellate Court can pass decree declaring plaintiff's right as mortgagee (by subrogation) though he had not filed cross-objections]; *Panchu Bania* v. *Anam Thakur*, 1924 Pat 160 (160): 2 Pat 712: 1 Pat L R 356: 77 Ind Cas 357: 5 Pat L Tim 489 [Where the plaintiff claims relief as against all defendants jointly, and his suit is dismissed as against some defendants only, in an appeal against the dismissal, the appellate Court can dismiss the whole suit]; *Akimannessa* v. *Bepin Behari*, (1916) 32 Ind Cas 499 (500): 22 Cal L Jour 397: 20 Cal W N 544 [Suit partly decreed and partly dismissed—Appeal by defendant—Appellate Court can allow plaintiff to withdraw *whole* suit]. See also *Manar Shaikh* v. *Mahomed Ghulam Nabi*, 1928 Cal 488 (489): 113 Ind Cas 32 [Suit for declaration that defendant was not entitled to draw water from plaintiff's tank from certain bank—Suit decreed but decree also providing that defendant was entitled to take water from another bank—This was not a point raised in the case at all—Appeal by defendant—Appellate Court affirming decree of trial Court as to former part but expunging latter part—*Held*, appellate Court had power to do so]; *Ramanadhan* v. *Alkonda*, (1895) 18 Mad 500 (502): 5 Mad L Jour 197 [Decree for redemption—Appeal by defendant—No appeal or cross-objection by plaintiff—Appellate Court can pass decree for possession in his favour without any liability to pay anything]; *Sarada Sundari Dasya* v. *Gangadhari Saha*, (1919) 52 Ind Cas 801 (801): 46 Cal 738 [Suit partly decreed and partly dismissed—Appeal by plaintiff—No appeal or cross-objection by defendant—*Whole case* may be remanded]. See also *Gungaram Dutt* v. *Chowdhry Junmajoy*, (1877) 1 Cal L Rep 144 (146) [Decree partly favourable to plaintiff and partly to defendant—Appeal by plaintiff—Remand by appellate Court—Second decision may be more favourable to defendant than former one].

O.41, R.33. Note 6.

It is submitted that the view expressed in (*c*) above is correct for the following reasons:—

(1) This rule is general in its terms and contains no words which would warrant its being restricted to cases where the appellate Court interferes in appellant's favour.[14]

(2) The following cases[15] out of the cases cited under (*a*) were decided under the previous Code which did not contain any provision corresponding to R. 33.

(3) The cases cited under (*b*) do not say that the appellate Court has no jurisdiction to pass a decree in *B's* favour in such circumstances.

In exercising the power under this rule, the Court should not lose sight of the other provisions of law such as the Court-Fees Act or the Limitation Act which are likely to be infringed by the exercise of such power.[16] Care and judicial discretion must, therefore, be exercised in view of all the circumstances of the case.[17] The following conditions should be satisfied before such power is exercised in favour of a party:—

(*a*) The Court must be satisfied that there are good reasons for such party not having filed any appeal or cross-objection.[18]

(*b*) Interference in favour of such party must be rendered necessary by the conclusions to which the appellate Court comes *in deciding the appeal.*[19]

Illustration.

A decree is passed in an administration suit dividing the estate between *A* and *B*, and rejecting the claim of *C* to be entitled to the whole estate in preference to both *A* and *B*. *A* appeals from the decree claiming a higher share. *C* does not file any appeal or cross-objection. The appellate Court has no power in such appeal to enter into the question of *C's* preferential *rights.*[20]

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(14) See *Subramanian* v. *Sinnammal*, 1930 Mad 801 (805): 32 Mad L W 895: 1930 Mad W N 798; 59 Mad L Jour 634: 58 Mad 881: 127 Ind Cas 624 F B.

(15) *Cheda Lal* v. *Badullah*, (1889) 11 All 35 (38): 1888 All W N 284: 13 Ind Jur 190; *Apee* v. *Heeranand*, (1870) 2 N W P H C 44; *Nayan Chandra* v. *Narayan*, (1879-80) 4 Bom 293 (294); *Raghu Nath Singh Manku* v. *Pareshram Mahta*, (1888) 9 Cal 635 (636, 637): 13 Cal L Rep 89.

(16) *Akimannessa* v. *Bepin Behari*, (1916) 32 Ind Cas 499 (500): 22 Cal L Jour 397: 20 Cal W N 544; *Abjal Majhi* v. *Intu Bepari*, (1916) 32 Ind Cas 494 (495): 22 Cal L Jour 394: 20 Cal W N 542; *Rangam Lal* v. *Chandu*, (1911) 11 Ind Cas 640 (641): 8 All L J 1111: 34 All 32; *Ramchandra Chowdhury* v. *Madhe Prasad Chatterji*, (1916) 36 Ind Cas 537 (539): 1918 Pat H C C 26: 5 Pat L W 213; *Maung Chit Pu* v. *Maung Pyaung*, (1917) 39 Ind Cas 380 (380): (1916) 2 U B R 144: 11 Bur L Tim 19; *Kishan Chand* v. *Ghani Mahomed*, (1917) 38 Ind Cas 361 (363) Cal; *Shib Chander Kar* v. *Dulcken*, (1918) 48 Ind Cas 78 (82): 28 Cal L Jour 123; *Official Trustee* v. *Charles*, (1920) 56 Ind Cas 262 (266): 1920 Pat H C C 161: 5 Pat L Jour 328: 1 Pat L Tim 434; *Illahi Baksh* v. *Javindamal*, (1920) 54 Ind Cas 971 (974): 38 Pun W R 1920: 1 Lah 396; *Ramalingam Chettiar* v. *Subramania Chettiar*, 1927 Mad 620 (622): 52 Mad L Jour 612: 38 Mad L Tim 323: 25 Mad L W 699: 103 Ind Cas 394: 50 Mad 614; *Gyan Singh* v. *Ata Husain*, 1921 All 56 (57, 58): 43 All 320: 19 All L J 83: 60 Ind Cas 817.

(17) *Rangam Lal* v. *Jhandu*, (1911) 11 Ind Cas 640 (641): 8 All L J 1111: 34 All 32 F B.

(18) *Rangam Lal* v. *Jhandu*, (1911) 11 Ind Cas 640 (641): 8 All L J 1111: 34 All 32 F B; *Subramaniam* v. *Sinnammal*, 1925 Mad 266 (267): 20 Mad L W 761: 85 Ind Cas 312 [Confirmed in 1930 Mad 801 (804) F B].

(19) *Rukhya* v. *Mewa Lal*, 1928 All 746 (750): 26 All L J 1139: 111 Ind Cas 751. See also *Ramalingam Chettiar* v. *Subramania Chettiar*, 1927 Mad 620 (622): 52 Mad L Jour 612: 38 Mad L Tim 328: 25 Mad L W 699: 103 Ind Cas 394: 50 Mad 614 [The rule cannot be read as giving a right to a respondent to urge something in his favour against another respondent which has nothing to do with the result of the appeal, without his filing an appeal or memo. of objections himself]: *Maung Tin* v. *Ma Yu*, 1930 Rang 237 (238): 8 Rang 480: 129 Ind Cas 524.

(20) *Maung Tin* v. *Ma Yu*, 1930 Rang 237 (238): 8 Rang 480: 129 Ind Cas 524; *Ma On Thin* v. *Ma Ngwe Yin*, 1929 Rang 265 (267): 7 Rang 398: 120 Ind Cas 666.

(*c*) Interference must be necessary in the interests of justice, equity and good conscience.[21]

In *Rukia* v. *Mewa Lal*[22] the High Court of Allahabad observed that the rule "is restricted to cases where *without disturbing the grounds upon which the judgment of the trial Court proceeds,* the appellate Court considers that the decree should be modified in order to do justice to all the parties concerned including such as have not set the law in motion." If these remarks were intended to lay down that under this rule an appellate Court has no power to vary a decree in favour of a respondent who has not filed an appeal or cross-objection if it has upset the grounds upon which the lower Court's judgment is based, it is submitted that the view is incorrect.

The appellate Court *can* interfere in favour of a party or a respondent, who has filed an appeal or cross-objection and *failed* therein.[23]

7. **Power if can be exercised in favour of persons not parties to appeal.**—The appellate Court can exercise its power under this rule in favour of parties to the suit who were not impleaded as parties to the appeal.[1] A contrary view has, however, been taken in the undermentioned cases.[2] It is submitted that this view is not correct as it is inconsistent with the express provisions of the rule which uses the words "respondents or parties".[3] *See also* Notes to R. 4, *ante.*

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(21) *Nandalal Roy Choudhury* v. *Mukundalal De,* 1926 Cal 57 (59): 89 Ind Cas 24; *Bhutnath* v. *Sashimukhi,* 1926 Cal 1042 (1044): 30 Cal W N 885: 96 Ind Cas 474; *Shaib Chandra Kar* v. *Dulcken,* (1918) 48 Ind Cas 78 (82): 28 Cal L Jour 123; *Official Trustee* v. *Charles,* (1920) 56 Ind Cas 262 (266): 1920 Pat H C C 161: 5 Pat L Jour 328: 1 Pat L Tim 434; *Feroze A Cooper* v. *Secretary of State,* 1928 Lah 947 (948): 111 Ind Cas 692; *Maharaja Bahadur Kesho Prasad Singh* v. *Narayan Dayal,* 1925 Pat 285 (287): 4 Pat 37: 82 Ind Cas 984; *Gopal Ukera* v. *B N Railway Co, Ltd,* 1933 Cal 165 (169): 56 Cal L Jour 285.

Rule to be invoked only when party appealing to it can fairly be said to be equitably entitled to relief.—*Punjab National Bank* v. *Uma Dutta,* 1928 Lah 599 (601): 9 Lah 291: 29 Pun L R 477: 112 Ind Cas 425; *Kushi Ram* v. *Balak Ram Mehar Chand,* 1931 Lah 370 (371): 130 Ind Cas 774 [Plaintiff not coming into the Court with clean hands—Powers under rule—Not to be exercised in his favour]; *Ram Chandra Chowdhury* v. *Madho Prasad Chatterji,* (1916) 36 Ind Cas 537 (539): 1918 Pat H C C 26: 5 Pat L W 213; *Thubati Venkatakrishnayya* v. *Vajrala China Veerareddi,* 1928 Mad 1144 (1146).

(22) 1928 All 746 (750): 26 All L J 1139: 111 Ind Cas 751.

(23) *Tehal Kaur* v. *Amarnath,* 1925 Lah 2 (9, 10): 17 Pun W R 1923: 79 Ind Cas 670; *Shankarnaraina Saralaya* v. *Laxmi Hengsu,* 1931 Mad 277 (278): 60 Mad L Jour 267: 33 Mad L W 411: 130 Ind Cas 764 [Independent appeals by plaintiff and defendant—Latter's appeal abating—He as respondent in plaintiff's appeal, can invoke R 33].

Note 7.

(1) *Subbarayalu* v. *Papammal,* (1915) 29 Ind Cas 579 (579) Mad; *Ambika* v. *Sastra,* (1915) 30 Ind Cas 868 (869): 22 Cal L Jour 61; *Venkatachala Pillai* v. *Ranga Pillai,* (1915) 28 Ind Cas 694 (695): 17 Mad L Tim 220: 28 Mad L Jour 334; *Peria Krishnaswami Naik* v. *Ayyappa Naik,* (1914) 24 Ind Cas 924 (925): 1 Mad L W 376; *Jawahar Bano* v. *Shujaat Husain Beg,* 1921 All 367 (368): 43 All 85: 18 All L J 925: 58 Ind Cas 114; *Mukku Venkataramayya* v. *Mukku Chinniah,* (1919) 53 Ind Cas 201 (202): 10 Mad L W 357: 1919 Mad W N 807 [Preferably they may be made parties]; *Madan Lal* v. *Gajendrapal Singh,* 1929 All 243 (244): 1929 All L J 344: 116 Ind Cas 436: 51 All 575; *Bhutnath* v. *Sashimukhi,* 1926 Cal 1042 (1044): 30 Cal W N 885: 96 Ind Cas 474; *Saktiprasanna Bhattacharya* v. *Naliniranjan Bhattacharya,* 1931 Cal 738 (740): 58 Cal 923: 133 Ind Cas 177; *Yadorao* v. *Chandudas,* 1927 Nag 196 (197): 101 Ind Cas 255. See also *Abdul Aziz* v. *Momin,* (1911) 9 Ind Cas 815 (816) Cal [Appellate Court is competent to make a decree in favour of a *party in second appeal* though such person was not a party to the first appeal].

(2) *Jogesh Chandra Banerjee* v. *Sarada Kumar Chakravarthi,* (1919) 49 Ind Cas 834 (835): 23 Cal W N 223; *Haridas Dey* v. *Kailash Chandra Bose,* (1918) 44 Ind Cas 480 (482) Cal; *Yado Rao* v. *Amrit Rao,* 1926 Nag 135 (136): 88 Ind Cas 803; *A C T R M Chetty* v. *Po U,* (1921) 63 Ind Cas 973 (974): 13 Bur L Tim 163; *Rukia* v. *Mewa Lal,* 1928 All 746 (751): 26 All L J 1139: 111 Ind Cas 751; *Ramachandra Mallaya* v. *Narayana Hegade,* (1917) 42 Ind Cas 972 (975): 1917 Mad W N 808: 22 Mad L Tim 480: 7 Mad L W 10. See also *Rao Vinayak* v. *Laxman,* (1918) 44 Ind Cas 51 (55): 14 Nag L R 56.

(3) *Mukku Venkataramayya* v. *Mukku Chinniah,* (1919) 53 Ind Cas 201 (202): 10 Mad L W 357: 1919 Mad W N 807; *Bhutnath* v. *Sashimukhi,* 1926 Cal 1042 (1044): 30 Cal W N 885: 96 Ind Cas 474; *Subramanian Chettiar* v. *Sinnammal,* 1925 Mad 266 (267): 20 Mad L W 761: 85 Ind Cas 312.

8. **Decree against several persons—Appeal by one—Power of appellate Court to set aside decree against all.**—Where a decree is passed against several persons and one of them appeals against it, it is competent to the appellate Court under this rule to set aside the decree against all of them[1] although such decree does not proceed on any ground *common to all* the persons against whom it is passed.[2] But this power of the appellate Court cannot be exercised as a matter of course and in the absence of special reasons.[3] Moreover, where there are several defendants and the decree imposes a separate liability on each of them, and one of them appeals against that part of the decree which concerns him, it has been held that the appellate Court cannot set aside the decree against all the defendants, the reason given being that in such a case there is really a combination of several decrees one of which alone is the subject-matter of the appeal.[4] *See also* Note 5, *ante*. A contrary view, however, has been taken in the following cases.[5]

Where a decree is passed against two defendants, against one of whom it is passed on confession of judgment, and against the other, after contest, and the latter appeals against the decree, the appellate Court cannot set aside the decree in favour of the former.[6]

9. **Power if can be exercised against person not party to appeal.**—Under this rule, the appellate Court has no power to interfere to the prejudice of a person who was a party to the suit but who was not impleaded in the

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Note 8.

(1) *Ambika* v. *Perdip*, (1915) 28 Ind Cas 446 (447): 19 Cal W N 233: 42 Cal 451; *Sagar Mal* v. *Bhudan Sahu*, (1913) 19 Ind Cas 251 (252) Cal; *Gaya Prasad Tewari* v. *Ram Phal Misir*, (1915) 28 Ind Cas 21 (22): 13 All L J 246; *Sunder Singh* v. *Krishna Mills*, (1914) 23 Ind Cas 91 (92): 11 Pun L R 1914: 22 Pun W R 1914: 63 Pun Re 1914; *Bhagtu* v. *Bua Ditta*, (1912) 13 Ind Cas 957 (957): 26 Pun W R 1912: 34 Pun L R 1912; *Ram Tahal* v. *Sukeshwar*, (1916) 35 Ind Cas 547 (548): 1 Pat L Jour 143; *Mosham Ali* v. *Muloo*, 1927 All 37 (37): 48 All 551: 24 All L J 586: 94 Ind Cas 347; *Gopala Ayyangar* v. *Mummachi Reddiar*, 1923 Mad 392 (402): 17 Mad L W 254: 74 Ind Cas 416; *Venkataramaier* v. *Gopalakrishna Pillai*, 1929 Mad 230 (233): 29 Mad L W 220: 56 Mad L Jour 255: 52 Mad 322: 116 Ind Cas 844; *Kariam Kuppuswami* v. *Desai Numberumal*, (1912) 16 Ind Cas 693 (694) Mad; *Abinash Chandra Bidyanidhi* v. *Dasurath Malo*, 1929 Cal 123 (126): 48 Cal L Jour 281: 32 Cal W N 1228: 114 Ind Cas 84: 56 Cal 598; *Chinnasami Servai* v. *Venkatasubba Vathiar*, 1928 Mad 681 (681): 1928 Mad W N 213: 110 Ind Cas 247; *Dharm Singh* v. *Bakshi*, 1926 All 425 (426): 94 Ind Cas 315; *Ajit Chowdhury* v. *Janak Lal Chaudhuri*, 1924 Pat 336 (339): 1923 Pat H C C 332: 75 Ind Cas 946; *Ambika* v. *Sasibara*, (1915) 30 Ind Cas 868 (869): 22 Cal L Jour 61; *Debendra Narayan Singh* v. *Narandra Narayan Singh*, (1920) 54 Ind Cas 636 (641): 30 Cal L Jour 417: 24 Cal W N 110; *Tulsi Raut* v. *Nabi Bux*, (1916) 32 Ind Cas 193 (194) Cal; *Somasundaram Chettiar* v. *Vaithilinga Mudaliar*, (1917) 41 Ind Cas 546 (551): 6 Mad L W 253: 40 Mad 846; *Ram Tahal* v. *Sukeswar*, (1916) 35 Ind Cas 547 (548): 1 Pat L Jour 143 [Decree against several defendants—One of them *ex parte*—Appeal by one—Appellate Court can set aside decree against all]. See also *Raghava Ayyangar* v. *Iruda Theran*, 1926 Mad 974 (975): 51 Mad L Jour 211: 24 Mad L W 292: 97 Ind Cas 346: 1926 Mad W N 761.

(2) *Peria Krishnaswami Naik* v. *Aiyappa Naik*, (1914) 24 Ind Cas 924 (925, 926): 1 Mad L W 376.

(3) *Piare Lal* v. *Mt Saraswati*, (1930) 123 Ind Cas 361 All: 1930 Notes 12 (d): 1930 All L J 1298; *Munawar Ali* v. *Jagmilan Ram*, 1927 All 177 (178): 99 Ind Cas 280; *Yadorao* v. *Chandu Das*, 1927 Nag 196 (197): 101 Ind Cas 255; *Gokal Chand* v. *Hukam Chand*, (1916) 34 Ind Cas 714 (716): 1916 Pun L R 154: 109 Pun W R 1916: 70, 71 Pun Re 1917. See also *Sham Lal* v. *Sohnu Shah*, (1911) 9 Ind Cas 742 (742): 14 Pun W R 1911: 98 Pun L R 1911.

(4) *Gayan Singh* v. *Atahussain*, 1921 All 56 (57, 58): 43 All 320: 19 All L J 83: 60 Ind Cas 817; *Venkatakrishnaya* v. *China Veerareddi*, 1928 Mad 1144 (1146); *Mahendra Nath Kamilya* v. *Khetra Mohan Bera*, 1928 Cal 593 (595): 109 Ind Cas 247: 55 Cal 1193; *Ramachandra Mallayya* v. *Narayana Hegade*, (1917) 42 Ind Cas 972 (973, 974, 975): 1917 Mad W N 808: 22 Mad L Tim 480: 7 Mad L W 10; *Rasmut Ali* v. *Asabali*, (1917) 38 Ind Cas 140 (141) Cal; *Bakht Bahadur* v. *Kishun Narain*, (1913) 18 Ind Cas 543 (544) All; *Mayandi Chetty* v. *Thirumalai Ayyangar*, (1915) 31 Ind Cas 986 (987) Mad; *Malyala Surayya* v. *Venkata Kumara Mahipathi Surya Rao*, 1925 Mad 771 (774): 48 Mad L Jour 577: 88 Ind Cas 99: 22 Mad L W 376: 1925 Mad W N 730.

(5) *Mukku Venkataramayya* v. *Mukku Chinniah*, (1919) 53 Ind Cas 201 (202): 10 Mad L W 357: 1919 Mad W N 807; *Somar Singh* v. *Mt Premadi Kuer*, 1925 Pat 40 (42): 3 Pat 327: 5 Pat L Tim 21: 1924 Pat H C C 105: 79 Ind Cas 794.

(6) *Fateh Muhammad* v. *Fateh Muhammad Khan*, (1913) 18 Ind Cas 758 (760): 80 Pun L R 1913: 109 Pun W R 1913.

O.41, R.33,
Notes
9—13.

appeal.[1] The decisions to the contrary are, it is submitted, not correct.[2] *See also* Notes to R. 4, *ante.*

10. **Addition of parties in appeal.**—*See also* O. 41, R. 20 and the notes thereunder. It has been held that the appellate Court has power under R. 33 to add parties to the appeal.[1] But the power must be exercised very sparingly.[2]

11. **Illustration to the rule.**—The illustration to the rule indicates a *type* of cases for which provision is intended to be made.[1] But it is not exhaustive of the classes of cases to which the rule applies, and does not restrict the scope of the rule.[2] Thus though the illustration contemplates that the person on whose favour the appellate Court interferes is a party to the appeal and that there is interference in favour of the appellant, these two conditions are not essential for the applicability of the rule. *See* Notes 6 and 7.

12. **Proviso.**—The proviso to the rule was added by Act, IX of 1922. Its effect is that the appellate Court cannot make an order for compensatory costs under S. 35-A where the trial Court has refused to do so. *See also* Note 3 to S. 35-A, *ante.*

13. **Limitation.**—*A* sues *B* for Rs. 1,000. The claim is decreed for Rs. 600. *A* appeals from the dismissal of his suit for the balance. It is competent to the appellate Court to dismiss his whole suit if it comes to the

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Note 9.

(1) *Mathewson* v. *Ram Kanai Singh,* (1912) 16 Ind Cas 387 (388) Cal; *Niazuddin* v. *Abdul Aziz,* (1909) 2 Ind Cas 552 (552): 6 All L J 643: 31 All 521; *Intu Meah* v. *Dar Baksh Bhayan,* (1911) 10 Ind Cas 275 (276): 15 Cal W N 798: 14 Cal L Jour 42; *Durga Charan Bose* v. *Lokhi Narain Bera,* (1918) 47 Ind Cas 917 (919) Cal; *Ali Sarkar* v. *Manikjan Bibi,* (1918) 43 Ind Cas 728 (729) Cal; *Madan Lal* v. *Gujendrapal Singh,* 1929 All 243 (244): 1929 All L J 344: 116 Ind Cas 436: 51 All 575; *Subramania Chettiar* v. *Chinnammal,* 1925 Mad 265 (267, 268): 20 Mad L W 761: 85 Ind Cas 312; *Bhagwant Datt* v. *Rajab Chaudry,* (1915) 27 Ind Cas 804 (805): 13 All L J 136; *Durga Charan Bose* v. *Lakshi Narain Bera,* (1918) 47 Ind Cas 917 (919) Cal. See also *Mannindra Chandra Nandi* v. *Bhagabati Devi Chaudurani,* 1926 Cal 335 (336): 30 Cal W N 45: 90 Ind Cas 966 [Appellate Court cannot vary decree against respondent against whom appeal had abated]; *Ilahi Baksh* v. *Jerindra Mal,* (1920) 54 Ind Cas 971 (973): 38 Pun W R 1920: 1 Lah 396 [Cross-objection against co-defendant who was not party to appeal, not allowed]; *Saktiprasanna Bhattacharya* v. *Nalin Ranjan Bhattacharya,* 1931 Cal 738 (739, 740): 58 Cal 923: 135 Ind Cas 177, (Do.). See also *Chokkalingam Chetty* v. *Sital Atchi,* 1925 Rang 108 (110): 2 Rang 541: 3 Bur L Jour 259: 84 Ind Cas 522 [Finding of lower Court not to be reversed in absence of necessary parties]; *Bankey Lal* v. *Natha Ram,* 1929 All 195 (196): 107 Ind Cas 569 [No decree to be passed against a *pro forma* party]; *Ghannu Mal* v. *Sant Das,* (1913) 18 Ind Cas 327 (327): 91 Pun L R 1913: 67 Pun W R 1913.

(2) *Bejoy Kumar Sen* v. *Kusum Kumari Debi,* 1929 Cal 315 (317): 33 Cal W N 221; *Bhutnath* v. *Sashimukhi,* 1926 Cal 1042 (1044): 30 Cal W N 885: 96 Ind Cas 474 [*Obiter*]. See also *Reballa Babu Reddi* v. *Dodla Rami Reddi,* (1915) 31 Ind Cas 978 (978, 979) Mad.

Note 10.

(1) *Probhat Chandra* v. *Gopal Chandra,* 1922 Cal 398 (399): 49 Cal 379: 69 Ind Cas 981; *Rebala Babu Reddi* v. *Dodla Rami Reddi,* (1915) 31 Ind Cas 978 (978) Mad; *Ma On Thin* v. *Ma Ngwe Yin,* 1929 Rang 265 (267): 7 Rang 398: 120 Ind Cas 666 [But compare *Maharaja Sahib of Faridkote State* v. *Kanshi Ram,* 1926 Lah 499 (500): 8 Lah L Jour 333: 97 Ind Cas 338: 27 Pun L R 576: 8 Lah 161]. See also *Dipan Rai* v. *Kapil Deo Singh,* 1932 All 120 (121): 1931 All L J 1004: 135 Ind Cas 553 [*Held,* that even assuming an appellate Court had jurisdiction under R 33 to add a party for the purpose of passing a decree against him, it had not exercised its discretion properly in this case —Compare 1927 P C 252 (256)].

(2) *Feroze A Cooper* v. *Secretary of State,* 1928 Lah 947 (948): 111 Ind Cas 692.

Note 11.

(1) See *Report of the Special Committee. See also Rangam Lal* v. *Jhandu,* (1911) 11 Ind Cas 640 (641): 8 All L J 1111: 34 All 32 F B; *Gokal Chand* v. *Hukam Chand,* (1916) 34 Ind Cas 714 (715): 109 Pun W N 1916: 154 Pun L R 1916: 70, 71 Pun Re 1917; *Ramalingam* v. *Subramania,* 1927 Mad 620 (622): 52 Mad L Jour 612: 38 Mad L Tim 323: 25 Mad L W 699: 103 Ind Cas 394: 50 Mad 614.

(2) *Peria Krishnasami* v. *Ayyappa,* (1914) 24 Ind Cas 924 (926): 1 Mad L W 376; *Mukku Venkataramayya* v. *Mukku Chinniah,* (1919) 53 Ind Cas 201 (202): 10 Mad L W 357: 1919 Mad W N 807; *Bhutnath Deb* v. *Shashimukhi Brahmani,* 1926 Cal 1042 (1044): 30 Cal W N 885: 96 Ind Cas 474; *Subramania Chettiar* v. *Sinnammal,* 1930 Mad 801 (804): 32 Mad L W 395: 1930 Mad W N 798: 59 Mad L Jour 631: 53 Mad 881: 127 Ind Cas 624.

O.41, R.33, Notes 13—14.

conclusion that it is time barred.[1] But it has been held that if the appellate Court is not in a position to reject the whole claim, as for instance, where the defendant has confessed judgment as to a part of the claim, the appellate Court should not dismiss even that part of the claim which is the subject-matter of appeal.[2] The reason given is that the obligation to dismiss a suit as time barred under S. 3 of the Limitation Act arises only when the appellate Court is in a position to dismiss the whole claim.[3]

When a suit is decreed partially and the plaintiff appeals against the disallowance of the balance of his claim, the entire decree is imperilled because the appellate Court can in such appeal dismiss the whole suit and hence limitation for execution of the decree runs from the date of the appellate decree.[4] When a decree imposes a separate liability on each of the several defendants, and one of them appeals against that portion of the decree which affects him, is limitation postponed under Art. 182, Cl. (2), even for the execution of the decrees against the other defendant. On this question there is a conflict of decisions, some cases holding that time runs from the appellate decree[5] and others holding that time runs from the lower Court's decree.[6]

14. Res judicata.—*A* sues *B* and *C* in the alternative for a certain sum of money. The suit is decreed against *B* and dismissed against *C*. *B* appeals making *A* and *C* respondents. The appellate Court sets aside the decree against *B*. It can at the same time pass a decree against *C*. But its failure to do so does not operate as *res judicata* under S. 11, Explanation 5, because it was not obligatory but only *discretionary* on the part of the appellate Court to grant relief to *A*.[1] (*See* S. 11, Note 25.) Similarly, the failure of *A* to ask for relief being granted to him under R. 33 does not operate as *res judicata* under S. 11, Explanation 4.[2]

Where a defendant appeals as to a part of the decree against him it has been held by the Madras High Court in the undermentioned case[3] that he is precluded by *res judicata* from urging in support of his appeal a point which goes to the root of the whole decree including the portion of it from which he has not appealed. It is submitted that this decision is inconsistent with the Full Bench decision of the same High Court in *Panchanada* v. *Vythinatha*[4] and other cases cited in S. 11, Note 29, Foot-note 10. Further the decision seems to overlook the provisions of the present rule which enable the appellate Court to

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Note 13.

[1] *Ganeshdas* v. *Mt Nimbi*, (1912) 17 Ind Cas 638 (639): 8 Nag L R 174.

[2] *Hukam Singh* v. *Shahao Din*, (1918) 44 Ind Cas 890 (891): 14 Pun W R 1918; *Chidambara Mudaliar* v. *Krishnaswami Pillai*, (1915) 28 Ind Cas 221 (228): 28 Mad L Jour 285: 2 Mad L W 241: 39 Mad 365.

[3] *Kandaswami Chetty* v. *Annamalai Chetty*, (1905) 28 Mad 67 (68): 15 Mad L Jour 402.

[4] *Panchu Bania* v. *Anand Thakur*, 1924 Pat 160 (161): 2 Pat 712: 1 Pat L R (Civ) 356: 77 Ind Cas 357: 5 Pat L Tim 489.

[5] *Somar Singh* v. *Premdei Kuer*, 1925 Pat 40 (42, 43): 8 Pat 327: 5 Pat L Tim 21: 1924 Pat H C C 105: 79 Ind Cas 794.

[6] *Gayan Singh* v. *Ata Husain*, 1921 All 56 (58): 43 All 320: 19 All L J 63: 60 Ind Cas 817.

Note 14.

[1] *Sarat Chandra* v. *Khararea Mezefula*, (1917) 42 Ind Cas 548 (549) Cal.

[2] *Sarat Chandra* v. *Khararea Mezefula*, (1917) 42 Ind Cas 548 (549, 555) Cal.

[3] *Pichai Koonar* v. *Narasimha Rama Ayyar*, 1930 Mad 471 (472, 473): 58 Mad L Jour 343: 31 Mad L W 832: 125 Ind Cas 247.

[4] (1906) 29 Mad 333 (335): 16 Mad L Jour 63 F B.

O.41, R.33. Notes 14—16.

reverse the whole decree though the appeal is as to a part of the decree alone. (*See* Note 5.)

15. **Remand.**—*See* 52 Ind. Cas. 801 cited in N. 6, Foot-note 14. above.

16. **Second Appeal.**—*A* sues *B* and *C*. The suit is decreed against *B*, but dismissed against *C*. *B* appeals from the decree but *A* does not file any appeal or cross-objections. *B's* appeal is allowed, and *A's* entire suit is, therefore, dismissed. *A* files a second appeal impleading *B* and *C* as respondents. He is not entitled to file a second appeal against *C* because to allow him to do so would be to allow him to prefer an appeal directly to the High Court from the decision of the trial Court.[1] The decisions to the contrary[2] are not good law in view of the Privy Council case mentioned below.[3]

A sues for Rs. 1,000. The trial Court passes a decree for Rs. 600. The defendant appeals but *A* does not file any appeal or cross-objection. The defendant's appeal is allowed and *A's* suit is dismissed in its entirety. *A* files a second appeal. He cannot contend in the second appeal that his whole suit should be decreed. The utmost he can claim is the restoration of the trial Court's decree.[4] The authorities to the contrary[5] are not good law as they are opposed to the Privy Council decision in *Nobinchandra* v. *Chandra Madhab.*[6] But where the omission to grant a relief is due to a mere slip of the pen, it can be decreed on further appeal, though no appeal was preferred against the decree of the first Court.[7]

The mere fact that a decree might have been passed in favour of a party to the suit who was not impleaded as a party to the appeal does not make him constructively a party to the appeal so as to enable him to file a second appeal against the decree in the appeal.[8] No second appeal lies against an order of remand passed not under R. 23, *ante* but under the present rule.[9]

Note 16.

(1) *Punjab National Bank* v. *Uma Dutta*, 1928 Lah 599 (601): 9 Lah 291: 29 Pun L R 477: 112 Ind Cas 425; *Asundi* v. *Bareddi*, (1910) 5 Ind Cas 927 (927, 928): 7 Mad L Tim 178: 20 Mad L Jour 369: 1910 Mad W N 546: 34 Mad 249; *Nizamud-din* v. *Abdul Aziz*, (1909) 31 All 521 (522): 6 All L J 643: 2 Ind Cas 552; *Mathewson* v. *Ram Kanai*, (1912) 16 Ind Cas 387 (388) Cal. See also *Mahomed Khaleef Shirazi* v. *Les Tanneries Lyonnaises*, 1926 P C 34 (35): 3 Oudh W N 568: 49 Mad 435: 94 Ind Cas 767: 1926 Mad W N 495: 24 Mad L W 115: 53 Ind App 84: 44 Cal L Jour 67: 28 Bom L R 1391: 31 Cal W N 1: 51 Mad L Jour 570 P C [Privy Council appeal]; *Padrath Mahton* v. *Hitan Singh*, 1924 Pat 773 (774, 775): 5 Pat L Tim 509: 1924 Pat H C C 249: 82 Ind Cas 600; *Yusuf Oosman Bros* v. *Win Ne Ya*, (1921) 59 Ind Cas 798 (799): 10 L B R 191.

(2) *Kanji Mall* v. *Durga Prasad*, 1925 All 555 (555): 23 All L J 501: 6 L R A (Civ) 346: 86 Ind Cas 438: 47 All 597; *Krishnier* v. *Sarvothama Royer*, (1910) 8 Ind Cas 366 (367): 1910 Mad W N 640: 8 Mad L Tim 377.

(3) *Mahomed Khaleef* v. *Les Tanneries Lyonnaises*, 1926 P C 34 (35): 3 Oudh W N 568: 49 Mad 435: 94 Ind Cas 767: 1926 Mad W N 495: 24 Mad L W 115: 53 Ind App 84: 44 Cal L Jour 67: 28 Bom L R 1391: 31 Cal W N 1: 51 Mad L Jour 570 P C.

(4) *Nobin Chandra* v. *Chander Madhab*, 1916 P C 148 (149): 44 Cal 1: 14 All L J 1199: 18 Bom L R 1022: 24 Cal L Jour 509: 21 Cal W N 97: 31 Mad L Jour 886: 20 Mad L Tim 430: 5 Mad L W 452: (1916) 2 Mad W N 565: 36 Ind Cas 1 P C. See also *Hukam Singh* v. *Shahda Din*, (1918) 44 Ind Cas 890 (891): 14 Pun W R 1918.

(5) *Kidar Singh* v. *Ganesh*, (1917) 42 Ind Cas 411 (412): 4 Oudh L J 532; *Man Han* v. *R M A L Firm*, 1926 Rang 172 (175): 4 Rang 110: 97 Ind Cas 876; *Bishen Singh* v. *Nathu*, (1909) 4 Ind Cas 892 (893): 93 Pun W R 1909: 83 Pun L R 1909.

(6) 1916 P C 148 (149): 44 Cal 1: 14 All L J 1199: 18 Bom L R 1022: 24 Cal L Jour 509: 21 Cal W N 97: 31 Mad L Jour 886: 20 Mad L Tim 430: 5 Mad L W 452: (1916) 2 Mad W N 565: 36 Ind Cas 1 P C.

(7) *Bishen Singh* v. *Nathu*, (1909) 4 Ind Cas 892 (893): 93 Pun W R 1909: 83 Pun L R 1909.

(8) *Kaviam Kuppuswami* v. *Desayi Numberumal*, (1912) 16 Ind Cas 693 (694) Mad.

(9) *Sobharam* v. *Ram Prasad*, 1929 Nag 63 (63): 117 Ind Cas 280: 26 Nag L R 44.

The refusal to take action under R. 33 in the exercise of its discretion by a lower appellate Court is not an error of law within S. 100 so as to sustain a second appeal.[10]

17. **Privy Council Appeal.**—*A* sues *B* and *C*. The claim is decreed against *B*, dismissed against *C*. *B* appeals to the High Court but *A* does not file any appeal or cross-objections. *B's* appeal is allowed. *A* appeals to the Privy Council impleading both *B* and *C*. His appeal against *C* is not maintainable because it amounts to a direct appeal to the Privy Council from the decree of the trial Court which is not allowed under the law.[1]

18. **Revision.**—Where an appellate Court refuses to interfere in favour of a respondent on the ground that it has no jurisdiction to do so in the absence of cross-objections, it fails to exercise a jurisdiction vested in it by law within S. 115.[1] It has been held that no revision lies against an order refusing to add certain persons as parties to the appeal, as such an order is interlocutory in its nature.[2]

O.41, R.34.

Dissent to be recorded.

R. **34.** [S. 576.] *Where* the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

[1877—S. 576; 1859—S. 359.]

DECREE IN APPEAL.

O.41, R.35.

Date and contents of decree.

R. **35.** [S. 579.] (1) The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and *a clear specification of* the relief granted or other *adjudication made.*

(3) The decree shall also state the amount of costs incurred in the appeal, and by *whom, or out of what property,* and in what proportions such costs and the costs in the suit are to be paid.

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[10] *Narasimham* v. *Narasinga Rao*, 1930 Mad 707 (707): 123 Ind Cas 39. See also *Umrao Singh* v. *Kanwal*, 1933 All 113 (114): 141 Ind Cas 15.

Note 17.

[1] *Mahomed Khaleef Shirazi and Sons* v. *Les Tanneries Lyonnaises*, 1926 P C 84 (85): 3 Oudh W N 568: 49 Mad 435: 94 Ind Cas 767: 1926 Mad W N 495: 24 Mad L W 115: 53 Ind App 84: 44 Cal L Jour 67: 28 Bom L R 1391: 31 Cal W N 1: 51 Mad L Jour 570 (P C).

Note 18.

[1] *Imbichunni Nair* v. *Narayana Nambudri*, (1913) 21 Ind Cas 767 (768): 1913 Mad W N 1024.

[2] *Rebala Bunu Reddy* v. *Dodla Rami Reddi*, (1915) 31 Ind Cas 978 (978) Mad.

(4) The decree shall be signed and dated by the Judge or Judges who passed it:

Judge dissenting from judgment need not sign decree.

Provided that where there are more Judges than one *and* there *is* a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

[1877—S. 579; 1859—S. 360.]

Local Amendment.

LAHORE.

Add the following as a proviso to R. 35 (4):—

Provided also in the case of the High Court, that in the absence of a Judge who passed a decree, or one or more Judges who passed a decree, either the Registrar or the Deputy Registrar of the Court shall sign the decree on behalf of such absent Judge or Judges; but that neither the Registrar nor the Deputy Registrar shall sign such decree on behalf of a Judge who dissented from the judgment of the Court.

Synopsis.

1. Date of decree.
2. Specification of relief.
3. Costs.
4. Decree in appeal supersedes that of the lower Court.
5. Court-fee.
6. Chartered High Courts.
7. Form of appellate decree—See App. G, Form No. 9.

Amendment of appellate decree. See Note 4, F.-N. (1).

1. **Date of decree.**—Under this rule, the date which the appellate decree shall bear is the date on which the judgment was delivered. Hence, the date of the decree for purposes of limitation for filing a second appeal is the date on which the judgment is delivered.[1] Compare O. 20, R. 7, *ante*.

2. **Specification of relief.**—The rule requires that the appellate decree must contain a clear specification of the relief granted. But where the decree did not specify the sum due to the appellant except by reference to the judgment and decree of the lower Court, it was held, that though the decree was informal, as the amount due to the decree-holder was ascertainable from the record, it was capable of execution, and execution should be allowed as a matter of equity, the defect in the decree being due to the mistake of the officers of the Court.[1] As to the construction of appellate decrees, *see* the undermentioned cases.[2]

Order 41, Rule 35—Note 1.

(1) *Barbati* v. *Bhola*, (1890) 12 All 79 (81): 1890 All W N 25.

Note 2.

(1) *Jawahir Mal* v. *Kistur Chand*, (1891) 13 All 343 (344, 345): 1891 All W N 119.

(2) *Srinivasa* v. *Yamunabhai*, (1905) 29 Mad 84 (86): 16 Mad L Jour 50 [Decree omitting to reserve rights of prior mortgages admitted by all the parties to the suit—Decree should be construed with reference to the admission]; *Soude Srinivasappa* v. *Krishnappa Hegde*, (1887) 11 Bom 177 (179) [High Court awarding plaintiff's claim

O.41, R.35, Notes 3—5.

3. **Costs.**—*See* generally S. 35 and the notes thereon. The appellate decree must provide for the costs of the appeal as well as of the suit.[1] As regards the costs of the appeal, the appellate decree must state the amount of costs incurred by either party in the appellate Court. A party cannot recover any sum as costs of the appeal if it is not entered in the decree.[2] But the amount[3] or particulars[4] of the costs incurred in the lower Court need not be specified in the appellate decree and the same may be ascertained from the lower Court's decree.[5]

The appellate Court must finally determine by which of the parties the costs are to be paid: it cannot declare that the costs shall be borne by the party who will be unsuccessful in a suit to be hereafter brought.[6]

The appellate Court can deprive a successful party of his costs for sufficient reasons. Thus where a decree is confirmed on grounds wholly different from those on which it was based by the lower Court, the appeal may be dismissed without costs.[7]

4. **Decree in appeal supersedes that of the lower Court.**—*See* S. 38 Note 5 and S. 148, Note 9 and the undermentioned case.[1]

5. **Court-fee.**—S. 33 of the Code provides, that after judgment a decree shall follow. In the undermentioned case[1] it was held by Oldfield, J., that even after the disposal of the appeal and pending the preparation of a decree, a Court had power to direct the plaintiff-appellant to correct the valuation and to pay additional Court-fee. The reason given was that the collection

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with costs throughout must be understood as referring to the claim as stated in the plaint and not to the claim described, according to the usage of the office, by the officials of the Court at the head of the paper book of the appeal]; *Huree Kishore Roy* v. *Kali Kishore Sein*, (1867) 8 Suth W R 114 (115) [There is good deal of distinction between appellate decree simply reversing decree of lower Court and decree which, reversing that decision, goes on to record judgment for the other party]; *Mussamat Beebee Toyboon* v. *Mahomed Wajid*, (1872) 2 Cal L Rep 504 (506) [Reversal of decree by appellate Court implies an order setting aside all that has been done under orders contradictory of the final order in the suit].

Note 3.

(1) See *Saikh Mahomed Busseroollah Choudhry* v. *Ram Kant Chowdhry*, (1871) 16 Suth W R 266 (267).

(2) *Mathradass Ramdas* v. *The Secretary of State for India*, (1912) 15 Ind Cas 828 (829): 5 Sind L R 254; *Nubo Kristo Mookerjee* v. *Parbutty Churn Bhuttacharjee*, (1870) 13 Suth W R 23 (23, 24). But compare *Mirza Mehdi Beg* v. *Zellal Thakoor*, (1871) 15 Suth W R 530 (530).

(3) *Rajkrishno Singh* v. *Pranoda Dabee*, (1874) 21 Suth W R 74 (74).

(4) *Mothura Mohun* v. *Hury Kishore*, (1872) 18 Suth W R 286 (286).

(5) *Raghu* v. *Rajendra*, (1909) 5 Ind Cas 842 (849): 14 Cal W N 556: 11 Cal L Jour 207.

(6) *Kashee Chunder* v. *Bungshee Buddun*, (1875) 23 Suth W R 89 (90).

(7) *G F Fischer* v. *Kamala Naicker*, (1860) 8 Moo Ind App 170 (192): 3 Suth W R P C 33: 1 Suth 395: 1 Sar 733 P C.

Note 4.

(1) *Viraragava Ayyangar* v. *Ponnammal*, (1900) 23 Mad 60 (67): 9 Mad L Jour 284 [Appellate decree is the only executable decree].

Decree to be amended is the appellate decree and appellate Court alone can amend.—*Pichuvayyangar* v. *Seshayyangar*, (1894) 18 Mad 214 (216): 5 Mad L Jour 39 F B; *Bhanushankar* v. *Raghunathram*, (1865) 2 Bom H C R A C J 101; *Rameshwar* v. *Bhabha Sundary*, (1910) 5 Ind Cas 304 (304): 11 Cal L Jour 81; *Vythilinga* v. *Vijayathammal*, (1882) 6 Mad 43 (46, 47): 6 Ind Jur 516 [Appeal withdrawn—Lower Court's decree is the executable decree]; *Hingan Khan* v. *Ganga Pershad*, (1867) 1 All 293 (295): 1 Ind Jur 410, (Do.): 1895 Pun Re No 10 [Time fixed for performance of act directed by decree runs from appellate decree]; *Thudayan* v. *Veludayan*, (1869-70) 5 Mad H C R 215 (223), (Do.); *Lal Dwaraka Das* v. *Burma Railways Co*, (1921) 62 Ind Cas 299 (302): 10 L B R 280: 13 Bur L Tim 173 [Appellate decree should embody so much of the lower Court's decree as it is intended to affirm, so as to avoid the necessity of reference to the superseded decree]; *Robinson* v. *Duleep Singh*, (1878) L R 11 Ch D 798 (813, 818, 821) referred to in 56 Ind Cas 283. [Decree ambiguous—Executing Court can construe it with reference to pleadings].

Note 5.

(1) *Mahadei* v. *Ram Kishen*, (1885) 7 All 528 (534): 1885 All W N 140 [Muhmood, J contra].

O.41, R.35, Notes 5—7. of Court-fees was no part of a Judge's functions in the trial of a suit which can be said to have ceased with its determination, and that the Court-Fees Act fixes no time for the collection of Court-fees.

6. **Chartered High Courts.**—This rule does not apply to Chartered High Courts in the exercise of their appellate jursdiction. (*See* O. 49, R. 3.)

7. **Form of appellate decree.**—*See* Appendix G, Form No. 9.

O.41, R.36.

Copies of judgment and decree to be furnished to parties.

R. **36.** [S. 580.] Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the *Appellate* Court and at their expense.

[1877—S. 580; 1859—S. 360.]

O.41, R.37.

Certified copy of decree to be sent to Court whose decree appealed *from*.

R. **37.** [S. 581.] A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed *from* and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

[1877—S. 581; 1859—S. 361.]

Local Amendments.

ALLAHABAD.

Add the following as R. 38:—

"38. (1) An address for service filed under O. 7, R. 19, or O. 8, R. 11, or subsequently altered under O. 7, R. 24, or O. 8, R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the appellate Court to such addresses.

(3) Rules 21, 22, 23 and 24 of O. 7 shall apply, so far as may be, to appellate proceedings."

BOMBAY.

The following shall be added as R. 38 in O. 41:—

Address for service filed to hold good during appellate proceedings.

"38. (1) An address for service filed under O. 7, R. 19, or O. 8, R. 11, subsequently altered under O. 7, R. 24, or O. 8, R. 12 shall hold good during all appellate proceedings arising out of the original suit or petition, subject to any alteration under sub-R. (3).

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses.

(3) Rules 22, 23 and 24 of O. 7 shall apply, so far as may be, to appellate proceedings.''

LAHORE.

The following shall be added as R. 38 in O. 41:—

"38. (1) An address for service filed under O. 7, R. 19, or O. 8, R. 11, or subsequently altered under O. 7, R. 24, or O. 8, R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses.

(3) Rules 21, 22, 23, 24 and 25 of O. 7 shall apply, so far as may be, to appellate proceedings.''

MADRAS.

After O. 41 *insert* the following as Orders 41-A and 41-B:—

ORDER XLI-A.

Appeals to the High Court from Original Decrees of Subordinate Courts.

Modifications in first appeals to High Court.

1. The rules contained in O. 41 shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order.

Notice Fee, etc., to accompany appeal memo.

2. (1) The memorandum of appeal shall be accompanied by the prescribed fees for service of notice of appeal and the receipt of the accountant of the Court for the sum prescribed by the rules of Court.

Time for respondent's appearance.

(2) Notwithstanding anything contained in R. 22 of O. 41 the period prescribed for entry of appearance by the respondent and filing by him of memorandum of cross-objections, if any, shall, unless otherwise ordered, be thirty days from the service of notice upon him.

Appearance to be filed by respondent.

3. (1) If the respondent intends to appear and defend the appeal he shall within the period specified in the notice of appeal enter an appearance by filing in Court a memorandum of appearance.

Penalty for default.

(2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub-rule above, he shall not be allowed to translate or print any part of the record:

Petition for enlargement of time and procedure thereon.

Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit. The application shall be supported by evidence to be given on affidavit as to the reason for the applicant's default, and notice thereof shall be given to the appellant and all parties who have entered an appearance. Unless otherwise ordered the applicant shall pay the costs of all parties appearing upon the application.

Address for service.

4. (1) The memorandum of appeal and the memorandum of appearance shall state an address for service within the City of Madras at which service of any notice, order or process may be made on the party filing such memorandum.

When party appears in person.

(2) If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred:

When by pleader.

Provided that if such party subsequently appears by a pleader he shall state in the vakalat an address for service within the City of Madras, and shall give notice thereof to each party who has appeared.

Service at pleader's address.

(3) If a party appears by a pleader, his address for service shall be that of his pleader, and all notices to the party shall be served on his pleader at that address.

Service by registered post.

5. The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and addressed to the address for service of the party to be served which has been filed by him in the lower Court: Provided that, after a party has given notice of an address for service in accordance with R. 4, service of any notice or process shall be made at such address.

Mode of service of notices and process other than notice of appeal.

6. All notices and process, other than a notice of appeal, shall be sufficiently served if left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court, between the hours of 11 a.m. and 5 p.m. at the address for service of the party to be served.

Service when to be by registered post.

7. Notices which may be served by a party or his pleader under R. 6, or which are sent from the office of the Registrar may, unless the Court otherwise directs, be sent by registered post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof and the posting thereof shall be a sufficient service.

Notice to respondents appearing separately.

8. If there are several respondents, and all do not appear by the same pleader, they shall give notice of appearance to such of the other respondents as appear separately.

List of cases in which notice is to be issued.

9. A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice board after the case has been registered.

Procedure where record not translated and printed before hearing.

10. (1) If upon a case being called on for hearing by the Court, it appears that the record has not been translated and printed in accordance with the rules of Court, the Court may hear the appeal or dismiss it, or may adjourn the hearing and direct the party in default to pay costs, or may make such order as it thinks fit.

(2) If the Court proceeds to hear the appeal, it may refuse to read or refer to any part of the record which is not included in the printed papers.

Cost of application and of adjournment.

11. When costs are awarded, unless the Court otherwise orders, the costs of a party appearing upon any application before the Registrar or the Court shall be Rs. 15, and the costs of appearing when the appeal is in the daily cause list for final hearing and is adjourned shall be Rs. 30. At the request of any party, the Registrar shall cause the order to be drawn up and the said cost to be inserted therein.

Memorandum of Objections.

Copies of memo. of objections when to be filed.

12. (1) If the acknowledgment mentioned in R. 22 (3) of O. 41 is not filed, the respondent shall together with the memorandum of objections file so many copies thereof as there are parties affected thereby.

Prescribed fee for service.

(2) The prescribed fees for service shall be presented together with the memorandum to the Registrar.

When service may be dispensed with.

13. If any party or the pleader of any party to whom a memorandum of objections has been tendered has refused or neglected for three days from the date of tender to give the acknowledgment mentioned in R. 22 (3) of O. 41, the respondent may file an affidavit stating the facts and the Registrar may dispense with service of the copies mentioned in R. 12 (1).

Judgment taken in shorthand.

14. Rule 31 of O. 41 shall not apply to the High Court. If judgment is given orally a shorthand note thereof shall be taken by an officer of the Court and a transcript made by him shall be signed or initialled by the Judge or by the Judges concurring therein after making such corrections as may be considered necessary.

ORDER XLI-B.

Letters Patent Appeals.

Modifications in second appeal.

1. The rules of O. 41-A shall apply so far as may be, to appeals to the High Court of Madras under Cl. 15 of the Letters Patent of the said Court:

Judgment and decree need not be filed.

Provided that it shall not be necessary to file copies of the judgment and decree appealed from.

Notice how served.

2. Notice of the appeal shall be given in manner prescribed by O. 41-A, R. 6, or if the party to be served has appeared in person, in manner prescribed by R. 5 of the said order.

N.-W. F. P.

Add the following rules:—

"38. (1) An address for service filed under O. 7, R. 19, or O. 8, R. 11, or subsequently altered under O. 7, R. 22, or O. 8, R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses.

(3) Rules 21 and 22 of O. 7 shall apply, so far as may be, to appellate proceedings."

OUDH.

Add the following as R. 38:—

"38. (1) An address for service filed under O. 7, R. 19, or O. 8, R. 11, or subsequently altered under O. 7, R. 26, or O. 8, R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the appellate Court to such addresses.

O.41, R.37.

(3) Rules 21, 22, 23 and 24 of O. 7 shall apply, so far as may be, to appellate proceedings."

PATNA.

Add the following rule:—

"38. (1) An address for service filed under O. 7, R. 19, or O. 8, R. 11, or subsequently altered under O. 7, R. 22, or O. 7, R. 12, shall hold good for all notices of appeals and all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the appellate Court to such addresses.

(3) Rules 21 and 22 of O. 7 shall apply, so far as may be, to appellate proceedings."

SIND.

Add the following as R. 38 in O. 41:—

"38. (1) An address for service filed under O. 7, R. 19, or O. 8, R. 11, subsequently altered under O. 7, R. 24, or O. 8, R. 12, shall hold good during all appellate proceedings arising out of the original suits or petition, subject to any alteration under sub-R. (3).

Address for service filed to hold good during appellate proceedings.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses.

(3) Rules 22, 23 and 24 of O. 7 shall apply, so far as may be, to appellate proceedings."

ORDER XLII.

APPEALS FROM APPELLATE DECREES.

O. 42, R.1.

Procedure.

R. 1. [S. 587.] *The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.*

[1877—S. 587; 1859—S. 37.]

Local Amendments.

ALLAHABAD.

Substitute the following for R. 1:—

"1. The rules of O. 41 shall apply, so far as may be, to appeals from appellate decrees, subject to the following provision:—

"Every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and also (unless the Court sees fit to dispense with either or both) by copies of the judgment on which the said decree is founded and of the judgment of the Court of first instance."

LAHORE.

Add the following as R. 2:—

"2. In addition to the copies specified in O. 41, R. 1, the memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance, unless the appellate Court dispenses therewith."

MADRAS.

Substitute the following for O. 42:—

"ORDER XLII.

Appeals from appellate decrees.

Modifications in second appeal.

1. The rules of O. 41 and O. 41-A shall apply, so far as may be, to appeals to the High Court of Judicature at Madras from appellate decrees with the modifications contained in this order:

Provided that in appeals from appellate decrees the memorandum of appeal shall be accompanied by a copy of the decree appealed from and four printed copies of the judgment on which it is founded, one of them being a certified copy; and also four printed copies of the judgment of the Court of first instance, one of them being a certified copy.

Memo. to be typed or printed.

2. (1) The memorandum of appeal shall be printed or typewritten and shall be accompanied by the following papers:—

Copies to be filed.

One certified copy of the decrees of Court of first instance and of the appellate Court; and four printed copies of each of the judgments of the said Courts, one copy of each judgment being a certified copy.

Printed or typed copies of document construed.

(2) If any ground of appeal is based upon the construction of a document, a printed or typewritten copy of such document shall be presented with the memorandum of appeal:

English translation of vernacular document.

Provided that if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader to be a correct translation shall be presented.

Dismissal for non-compliance of rule.

(3) If the appellant fails to comply with this rule, the appeal may be dismissed."

Synopsis.

1 Procedure applicable to second appeals.	3. Inherent power of remand—See O. 41, R. 23, ante.
2. Amendment of the rule.	

1. **Procedure applicable to second appeals.**—The rules relating to first appeals apply, so far as may be, to second appeals also. *See* the various rules of O. 41 and the notes thereon and also the case cited below.[1]

2. **Amendment of the rule.**—*See* the following cases[1] bearing upon the amendments of the rule by the High Courts of Allahabad and Lahore.

3. **Inherent power of Remand.**—*See* O. 41, R. 23, *ante*.

Order 42, Rule 1—Note 1.

[1] *Hakam Beg* v. *Rahim Shah*, 1927 Lah 912 (914): 100 Ind Cas 810 [Every second appeal must be accompanied by a copy of the decree of lower appellate Court].

Note 2.

[1] *Narsingh Sahai* v. *Sheo Prasad*, (1917) 42 Ind Cas 855 (856): 15 All L J 835: 40 All 1 F B [Copy of the judgment of trial Court should be filed along with the memorandum of second appeal]; *Dyala* v. *Hiru*, 1921 Jour 34 (2): 3 Lah L Jour 255: 67 Ind Cas 670, (Do.); *Abdullah* v. *Behari Lal*, 1926 Lah 638 (638): 8 Lah L Jour 361: 27 Pun L R 701: 97 Ind Cas 780, (Do.); *Naul* v. *Mula*, 1926 Lah 626 (627): 8 Lah L Jour 397: 27 Pun L R 652: 97 Ind Cas 778, (Do.); *Molu Mal* v. *Sri Ram*, 1921 Lah 73 (73): 2 Lah 227: 90 Pun L R 1921: 63 Ind Cas 33, (Do.); *Bindeshri* v. *Afzal Khan*, 1921 All 242 (243): 19 All L J 706: 63 Ind Cas 344, (Do.); *Bhiron* v. *Ram Autar*, 1921 All 23 (23): 63 Ind Cas 338 (341, 342): 43 All 660: 19 All L J 598.

ORDER XLIII.

APPEALS FROM ORDERS.

Appeals from orders.

R. 1. [S. 588.] An appeal shall lie from the following orders under *the provisions of section* 104, *namely*:—

(*a*) *an* order under rule 10 of Order VII returning *a* plaint to be presented to the proper Court;

(*b*) an order under rule 10 *of Order VIII* pronouncing judgment against a party;

(*c*) *an* order *under rule* 9 *of Order IX* rejecting *an* application (in *a* case open to appeal) for an order to set aside the dismissal of a suit;

(*d*) *an* order under *rule* 13 *of Order IX* rejecting *an* application (*in a case open to appeal*) for an order to set aside a decree *passed ex parte*;

(*e*) an order under rule 4 of *Order X* pronouncing judgment against a party;

(*f*) an order under rule 21 *of Order XI*;

(*g*) *an* order under *rule* 10 *of Order XVI* for the attachment of property;

(*h*) an order under rule 20 *of Order XVI* pronouncing judgment against a party;

(*i*) *an* order under *rule* 34 *of Order XXI on an* objection to *the* draft *of a* document *or of an* endorsement;

(*j*) *an* order under *rule* 72 *or rule* 92 *of Order XXI* setting aside or refusing to set aside a sale;

(*k*) *an* order under *rule* 9 *of Order XXII* refusing to set aside the abatement or dismissal of a suit;

(*l*) *an order under rule* 10 *of Order XXII* giving or refusing to give leave;

(*m*) *an order under rule* 3 *of Order XXIII recording or refusing to record an agreement, compromise or satisfaction*;

(*n*) *an order under rule* 2 *of Order XXV rejecting an application* (in a case open to appeal) *for an order to set aside the dismissal of a suit*;

O. 43, R. 1

(o) *an order under rule* 2, *rule* 4 *or rule* 7 *of Order XXXIV refusing to extend the time for the payment of mortgage money*;

(p) *orders in interpleader suits under rule* 3, *rule* 4 *or rule* 6 *of Order XXXV*;

(q) *an order under rule* 2, *rule* 3 *or rule* 6 *of Order XXXVIII*;

(r) *an order under rule* 1, *rule* 2, *rule* 4 *or rule* 10 *of Order XXXIX*;

(s) *an order under rule* 1 *or rule* 4 *of Order XL*;

(t) *an order of refusal under rule* 19 *of Order XLI to re-admit, or under rule* 21 *of Order XLI to re-hear, an appeal*;

(u) *an order under rule* 23 *of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court*;

(v) *an order made by any Court other than a High Court refusing the grant of a certificate under rule* 6 *of Order XLV*;

(w) *an order under rule* 4 *of Order XLVII granting an application for review.*

[1877—S. 588; 1859—Ss. 36, 94, 363, 365.]

Local Amendments.

ALLAHABAD.

Rule 1 (u). *For* the words "an order under R. 23 of O. 41" *read* "any order".

BOMBAY.

Rule 1 (w) of O. 43 shall be deleted.

OUDH.

In Rule 1 (u) *for* the words "an order under R. 23 of O. 41" *read* "any order".

RANGOON.

Add the following between Cls. (*i*) and (*j*):—

"(*ii*) a garnishee order under R. 63-C or R. 63-E, and an order as to costs in garnishee proceedings under R. 63-G of O. 21."

1. **Appeals from orders**.—*See* Ss. 104 and 105. *See also* the notes under the various rules referred to in the several clauses of this rule.

O. 43, R. 1, Notes 2—8.

2. **Clause (a): Order returning plaint for presentation to the proper Court.**—*See* O. 7, R. 10, Note 11 and the following cases.[1]

3. **Clause (c): Order rejecting application under O. 9, R. 9 to set aside dismissal of suit.**—This clause refers to an order rejecting an application to restore a *suit* dismissed for default. Hence where an *application* to restore a suit dismissed for default is itself dismissed for default, the order of dismissal is not appealable under this clause.[1]

4 **Clause (d): Order rejecting application for setting aside ex parte decree.**—*See also* O. 9, R. 13, Note 29.

This clause refers to an order *rejecting* an application to set aside an *ex parte* decree. No appeal lies from an order *allowing* an application for setting aside an *ex parte* decree.[1] Nor does an appeal lie from an order rejecting an application to set aside an *ex parte* order.[2] *See also* Note 7 to S. 141, *ante*.

5. **Clause (j): Order setting aside or refusing to set aside a sale.**—*See* O. 21, R. 89, Note 29; R. 90, Note 50 and R. 92, Note 13 and the undermentioned case.[1]

6. **Clause (l): Order under O. 22, R. 10.**—*See* O. 22, R. 10, Note 20 and the undermentioned case.[1]

7. **Clause (m): Order recording or refusing to record compromise.**—*See* O. 23, R. 3, Note 31 and the case cited below.[1]

8 **Clause (q): Order under O. 38.**—An unconditional order of attachment before judgment can only be passed under O. 38, R. 6 and not R. 5. Hence, where a Judge proposes to pass an *unconditional* order of attachment under R. 5 the order must nevertheless be treated as one under R. 6 and will therefore be appealable under this clause.[1]

Order 43, Rule 1—Note 2.

(1) *Sikandar Shah* v. *Ghulam Nabi*, (1918) 47 Ind Cas 7 (8): 151 Pun W R 1918 [Appeal lies from order returning plaint to be presented to proper Court]; *Bankey Lal* v. *Meghraj*, 1921 All 177 (177): 19 All L J 868: 63 Ind Cas 951 [No appeal lies from order of District Judge returning a *memorandum of appeal* for presentation to proper Court]; *Hari Chand* v. *Madan Lal*, 1930 Lah 832 (833): 31 Pun L R 536: 128 Ind Cas 491, (Do.).

Note 3.

(1) *Brij Mohan* v. *Raghoba*, 1932 Nag 101 (102): 28 Nag L R 83: 139 Ind Cas 296 [Overruling 1923 Nag 293].

Note 4.

(1) *Mahomed Ali* v. *Shaukat Ali*, (1916) 34 Ind Cas 702 (702): 3 Oudh L J 229 [*Ex parte* decree in resumption suit under Oudh Rent Act—*Ex parte* decree set aside—No appeal lies under the Code—But order is appealable under Oudh Rent Act.]

(2) *Lu Bein* v. *Po Sein*, 1909 L B R 203 (204) F B [Order under O 21, R 60]; *Hasun Molla* v. *Tasiruddin*, (1912) 15 Ind Cas 925 (925): 39 Cal 893 [Order under Land Acquisition Act, not amounting to award].

Note 5.

(1) *Vemba Pillai* v. *Marudaya Pillai*, (1908) 4 Mad L Tim 96 [Order under R 92 of O 21, or one refusing to set aside a sale under R 89 of that Order is appealable].

Note 6.

(1) *Fana* v. *Tetka*, (1906) 2 Nag L R 178 (179) [Case under old Code].

Note 7.

(1) *Munshi Masihul Azam* v. *Golsar Ahmed Mia*, 1925 Cal 924 (925): 29 Cal W N 795: 95 Ind Cas 773 [Order refusing to accept arbitrator's award is not order refusing to record compromise and no appeal lies]; *Hari Das Sadu Khan* v. *Iswar Ratneswar*, 1933 Cal 94 (95): 36 Cal W N 1013: 57 Cal L Jour 26: 141 Ind Cas 732 [Appeal from order under O 23, R 3—Decree made before presentation of appeal—Appeal is still competent].

Note 8.

(1) *Jai Dev Singh* v. *Jai Singh*, 1928 Lah 445 (445): 107 Ind Cas 276.

O. 43, R. 1, Notes 9—12.

9. Clause (r): Orders under O. 39.—This clause allows an appeal against an order passed under O. 39, R. 1, R. 2, R. 4 or R. 10.[1] But no second appeal lies against such an Order.[2] ([*See* S. 104 (2).]

10. Clause (s): Orders under O. 40, R. 1, or R. 4—*See* Notes under O. 40, Rr. 1 and 4 and the undermentioned cases.[1]

11. Clause (t): Order rejecting application to restore appeal.—*See* the undermentioned case.[1]

12. Clause (u): Order of remand under O. 41, R. 23.—*See* Notes under O. 41, R. 23 and the undermentioned cases.[1]

O. 43, R. 2.

Procedure.

R. 2. [S. 590.] The *rules of Order XLI* shall apply, so far as may be, to appeals from orders.

[1877—S. 590; 1859—S. 366—See S. 108, cl. (*b*).]

Local Amendment.

ALLAHABAD.

Add the following as R. 3:—

> "3. In every appeal under R. 1, in every miscellaneous case, and in *every suit dismissed for default*, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to be paid."

MADRAS.

Substitute the following for R. 2:—

Note 9.

(1) *N W Ry Administration* v. *N W Ry Union, Lahore*, 1933 Lah 203 (205) [Order refusing to discharge an injunction issued under O 39, R 2 is appealable]; *District Board of Farrukhabad* v. *Ikhlaque Husain*, 1933 All 86 (86): 1932 All L J 803 [Appeal lies from order refusing to grant temporary injunction]; *Chaturbhuj Das* v. *Natvarlal*, 1931 Bom 509 (510): 33 Bom L R 1109: 134 Ind Cas 1165 [Order refusing to commit for contempt for disobeying temporary injunction—Appeal lies]; *Sm Deivasigamani Annamalai* v. *Desikan Govinda Rao*, 1924 Mad 857 (857, 858): 20 Mad L W 556 [No appeal against order issuing notice on an application for temporary injunction under O 39, R 3].

(2) *Khusal Chand* v. *Shiv Lal*, 1885 Bom P J 72 (72).

Note 10.

(1) *Wali Ram* v. *Ishar Chand*, 1904 Pun Re No 26: 65 Pun L R 1904 [Order of Court accepting amount stated by the Receiver to have been realised by him and referring decree-holder to a suit for the decision of his claim against Receiver is not appealable under this clause]; *Mono Mohan Neogy* v. *Surendra Kumar Roy*, 1933 Cal 52 (53): 36 Cal W N 903 [Order removing Receiver is appealable—But Receiver cannot appeal from such order].

Note 11.

(1) *Satya Nidhan Banerji* v. *Mohamed Hazabbur Ali Khan*, 1931 All 533 (534): 131 Ind Cas 871: 53 All 516: 1931 All L J 964 [Order refusing to restore revenue appeal—Such order is order "passed in appeal" within the meaning of Agra Tenancy Act, S 249 and is not open to appeal].

Note 12.

(1) *Bhau Bola* v. *Bapaji*, (1890) 14 Bom 14 (17) [Court hearing an appeal against order of remand is not restricted to the consideration of the form of the order, but may examine it on its merits]; *Khorshed Ali Bepari* v. *Probhat Chandra Das*, (1933) 37 Cal W N 190 (191) [No appeal lies where the order of remand is purported to be made under O 41, R 25]; *Babu* v. *Kishen Singh*, 1927 All 496 (496): 101 Ind Cas 687: L R 8 All 188 Rev [Order of remand passed by lower appellate Court under inherent powers under S 151 before the amendment of Cl (*u*) into its present form by the Allahabad High Court is not appealable]; *Sarabjit Singh* v. *Farhatullah Khan*, 1930 Oudh 366 (368): 7 Oudh W N 594 [Amendment of rule by Allahabad High Court—Appeal lies against order of remand under inherent power]; *Karam Ilahi* v. *Hira*, (1911) 10 Ind Cas 842 (843): 74 Pun L R 1911: 175 Pun W R 1911 [Remand under O 41, R 23—Appeal lies]; *Pandit Singh* v. *Mode Narain Singh*, (1919) 50 Ind Cas 367 (368) Pat [Case disposed of on merits—Appeal—Appellate Court reversing decision on merits and remanding case—Further appeal—*Ad valorem* Court-fee to be paid]; *Sumitra* v. *Mahabir*, (1928) 111 Ind Cas 789: 1928 Notes 84 (*a*) [Order of remand passed in appeal against appealable order—Appeal against order of remand not competent]; *Hazura Singh* v. *Santa Singh*, (1928) 111 Ind Cas 796: 1928 Notes 75 (*e*) [Hearing of an appeal is not barred by the mere fact that the order has been carried out by the trial Court]; *Cotton Trading Syndicate Commission Agency, Bombay* v. *Malawamal Shivram Das*, 1931 Lah 497: 32 Pun L R 409: 131 Ind Cas 750 (751) [Order rejecting plaint—Order set aside in appeal—Order is not under R 23 of O 41—No appeal lies].

O. 43, R. 2.

"2. The rules of O. 41 and of O. 41-A shall apply, so far as may be, to appeals from the orders specified in R. 1 and other orders of any civil Court from which an appeal to the High Court is allowed under any provision of law:

Provided that in the case of appeals against interlocutory orders made prior to decree, the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court."

Add the following as R. 3:—

"3. (1) The provisions of O. 42 shall apply, so far as may be, to appeals from appellate orders.

(2) A memorandum of appeal from an appellate order shall be accompanied by a certified copy of the judgment and of the order of the Court of first instance, and by a certified copy of the judgment and of the order of the appellate Court.

(3) If any ground of appeal is based upon the construction of a document, a printed or typewritten copy of such document shall be presented with the memorandum of appeal:

Provided that, if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader to be a correct translation shall be presented."

OUDH.

Add the following as R. 3:—

"3. In every appeal under R. 1, in every miscellaneous case, and *in every suit dismissed for default*, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred and the parties, if any, by whom such costs are to be paid."

O. 44, R. 1.

ORDER XLIV.

PAUPER APPEALS.

Who may appeal as pauper.

R. 1. [S. 592.] Any person entitled to prefer an appeal, who is unable to pay the fee required[2] for the *memorandum* of appeal, may present an application accompanied by a memorandum of appeal[3], *and may* be allowed to appeal as a pauper, subject, *in all matters, including the presentation*[5] *of such application, to the provisions relating to suits*[4] *by paupers*, in so far as those *provisions* are applicable:

Procedure on application for admission of appeal.

Provided[6] that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed *from*, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

[1877—S. 592; 1859—Ss. 369, 370.]

Synopsis.

1. Legislative changes.
2. "Who is unable to pay the fee required"—See notes to O. 33, R. 1, ante.
3. Application accompanied by a memorandum of appeal.
4. Subject to the provision relating to suits by paupers.
5. In all matters including the presentation of such application.
6. Proviso to the rule.
7. Power to grant time for payment of Court-fee.
8. Power to order security for costs—See O. 41, R. 10.
9. Cross-objection or cross-appeal by a pauper respondent—See notes to O. 41, R. 22.
10. Appeal.
11. Letters Patent appeal.
12. Privy Council appeal.
13. Limitation.
14. Revision.

1. Legislative changes:—

1. The words "under the Code or any other law" which occurred in the old S. 592, after the words "Any person entitled" have been omitted in the present rule.
2. The words "including the presentation of such application" have been newly added so as to override the decision in I.L.R. 26 Mad. 369. (*See* Note 6, *infra.*) This order does not apply to appeals under the Agra Tenancy Act (III of 1926) and the Madras Estates Land Act (I of 1908).

2. **"Who is unable to pay the fee required".**—*See* Notes to O. 33, R. 1, *ante*.

3. **Application accompanied by a memorandum of appeal.**—Unlike the plaint in a pauper *suit* which forms an integral portion of the pauper application itself, the application for leave to *appeal* as a pauper is a distinct document from the memorandum of appeal accompanying the application. The memorandum of appeal itself cannot be treated as an application for leave to appeal as a pauper.[1]

4. **Subject to the provision relating to suits by paupers.**—The granting of leave to appeal as a pauper is subject to the provisions relating to suits by paupers as provided in O. 33. Thus if the appellant has entered into an agreement with reference to the subject-matter of the appeal[1] or has not stated with the utmost good faith, in his application, the whole of his assets[2] then his application for leave to appeal is liable to be rejected.

The application for leave to appeal as a pauper should be verified at its foot, as required by O. 33, R. 2.[3] But though it is not so verified, if it is accompanied by an affidavit in which the statements contained in the application are stated to be true and there is no falsehood or concealment in the application, the rule will be deemed to have been sufficiently complied with.[4] It has been held that the presentation of an application under this rule without

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Order 44, Rule 1—Note 3.

[1] *Gati* v. *Rachla Kunwar*, (1915) 29 Ind Cas 1003 (1004): 13 All L J 635. But see *Kamod Poory* v. *Sheo Poory*, (1869) 1 All H C R 246.

Note 4.

[1] *Rameshwar Prasad* v. *Bachu Behari Lal*, (1930) 122 Ind Cas 831: 1930 Notes 21 (*a*); *Hanifa Bai* v. *Meanjee Sait*, (1907) 30 Mad 547 (548): 17 Mad L Jour 447: 8 Mad L Tim 11.

[2] *Durga Prasad* v. *Srinivasa Sureka*, 1930 Pat 368 (369): 123 Ind Cas 898: 11 Pat L Tim 567.

[3] *Muhammad Salamat-ul-lah* v. *Ram Jiawan*, (1908) 11 Oudh Cas 19 (20).

[4] *Ashraf Ali* v. *Rameshwar Nath*, 1923 Lah 684 (684): 77 Ind Cas 908.

a list of properties as required by R. 2 is not invalid and the same could be supplied after the limitation period.[5]

5. **In all matters including the presentation of such application.**—In the absence of these words in the corresponding section of the old Code, it was held by the High Court of Madras[1] that the rule as to presentation in person by a pauper applicant now contained in O. 33, R. 3 did not apply to pauper *appellants*. It is now clear that the application should be presented in the same manner as in the case of a person *suing* in *forma pauperis, i.e.,* in person. But a pardanashin lady is however exempted from personal appearance under S. 132 of the Code and therefore, she need not present the application to appeal in *forma pauperis* in person.[2] The *memorandum of appeal* need not be presented in person.[3]

6. **Proviso to the rule.**—The proviso is mandatory.[1] In *Saku Bai* v. *Ganpat,* I.L.R. 28 Bom. 451, Jenkins, C.J., observed as follows:—

> "That proviso is a very necessary safeguard introduced by the legislature for the benefit of litigants who find themselves opposed by paupers and in our opinion the Court should be careful to see that the proviso is satisfied. It is to be noticed that the Court must come to its conclusion upon a perusal only of *application,* the *judgment* and the decree. This proviso is apt to be overlooked, but it would provide a safeguard against this, if the Judge or Bench admitting a pauper appeal were to express and record very briefly the reasons for granting leave so that the Bench before whom the appeal ultimately comes may have an assurance that the leave was properly given."

A party cannot therefore be allowed to appeal as pauper unless the decree appealed from appears to be contrary to law or to some usage having the force of law or is otherwise erroneous or unjust.[2] But unlike R. 11 of O. 41 which empowers the Court to call for the *records,* the Court is restricted under this proviso to a perusal of the *judgment* and *decree* appealed against and has no discretionary power to go into the *record*.[3] It is not necessary for the Court to arrive at a *definite* and *final* conclusion that the decree is contrary to law or is otherwise

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(5) *Mt Jaindi* v. *Kanshi Ram,* 1899 Pun Re No 19.

Note 5.

(1) *Maülthi* v. *Somappa,* (1903) 26 Mad 369 (370). But see *Musst Bhughobutty Kooer* v. *Gunesh Dutt,* (1874) 21 Suth W R 308 (308).

(2) *Wazirunnissa* v. *Illahi Baksh,* (1902) 24 All 172 (173): 1901 All W N 213; *Narsi, In re,* (1885) 8 Mad 504 (505).

(3) *Sajjad Ali* v. *Jagmohan,* 1926 Oudh 13 (14): 90 Ind Cas 371.

Note 6.

(1) *Ghulam Nabi* v. *Secretary of State,* 1932 Lah 654 (655); *Ghulam Nabi* v. *Secretary of State for India,* 1929 Lah 539 (539): 114 Ind Cas 80; *Ahmad-ul-nisa* v. *Jagan Nath,* (1928) 109 Ind Cas 891: 1928 Notes 25 (d); *Shrimati Vidya Wanti* v. *Jai Dayal Kapur,* 1924 Lah 536 (536): 6 Lah L Jour 205: 80 Ind Cas 649; *Rajendra Prosad Bose* v. *Gopal Prasad Bose,* 1925 Pat 442 (442): 4 Pat 67: 94 Ind Cas 814; *Maung San Shwe* v. *Haji Ko Ishaq,* 1931 Rang 131 (134): 9 Rang 92: 132 Ind Cas 707 [There must be some material from which the Court could reasonably form the opinion that the case falls within the proviso]; *Ram Kumar* v. *Lala Girdhari Lal,* 1932 All 712 (712): 1932 All L J 860 [Applicant entitled to be heard only if Judge after reading judgment thinks it to be wrong].

(2) *Vidya Wanti* v. *Jai Dayal,* 1925 Lah 391 (391): 7 Lah L Jour 214: 89 Ind Cas 292; *Solayappa Chetty* v. *Lakshmanan Chetty,* (1920) 54 Ind Cas 761 (763): 10 Mad L W 659: 38 Mad L Jour 146: 1920 Mad W N 277; *Musst Gobi Bibi* v. *Chanu Prasad Singh,* 1930 Pat 142 (143): 117 Ind Cas 187 [Decree altered in material particular by successor of Judge—Leave can be granted]; In the matter of the petition of *Inayat Beg,* 1896 All W N 34 (34).

(3) *Maung Thadin* v. *Daw Paw,* 1925 Rang 249 (250): 4 Bur L Jour 55: 88 Ind Cas 988; *Inayat-ul-Rahman* v. *Aziz-ul-Rahman,* (1910) 8 Ind Cas 376 (377): 13 Oudh Cas 302.

O. 44, R. 1, Notes 6—7.

erroneous or unjust. It is enough if the Court finds that there is a substantial question of law or the appellant has a *prima facie* good case.[4]

A Full Bench of the High Court of Patna[5] and the High Court of Lahore[6] have held that a mere issue of a notice to the respondent under App. G, Form No. 11 is no ground for holding that the Court is satisfied as to the conditions laid down in the proviso, and that the respondent appearing in answer to the notice is entitled to urge that the application should be rejected on the ground that the conditions of the proviso have not been satisfied. The High Courts of Madras[7] and Allahabad[8] have, on the other hand, held that a notice issued to the respondent under Form No. 11 is only to state the objections of the respondent in respect of the pauperism of the applicant, and that the respondent has no *locus standi* to urge at that stage that the proviso is not satisfied.

7. **Power to grant time for payment of Court-fee.**—The rejection of an application for leave to appeal as a pauper does not *ipso facto* carry with it the rejection of the memorandum of appeal filed along with it.[1] The memorandum of appeal is a separate document before the Court which remains for disposal after the rejection of the application and the Court has power under S. 149 of the Code to give further time for the payment of the requisite Court-fee stamp and admit the appeal.[2] The memorandum of appeal though originally unstamped is not a nullity and can be validated with effect from the date of the presentation, by the payment of the Court-fee.[3] The appellate Court can also, in a fit case, excuse the delay under S. 5 of the Limitation Act and admit the appeal after the expiry of the limitation, on payment of the full Court-fee.[4]

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[4] *Chennamma,* In re, 1931 Mad 198 (198): 31 Mad L W 76: 58 Mad L Jour 195: 122 Ind Cas 337: 58 Mad 245; *Chhagan Lal* v. *Govind Ram,* 1930 Nag 28 (31): 121 Ind Cas 61: 12 Nag L J 92 [Granting of leave involves that the case is fit to be placed outside the purview of O 41, R 10].

[5] *Tilak Mahto* v. *Akhil Kishore,* 1931 Pat 183 (184, 185): 12 Pat L Tim 156: 132 Ind Cas 864: 10 Pat H C R 606 F B [Overruling 1924 Pat 791; 1928 Pat 118; 1929 Pat 27; and 1929 Pat 31].

[6] *Ram Sobha Das* v. *Ram Sarup Das,* (1931) 138 Ind Cas 125 (126): 1931 Notes 24 (*a*) Lah; *Basant Kuar* v. *Chandu Lal,* (1929) 114 Ind Cas 825 (826): 1929 Lah 514; *Ghulam Nabi* v. *Secretary of State,* 1932 Lah 654 (654, 655); *Shamas-ud-Din* v. *Sant Ram,* (1933) 141 Ind Cas 649 (650).

[7] *Meruva Parasuramudu* v. *Mandavilli Ramanna,* 1925 Mad 1178 (1179): 49 Mad L Jour 353: 22 Mad L W 23: 87 Ind Cas 960; *S K M R M Somasundaram Chettiar* v. *Rm Ar Ar Rm Arunachalam Chettiar,* 1932 Mad 523 (524, 525, 527): 1932 Mad W N 537: 63 Mad L Jour 28: 36 Mad L W 33: 139 Ind Cas 652; *Paramasivam Pillai,* In re, (1915) 28 Ind Cas 957 (957) Mad.

[8] *Mt Hubraji* v. *Balkaran Singh,* 1933 All 11 (12): 54 All 894

Note 7.

[1] *Nellavadivu Ammal* v. *Subramania Pillai,* (1917) 38 Ind Cas 617 (618): 31 Mad L Jour 269: 40 Mad 687; *Muhammad Farzand Ali* v. *Rahat Ali,* (1918) 45 Ind Cas 29 (29): 16 All L J 309: 40 All 381; *Maung San Shwe* v. *Haji Ko Ishaq,* 1931 Rang 131 (134): 9 Rang 92: 132 Ind Cas 707.

[2] *Rajendra Prasad Bose* v. *Gopal Prasad Sen,* 1925 Pat 442 (442): 4 Pat 67: 94 Ind Cas 814; *Jamnabai* v. *Vissondas,* (1897) 21 Bom 576 (579); *Bai Ful* v. *Desai Manorbhai,* (1898) 22 Bom 849 (857, 861); *Hari Singh* v. *Gurbaksh,* (1909) 4 Ind Cas 896 (897): 95 Pun W R 1909: 130 Pun L R 1909: 94 Pun Re 1909; *Sajjad Ali Khan* v. *Jagmohan Das,* 1926 Oudh 13 (14): 90 Ind Cas 371; *Girwarlal* v. *Lakshmi Narain,* (1906) 26 All 329 (331): 1904 All W N 24.

[3] *Mahant Diyal Das* v. *Mahant Sundar Das,* 1922 Lah 225 (226): 3 Lah 85: 65 Ind Cas 741: 26 Pun W R 1922; *Swantee* v. *Ma Ngwe,* (1916) 32 Ind Cas 630 (630): 9 Bur L Tim 69. But see *Shanghai* v. *Brown,* (1916) 32 Ind Cas 534 (536): 9 Bur L Tim 43 [Even in the case of an appeal in *forma pauperis*]; *Bishnath* v. *Jagarnath,* (1891) 13 All 305 (308): 1891 All W N 99; *Mt Riyazulnissa* v. *Mt Askari,* 1932 Oudh 343 (344): 9 Oudh W N 855: 140 Ind Cas 190 [Court-fee is on the scale at the time when the petition for leave was presented].

[4] *Ram Charan* v. *Bansidhar,* 1928 All 499 (499): 26 All L J 847: 111 Ind Cas 655.

O. 44, R. 1, Notes 7—13.

As to the Court's powers to order the payment of Court-fees after the disposal of the appeal see the following cases.[5]

8. **Power to order security for costs.**—*See* O. 41, R. 10.

9. **Cross-objection or cross appeal by a pauper respondent.**—*See* Notes to O. 41, R. 22.

10. **Appeal.**—An order under this rule is not appealable either under S. 104 or under O. 43, R. 1.[1] As to the maintainability of a Letters Patent Appeal, *see* next note.

11. **Letters Patent Appeal.**—It was held by the High Courts of Allahabad[1] and Madras[2] in cases decided under the old Code that an order rejecting an application under this rule was not appealable under Cl. 15 of the Letters Patent. The decisions of the Madras High Court abovementioned were however dissented from in a later Full Bench case of the same High Court,[3] though the point for decision in the Full Bench was not with reference to an order under this rule. In a recent case[4] the Madras High Court without definitely deciding the question as to the appealability or otherwise under Cl. 15 of the Letters Patent, refused to interfere in appeal on the ground that the matter is one of exercise of *discretion* by the Court. *See also* S. 104, Note 6.

12. **Privy Council Appeal.**—This rule contemplates the appellate Court perusing the judgment of a *subordinate* Court, and not the Court where judgment is appealed from, perusing its own judgment.[1] O. 44 does not therefore apply to appeals to His Majesty in Council and the High Court has no jurisdiction to grant leave to appeal in *forma pauperis* to the Privy Council.[2] But the petitioner may apply in England for such leave in accordance with the rule that govern such applications.[3]

13. **Limitation.**—Under Art. 170, Schedule I of the Limitation Act the period of limitation for presenting an application for leave to appeal in *forma pauperis* is 30 days from the date of the decree appealed against.[1]

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[5] *Balamani Ammal* v. *Rama Ayyar*, 1925 Mad 786 (787): 48 Mad L Jour 273: 21 Mad L W 528: 1925 Mad W N 163: 87 Ind Cas 57; *Bai Chandaba* v. *Kuver Saheb Bapu Saheb*, (1894) 18 Bom 464 (467).

Note 10.

[1] See also *Hurri Singh* v. *Jeet Singh*, 1870 Pun Re No 62.

Note 11.

[1] *Banno Bibi* v. *Mehdi Husain*, (1889) 11 All 375 (377): 1889 All W N 70.

[2] *Appasami Pillai* v. *Somasundara Mudaliar*, (1903) 26 Mad 437 (438); In re *Rajagopal*, (1886) 9 Mad 447 (447).

[3] *Tuljaram* v. *Alagappa*, (1910) 8 Ind Cas 340 (347): 1910 Mad W N 697: 8 Mad L Tim 453: 21 Mad L Jour 1: 35 Mad 1.

[4] *Parvathi Ammal* v. *K G Venkateswara Ayyar*, 1926 Mad 656 (656): 50 Mad L Jour 426: 23 Mad L W 511: 1926 Mad W N 255: 94 Ind Cas 45.

Note 12.

[1] *Ramkishen Lal* v. *Manna Kumari*, (1918) 44 Ind Cas 731 (732): 3 Pat L Jour 179.

[2] *Ram Kishen Lal* v. *Manna Kumari*, (1918) 44 Ind Cas 731 (732): 3 Pat L Jour 179; *Jagadananda Asram* v. *Rajendra Roy*, (1913) 18 Ind Cas 129 (129): 17 Cal L Jour 381; *Thompson* v. *Calcutta Tramways Co*, (1894) 21 Cal 523 (525) [Question left open]; *Amba* v. *Shrinivasa Kamathi*, (1918) 47 Ind Cas 646 (647): 35 Mad L Jour 258: 24 Mad L Tim 207: 8 Mad L W 460: 42 Mad 82; *Munni Ram Awasty* v. *Sheo Churn Awasty*, (1846-50) 4 Moo Ind App 114 (136): 7 W R P C 29: 1 Suth 166: 1 Sar 323 P C. But see *Tej Kishen* v. *Abdul Hamid Khan*, (1917) 38 Ind Cas 541 (541): 3 Oudh L Jour 694; *Jowad Ali*, Appellant, (1867) 8 Suth W R 48 (48).

[3] *Jagadananda Asram* v. *Rajendra Roy*, (1912) 18 Ind Cas 129 (129): 17 Cal L Jour 381.

Note 13.

[1] See also *Gati* v. *Rachla Kunwar*, (1915) 29 Ind Cas 1003 (1004): 13 All L J 635; *Mahadev* v. *Lakshman*, (1895) 19 Bom 48 (50); *Mg Wa Tha* v. *Abdul Gani*, (1913) 18 Ind Cas 518 (518): 5 Bur L Tim 294; *Parbati* v. *Bhola*, (1890) 12 All 79 (93): 1890 All W N 25; *Bechi* v. *Ahsanulla*, (1890) 12 All 461 (488): 1890 All W N 149 F B.

O. 44, R. 1, Note 14.

14. **Revision.**—*See* Note 26 to S. 115 and the undermentioned cases.[1]

O. 44, R. 2, Note 1.

Inquiry into pauperism.

R. 2. [S. 593.] The inquiry into the pauperism of the applicant may be made either by the Appellate Court or under the orders of the Appellate Court by the Court *from* whose decision the appeal is *preferred:*

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court *from* whose decree the appeal is *preferred*, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees cause to direct such inquiry.

1. **Inquiry into pauperism.**—If the pauper applicant—appellant had been allowed in the trial Court to sue as a pauper, no fresh enquiry as regards his pauperism is necessary unless the appellate Court sees reason to require it. Otherwise enquiry into his pauperism is necessary, and such enquiry may be made by the appellate Court itself or under its direction, by the trial Court. In the latter case, the report of the trial Court as regards pauperism does not operate as a final disposal of the application, and does not affect the power of the appellate Court to consider and decide whether leave should or should not be granted.[1]

ORDER XLV.

APPEALS TO THE KING IN COUNCIL.

O. 45, R. 1, Note 1.

"Decree," defined.

R. 1. [S. 594.] In this *Order*, unless there *is* something repugnant in the subject or context, the expression "decree" *shall* include a *final* order.

[1877—S. 594—*See* Ss. 109 & 110, *supra.*]

Synopsis.

1. **Decree.**
2. **When appeal lies to the King in Council.**

1. **Decree.**—The words "decree shall include a *final order*" have been substituted for the words "decree includes also judgment and order" which occurred in the old Code.

As to the meaning of the words "final order" *see* Note 4 to S. 109, *ante* and the recent case of *Abdul Rahman* v. *Cassim and Sons*[1] in which their Lordships of the Privy Council have re-affirmed the view expressed in *Firm of*

Note 14.

(1) *Barkat Ali* v. *Ghulam Kadir*, 1885 Pun Re No 21: 1 Pat L R 449 (450).

Order 44, Rule 2—Note 1.

(1) *Hanifa Bai* v. *Haji Siddick Bai Meanji*, (1907) 30 Mad 547 (547): 3 Mad L Tim 11: 17 Mad L Jour 447.

Order 45, Rule 1—Note 1.

(1) 1933 Mad W N 166 (168 and 169).

O. 45, R. 1, Notes 1—2.

Ramchand Manjimal v. *Firm of Govardhandas Vishindas Ratanchand*[2], that the test of finality is whether the order *finally disposes of the rights of the parties.*

2. **When appeal lies to the King in Council.**—*See* Ss. 109 and 110. As to cross appeals *see* Note 14 to S. 110 and the cases noted below.[1]

O. 45, R. 2, Notes 1—3.

Application to Court whose decree complained of.

R. **2.** [S. 598.] Whoever desires to appeal to *His* Majesty in Council *shall* apply by petition to the Court whose decree is complained of.

[1877—S. 598.]

Synopsis.

1. **Scope of the rule.**
2. **Appeals in forma pauperis.**
3. **Limitation.**

1. **Scope of the rule.**—A party desirous of appealing to His Majesty in Council should apply by a *petition* to the Court whose decree is complained of. Where there are two appeals from two decrees although they are decided by a common judgment two separate applications are necessary even though both the decrees were based on one common judgment.[1]

Where *A* appeals to the High Court making *B* a party to the appeal and succeeds in the appeal, *B* is entitled to present a petition for leave to appeal to the Privy Council and the High Court, in such petition, is not competent to go into the question whether he has any *locus standi* to maintain the application.[2]

2. **Appeals in forma pauperis.**—*See* Note 13 to O. 44, R. 1.

An order for leave to appeal in *forma pauperis* takes effect from its date and has no effect whatever on costs incurred before that date.[1]

3. **Limitation.**—An application for leave to appeal to the Privy Council must be filed within 90 days of the date of decree or order appealed from, under Art. 179 of the Limitation Act, 1908. Where the decree is modified on review, the time will begin to run from the date of the decree passed on review.[1]

Where the Court is closed on the last day prescribed for the application, it may be presented on the next re-opening day.[2] In calculating the period

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(2) 1920 P C 86 (87): 47 Ind App 124: 14 Sind L R 191: 18 All L J 591: 22 Bom L R 606: 24 Cal W N 721: 39 Mad L Jour 27: 28 Mad L Tim 87: 12 Mad L W 15: 1920 Mad W N 407: 2 U P L R (P C) 94: 56 Ind Cas 302: 47 Cal 918 P C.

Note 2.

(1) *Nana Narain Rao* v. *Hurree*, (1854-57) 6 Moo Ind App 464 (465, 466): 11 Moo P C 86: *Omanath* v. *Nujeeh Chowdhry*, (1859-61): 8 Moo Ind App 498 (499): 1 Sar 812.

Order 45, Rule 2—Note 1.

(1) *Mahadeo Prasad* v. *Gajadhar Prasad*, (1920) 57 Ind Cas 812 (815): 1 Pat L Tim 262; *Gopal Singh* v. *N Johnstone*, 1932 Lah 441 (442): 33 Pun L R 455: 140 Ind Cas 70.

(2) *Gendamoni Debya* v. *Raghunandan Singh*, 1925 Pat 712 (712): 1925 Pat H C Cas 337: 91 Ind Cas 768: 7 Pat L Tim 287.

Note 2.

(1) *Levine* v. *Serling*, 1914 P C 227 (227) P C.

Note 3.

(1) *Nawaz Ali* v. *Allu*, 1924 Lah 82 (82): 4 Lah 185: 75 Ind Cas 520: 6 Lah L Jour 44.

(2) *Luchman Chunder Gir* v. *Kalee Churn Singh*, (1869) 12 Suth W R 293 (294). But see *Tamvaco* v. *Skinner*, (1868) 1 Beng L R (O C) 89 [Six months period expiring during holidays—Application for leave made on re-opening day—Leave could not be given].

O. 45, R. 2, Note 3.

of limitation the day on which the decree or order appealed from is pronounced or dated should be excluded.[3] S. 12, sub-S. (2) of the Limitation Act of 1877 was restricted to applications for leave to appeal *as a pauper* and hence it was held that the time spent in getting a copy of the *decree* could not be excluded in computing the period of limitation.[4] Under the present S. 12, sub-S. (2) of the Limitation Act, 1908 such time can be clearly excluded in computing the period of limitation for an application for leave to appeal under this rule.[5] Sub-S. (3) of S. 12 of that Act is however not applicable to applications for leave to appeal and therefore the time spent in obtaining a copy of the *judgment* cannot be excluded.[6]

S. 6 of the Limitation Act, 1908 does not apply to application for the leave to appeal.[7]

See also Note 8 to S. 109 and the undermentioned cases.[8]

O.45, R.3

Certificate as to value or fitness.

R. 3. [S. 600] (1) Every petition *shall* state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to *His* Majesty in Council.

(2) Upon receipt of such petition, the Court *shall* direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

[1877—S. 600.]

Local Amendments.

BOMBAY.

In sub-R. (2) of R. 3 of O. 45, after the words "to show cause why the said certificate should not be granted" the following words shall be inserted, namely:—"unless it thinks fit to refuse the certificate."

NAGPUR.

For sub-R. (2) of R. 3 of O. 45, the following sub-rules shall be *substituted*, namely:—

"(2) Upon receipt of such petition, the Court, after sending for the record, and after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day, may dismiss the petition.

(3) Unless the Court dismisses the petition under sub-R. (2) it shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted."

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(3) *Petition of Ramanujan Narain*, (1870) 13 Suth W R 17 (18) P C.

(4) *Lakshmanan* v. *Periaswami*, (1887) 10 Mad 373 (374).

(5) *Jogesh Chandra* v. *Benode Lal Roy Chowdhry*, (1912) 5 Ind Cas 59 (62): 14 Cal W N 122; *Eastern Mortgage and Agency Co* v. *Purna Chandra*, (1912) 15 Ind Cas 497 (497): 39 Cal 510.

(6) *Wilayati Begam* v. *Firm Jhandu Mal Mithu Lal*, 1926 All 286 (286): 24 All L J 349: 92 Ind Cas 897.

(7) *Thurai Rajah* v. *Jainilabdeen Rowthan*, (1895) 18 Mad 484 (485, 486).

(8) *Mahadeo Prashad* v. *Gajadhar Prasad*, (1920) 57 Ind Cas 312 (315): 1 Pat L Tim 262 [Application for copies not filed in time—Time cannot be excluded]; *Raj Kishen* v. *Soonduree*, (1871) 15 Suth W R 255 (257) [Leave granted—Cannot be cancelled subsequently on the ground of limitation].

O. 45, R.
Notes
1—4.

Synopsis.

1. **Legislative changes.**
2. **Scope of the rule.**
3. **Certificate as to fulfilment of the requirements of S. 110—See Note 10 to S. 109 and notes to S. 110, ante.**
4. **Certificate as to fitness.**
5. **Ex parte grant of leave to appeal.**
6. **Non-prosecution of petition.**
7. **Letters Patent Appeal.**
8. **Review.**
9. **Form.**

Notice. See Note 1.

Objection to grant of leave. See Note 4, Pts. (4), (5) and (6).

Special leave by the judicial committee. See Note 2, Pt. (2).

1. Legislative changes:—

In sub-R. (2) the words "shall direct notice" have been substituted for the words "may direct notice" which occurred in the corresponding section of the Code of 1882.

2. Scope of the rule.—This rule must be read with S. 109, Cl. (*c*) and S. 110. A party wishing to file an appeal to His Majesty in Council, should file a petition to the High Court under this rule for the issue of a certificate that the case fulfils the requirements of S. 110 or is 'otherwise fit' for appeal.[1]

This rule does not restrict the power or prerogative of the Judicial Committee to grant *special leave* to appeal. *See* Notes under S. 112, *ante* and the following cases.[2] In *Motichand* v. *Ganga Prasad*,[2-a] Lord Davey in delivering the judgment of the Board observed as follows:—"Where a party in an Indian case comes to this Board and asks for special leave to appeal the matter being under the appealable value, their Lordships think that he should *first apply to the Court below for a certificate* under the second part of S. 600 namely that it is otherwise a fit one for appeal to Her Majesty in Council".

3. Certificate as to fulfilment of the requirements of S. 110.—*See* Note 10 to S. 109 and Notes to S. 110, *ante*.

4. Certificate as to fitness.—It is the *certificate* granting leave to appeal and not the *order* for such certificate, which the Judicial Committee will consider and act upon: and unless the certificate upon which leave to appeal is based is in such a form as to justify that leave, it will be held not to have been properly given.[1] In *Radhakrishna Ayyar* v. *Swaminatha Ayyar*[2] their Lordships of the Judicial Committee pointed out that where an appeal is certified to be otherwise fit, it is of the utmost importance that the certificate should on the face of

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Order 45, Rule 3—Note 2.

[1] *Ali Akbar* v. *Abdul Latif*, (1875) 12 Bom H C R 8 (8); *Shri Surajmalji* v. *Jalah Kanubhai*, (1895) Bom P J 462 [No fresh vakalatnama necessary for the petition]; *Nibaran Chandra Chatterjee* v. *Maharaja Pratab Udai Nath Sahi Deo*, 1921 Pat 134 (135): 1921 Pat H C C 129: 2 Pat L Tim 173: 60 Ind Cas 500 [Held defendant not taking any part in defending the suit or appeal not entitled to leave separately].

[2] *Muhammad* v. *Najivan*, (1897) 19 All 95 (97): 23 Ind App 167: 7 Sar 99 P C [Special leave granted without security]; *Sadagopa Chariar* v. *Krishna Murthi*, (1907) 30 Mad 185 (188): 34 Ind App 93: 4 All L J 333: 9 Bom L R 663: 11 Cal W N 585: 17 Mad L Jour 240: 5 Cal L Jour 566: 2 Mad L Tim 204 P C.

[2-a] (1901) 24 All. 174: 6 Cal W N 362: 4 Bom L R 159: 29 Ind App 40: 8 Sar 247 P C.

Note 4.

[1] *Radhakrishna Das* v. *Rai Krishenchand*, (1901) 23 All 415 (418): 28 Ind App 182: 5 Cal W N 689: 3 Bom L R 469: 8 Sar 114 P C.

[2] 1921 P C 25 (26): 44 Mad 293: 19 All L J 161: 23 Bom L R 718: 33 Cal L Jour 277: 25 Cal W N 630: 40 Mad L Jour 229: 13 Mad L W 321: 1921 Mad W N 119: 60 Ind Cas 85: 48 Ind App 31: 29 Mad L Tim 418 P C. See also *Maharaj Bahadur Singh* v. *Balchand Chowdhury*, 1921 P C 128 (128): 48 Ind App 376: 13 Mad L W 365: 1921 Mad W N 87: 2 Pat L Tim 182: 62 Ind Cas 320: 29 Mad L Tim 156 P C.

O.45, R.5, Notes 3—4.

it, show clearly the grounds upon which it is based. There should be an indication of the nature of the question that is involved in the appeal and that the discretion conferred by S. 109, Cl. (*c*) was invoked or was exercised. Their Lordships think it should be brought to the attention of the Indian Courts that these certificates are of great consequence, that they seriously affect the rights of litigant parties, and that they ought to be given in such a form that it is impossible to mistake their meaning upon their face". Even if the High Court refuses a certificate it is desirable that the reasons for such refusal should be stated.[3]

The respondent can raise a preliminary objection before the Judicial Committee on the ground that the order granting leave is *ultra vires* and that hence the appeal is not maintainable.[4] But objection as to valuation, should be taken at the earliest possible opportunity.[5] The Privy Council will not interfere with any question of valuation unless it can be shown that some item has improperly been made the subject of valuation, or excluded therefrom, or that there is some *fundamental principle* affecting the valuation which renders it unsound.[6]

Certificate if can be granted after final adjudication by the Judicial Committee.—The certificate under this rule cannot be granted after there has been a final adjudication in the matter by the Judicial Committee. In *Neki* v. *Chejju Ram*[7] the plaintiff's suit which was decreed in the trial Court was reversed by the High Court. The plaintiff then filed a petition for leave to appeal to the Judicial Committee as also an application for a review. The latter application was granted and the High Court reversed its original judgment. The defendant took the matter in appeal to the Privy Council which held that the application for review was not maintainable and dismissed the suit restoring the first judgment of the High Court. Subsequently the plaintiff pressed his original petition for leave to appeal and the High Court granted leave holding that the petition was still alive, and not disposed of. The Privy Council reversed the order granting leave holding that there was no suit *existing* after the decision of the Judicial Committee and that no leave could therefore be granted.

5. **Ex parte grant of leave to appeal.**—An *ex parte* order granting leave to appeal is liable to be rescinded if it is obtained by any misrepresentation or concealment of fact which ought to have been disclosed.[1]

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(3) *Vengunat Swaroopathil Valia Nambidi* v. *Cherakunnath Nambiyathan*, (1902) 29 Mad 194 (195): 33 Ind App 67: 10 Cal W N 545: 8 Bom L R 374: 4 Cal L Jour 305: 16 Mad L Jour 160 P C.

(4) *Gajadhur Pershad* v. *The Widows of Emam Ali*, (1897) 15 Beng L R 221: 2 Ind App 205.

(5) *Nīlmadhab* v. *Biswambhar*, (1869) 13 Moo Ind App 85 (95): 3 Beng L R 27: 12 Suth W R P C 29: 2 Suther 257: 2 Sar 489 P C.

(6) *Charan Das* v. *Amir Khan*, 1921 P C 50 (52): 48 Cal 110: 47 Ind App 255: 18 All L J 1095: 22 Bom L R 1370: 3 Pun W R 1921: 39 Mad L Jour 195: 28 Mad L Tim 149: 2 U P L R 124: 57 Ind Cas 606: 25 Cal W N 289: 13 Mad L W 49 P C; *Radha Kunwar* v. *Reoti Singh*, 1916 P C 18 (20): 38 All 488: 43 Ind App 187: 14 All L J 1002: 18 Bom L R 850: 24 Cal L Jour 303: 20 Cal W N 1279: 31 Mad L Jour 571: 20 Mad L Tim 211: 5 Mad L W 456: (1916) 2 Mad W N 200: 35 Ind Cas 939 P C. See also *Radhakrishna* v. *Sundareswamier*, 1922 P C 257 (258): 16 Mad L W 18: 41 Mad 475: 31 Mad L Tim 31: 43 Mad L Jour 323: 49 Ind App 211: 27 Cal W N 1: 20 All L J 937: 36 Cal L Jour 450: 74 Ind Cas 584 P C [Order of council dated 9—2 -1920 shows certificate not conclusive as to valuation].

(7) 1925 P C 174 (175): 6 L R P C 128: 89 Ind Cas 185: 26 Pun L R 526 P C [Reversing 1924 Lah 225].

Note 5.

(1) *The Mussoorie Bank, Ltd* v. *Albert Charles Raynor*, (1882) 4 All 500 (508): 9 Ind App 70: 6 Ind Jur 384: 4 Sar 346; *Mohun Lal* v. *Bibi*

O. 45, R. 3, Notes 6—9.

6. **Non-prosecution of petition.**—The petition is liable to be struck off for default if the applicant does not prosecute it diligently.[1] The Court can however restore the petition on *sufficient cause* being shown.[2]

The Privy Council may also dismiss an appeal presented to it for want of prosecution where no further proceedings, are taken in the High Court, as required by the rules.[3]

7. **Letters Patent Appeal.**—No appeal lies under Cl. 15 of the Letters Patent from an order granting[1] or refusing[2] a certificate for leave to appeal.

8. **Review.**—An order granting or refusing leave to appeal can be reviewed.[1]

9. **Form.**—*See* Appendix G, Form No. 12.

O. 45, R. 4, Note 1.

Consolidation of suits.

4. [New.] *For the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated: but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination.*

Synopsis.

1. Consolidation of suits.
2. Inherent power to consolidate.
3. "Judgment," meaning of.
4. Costs.

1. Consolidation of suits.—There was no provision under the old Code corresponding to this rule and there was a conflict of opinion as to whether, and when, two suits could be consolidated together for the purpose of reaching the pecuniary limit necessary for an appeal to the Privy Council. According to the High Court of Allahabad, suits, though decided by *separate* judgments could be consolidated provided the questions involved in them were substantially the same, and the property affected by the suits were also the same.[1] According to the High Court of Calcutta, such consolidation was not permissible unless

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Doss, (1859-61) 8 Moo Ind App 193 (195): 1 Sar 792: 1 Suther 458; *Sibnarain* v. *Hullodhur,* (1854-57) 6 Moo Ind App 207 (208, 209): 1 Sar 532: 9 Moo P C 354; *Madhub Chunder Dey* v. *Law,* (1875) 14 Beng L R 394.

Note 6.

[1] *Moorajee Poonja* v. *Visranjee,* (1886) 12 Cal 658 (660); *Aghore Nath Chatterjee* v. *Damodardas Burman,* (1897) 2 Cal W N 46 (47) (Notes); *Gobardhan* v. *Mani Bibi,* (1870) 5 Beng L R 76: 14 Suth W R O C 34 [On appeal from 3 Beng L R O C 126]; *Thakoor Kapilnath* v. *The Government,* (1876) 1 Cal 142 (143): 22 Suth W R 17: 13 Beng L R 445.

[2] *Shankar Baksh* v. *Hardeo Baksh,* (1889) 16 Cal 397 (403): 16 Ind App 71: 5 Sar 299: 13 Ind Jur 93: R and J 108 P C; *Radha Binode Misser* v. *Kripa Moyee Debea,* (1867) 7 Suth W R 531 (531): Beng L R Sup Vol 730. But see *Bolakun, in re,* (1866) 6 Suth W R Mis 121.

[3] *Rabutty Dossee* v. *Radhanath,* (1854-57) 6 Moo Ind App 346 (347): 1 Sar 547 P C.

Note 7.

[1] *Lutf Ali* v. *Asgur Reza,* (1890) 17 Cal 455 (458); *Mowla Buksh* v. *Kissen Pertab,* (1876) 1 Cal 102 (103); *Amirunnissa* v. *Behary Lal,* (1876) 25 Suth W R 529 (531); *Mowla Buksh* v. *Hodgkinson,* (1875) 24 Suth W R 150 (151).

[2] *Manly* v. *Patterson,* (1881) 7 Cal 339 (342): 9 Cal L Rep 166; *Tara Chand* v. *Radha Jeebun,* (1875) 24 Suth W R 148 (149).

Note 8.

[1] *Gopinath Birbar* v. *Goluck Chunder,* (1884) 16 Cal 292 (294); *Nand Kishore* v. *Ram Golam,* (1912) 17 Ind Cas 221 (222): 39 Cal 1037: 16 Cal W N 1089.

Order 45, Rule 4—Note 1.

[1] *Muhammad Yusuf, in the matter of,* (1886) 18 All 196 (198): 1896 All W N 39.

O. 45, R. 4, Notes 1—2.

the suits had been decided by the *same* judgment.[2] The present rule gives effect to the latter view, and no consolidation is permissible under the present Code, unless the suits have been decided by the same judgment. The object of the rule is that where there are appeals from *one judgment* involving substantially the same question for determination before the Privy Council, they may be consolidated if, in the aggregate, the value of the appeals amount to the appealable minimum.[3] But in interpreting the words "same judgment," the spirit of the rule should be observed and a narrow interpretation should not be given to it.[4] Where the judgment in one suit is merely a copy of the other[5] or where the judgment in one suit merely refers to the judgment in the other, and, adopting its reasons, and passes a decree accordingly,[6] the suits must, for the purposes of this rule be regarded as having been decided by the *same* judgment. Where the evidence in the two suits was, at the request of the parties, considered as a whole, and the Court came to a decision on the whole of the evidence in favour of a party, it was held by the High Court of Allahabad that it was a proper case to which the procedure sanctioned by this rule should be applied.[7] But the rule allows consolidation only for the purpose of making good a defect in pecuniary valuation, and not a defect of any other kind. In the case cited below the same judgment affirmed the lower Court's judgment in part relating to one defendant and modified it in part relating to another defendant. In regard to the former part, there was no substantial question of law involved and in regard to the latter part the appealable value was less than Rs. 10,000. Both defendants applied jointly for leave to appeal. It was held that leave should be refused.[8]

The rule applies only to appeals to the King in Council and not to appeals to the High Court.[9]

2. **Inherent power to consolidate.**—The rule does not limit the inherent power of the High Court to consolidate appeals to the Privy Council for the purpose of *security for costs* and for *saving expenses*[1] though such power cannot be exercised for settling pecuniary valuation when the rule forbids it in cases governed by *different judgments*.[2]

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(2) *Royal Insurance Company* v. *Akhoy Coomar*, (1901-02) 6 Cal W N 41 (42) F B; *Muhammad Ubdoolah* v. *Mootechand*, (1866) 5 Suth W R P C 34 (38): 1 Moo Ind App 363: 1 Suth 56: 1 Sar 129; *Khajah Ashanulla* v. *Karoonamoyi Chowdhury*, (1879) 4 Cal L Rep 125 (127); *Deonarain Singh* v. *Guni Singh*, (1907) 34 Cal 400 (402); *Gopal Lal Thakoor* v. *Teluk Chunder Rai*, (1860) 7 Moo Ind App 548 (551): 1 Sar 737. But see *Joogulkishore* v. *Jotendro Mohun*, (1882) 8 Cal 210 (211): 6 Ind Jur 356; *Ajuas Kooer* v. *Luteefa*, (1872) 18 Suth W R 21 (22).

(3) *Har Prasad* v. *Brij Kishen Das*, (1918) 45 Ind Cas 551 (552): 3 Pat L Jour 446: 1918 Pat H C C 259; *Banga Chandra Dhar* v. *Jagath Kishore*, (1911) 10 Ind Cas 967 (967): 13 Cal L Jour 503; *Rajeswara Sethupathi* v. *Arunachalam*, 1923 Mad 602 (603): 44 Mad L Jour 424: 73 Ind Cas 217. See also *Abdul Karim* v. *Allah Baksh*, (1913) 21 Ind Cas 624 (624): 90 Pun Re 1913: 340 Pun L R 1913: 229 Pun W R 1913.

(4) *Jivangiri* v. *Gajanan*, 1927 Bom 19 (20): 50 Bom 753: 28 Bom L R 1437: 100 Ind Cas 143.

(5) *Vasi Reddi* v. *Secretary of State*, 1932 Mad 125 (126): 61 Mad L Jour 692: 34 Mad L W 817: 135 Ind Cas 449: 55 Mad 106.

(6) *Jivangiri* v. *Gajanan*, 1927 Bom 19 (20): 50 Bom 753: 28 Bom L R 1437: 100 Ind Cas 143.

(7) *Bhagwan Singh* v. *Bhawani Das Bhagwan Das*, 1921 All 270 (270): 18 All L J 1119: 43 All 223: 59 Ind Cas 794.

(8) *Narayana Das* v. *Mt Kamala Bai*, 1923 Nag 198 (199): 69 Ind Cas 525.

(9) *Har Devi* v. *Harnam Singh*, (1910) 6 Ind Cas 491 (492): 17 Pun L R 1910: 123 Pun W R 1910.

Note 2.

(1) *Har Prasad Rai* v. *Brji Kishen Das*, (1918) 45 Ind Cas 551 (552): 3 Pat L Jour 446: 1918 Pat H C C 259.

(2) *Deoki Nandan Prasad* v. *Narsingh Raut*, 1921 Pat 97 (98): 2 Pat L Tim 157: 6 Pat L Jour 97: 1921 Pat H C C 145: 60 Ind Cas 517.

O. 45, R. 4, Notes 3—4.

3. **"Judgment" meaning of.**—The word "judgment" refers to the judgment appealed against and not the judgment of the Court below.[1] The fact that there was a common judgment in two suits in the trial Court is no ground for consolidating the suits under this rule unless there is a common judgment in the High Court also.[2]

4. **Costs.**—The effect of an order of consolidation of several appeals under this rule is to make them a single appeal, and if costs are awarded against the respondents, they are jointly and severally liable for the whole costs.[1]

As to security for costs in consolidated appeals, *see* Note 5 to R. 7, below.

O. 45, R. 5, Note 1.

Remission of dispute to Court of first instance.

R. **5.** [New.] *In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value of the subject-matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last-mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made.*

1. **Remission of dispute as to amount or value of the subject-matter.**—This rule gives effect to the practice followed under the old Code a practice sanctioned by the Judicial Committee of ascertaining by evidence and enquiry as to the true value of the subject-matter in appeal when there is a dispute regarding the same.[1]

A remand under this rule is unnecessary and should not be made when an issue as to valuation was raised and decided in the trial Court and the parties acquiesced in the finding on that issue.[2]

Where there is a remand under this rule the Court to which the remand is made should itself carry out the investigation and cannot remit it to some

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Note 3.

(1) *Vasi Reddi* v. *Secretary of State for India*, 1932 Mad 125 (126): 61 Mad L Jour 692: 34 Mad L W 817: 135 Ind Cas 449: 55 Mad 106.

(2) *Deoki Nandan Prasad* v. *Narsingh Raut*, 1921 Pat 97 (98): 6 Pat L Jour 97: 1921 Pat H C C 145: 60 Ind Cas 517: 2 Pat L Tim 157.

Note 4.

(1) *The Midnapur Co, Ltd* v. *Madan Marwari*, 1923 Pat 215 (216): 1923 Pat H C C 17: 70 Ind Cas 782.

Order 45, Rule 5—Note 1.

(1) *Rai Amrita Nath Mitter Bahadur* v. *Abhoy Charan Ghosh*, (1905) 9 Cal W N 370 (371); *Ikramul Huq* v. *Wilkie*, (1906) 33 Cal 893 (894): 33 Ind App 106: 3 All L J 740: 6 Cal L Jour 682: 11 Cal W N 946: 17 Mad L Jour 454: 2 Mad L Tim 448 P C.

(2) *Anant Narayan Deshpande* v. *Ramchandra Ganghadar Deshpande*, (1918) 46 Ind Cas 4 (5): 42 Bom 609: 20 Bom L R 418; *Rameshwar Khemka* v. *Siddeshwar Ghosh*, 1927 Cal 418 (419): 45 Cal L Jour 225: 101 Ind Cas 901; *Deokinandan* v. *Narsingh*, 1921 Pat 97 (98): 6 Pat L Jour 97: 1921 Pat H C C 145: 2 Pat L Tim 157: 60 Ind Cas 517. See also *Jaganath Bakhsh* v. *Mandana*, (1916) 30 Ind Cas 204 (205): 2 Oudh L J 208 [Defendant not objecting as to plaint valuation —Held he cannot object in High Court].

other officer.[3] But it has power to hold a local enquiry for the purpose of determining the value of the subject-matter.[4]

Effect of refusal of certificate.

R. 6. [S. 601.] *Where* such certificate *is* refused, the petition shall be dismissed.

[1877—S. 601.]

Synopsis.

1. **Reasons for refusal.**
2. **Costs.**
3. **Appeal.**
4. **Review.**

1. **Reasons for refusal.**—In the undermentioned case[1] the Judicial Committee observed as follows:—"Their Lordships desire to add that it would be convenient if the High Court on future occasions in refusing a certificate for leave to appeal would be good enough to state the grounds on which they refused it."

2. **Costs.**—Where an application for leave to appeal is dismissed with costs, the proper Court to execute the order as to costs is the trial Court.[1]

3. **Appeal.**—Under O. 43, R. 1, Cl. (*v*) an appeal lies against an order made by any Court *other than a High Court* refusing the grant of a certificate under this rule and the period of limitation is 30 days from the date of the order under Art. 153 of the Indian Limitation Act.

4. **Review.**—*See* Note 8 to R. 3, *ante.*

Security and deposit required on grant of certificate.

R. 7. [S. 602.] (1) *Where* the certificate *is* granted, the applicant shall, within *ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow* from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

(*a*) *furnish* security in *cash or in Government securities* for the costs of the respondent, and

(*b*) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to *His*

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[3] *Hansman Jha* v. *Bahuji Jha,* (1916) 34 Ind Cas 203 (203): 43 Cal 225.

[4] *Promada Nath Roy Bahadur* v. *Basiruddin Quazi,* 1925 Cal 414 (415): 82 Ind Cas 744.

Order 45, Rule 6—Note 1.

[1] *Venganat Swaroopathil Valia Nambidi Avergal* v. *Cherakunnath Nambiyathan Nambudris,* (1906) 29 Mad 194 (195): 10 Cal W N 545: 8 Bom L R 374: 16 Mad L Jour 160: 4 Cal L Jour 305: 33 Ind App 67 P C.

Note 2.

[1] *Jogendra Chandra Sen* v. *Wazi Dunnissa Khatun,* (1907) 34 Cal 860 (862): 11 Cal W N 856. See however *Hurro Prosad Roy* v. *Bhupendro Narain,* (1881) 6 Cal 201 (203): 7 Cal L Rep 79 [*Held,* High Court can execute such order].

O. 45, R. 7. Majesty in Council a correct copy of the whole record of the suit, except—

(1) formal documents directed to be excluded by any order of *His* Majesty in Council in force for the time being;

(2) papers which the parties agree to exclude;

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included; and

(4) such other documents as the High Court may direct to be excluded.

Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished:

Provided further, that no adjournment shall be granted to an opposite party to contest the nature of such security.

(2) *Where* the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also within the time mentioned in *sub-rule* (1) deposit the amount required to defray the expense of printing such copy.

[1877—S. 602.]

Local Amendments.

BOMBAY.

After R. 7, the following rule shall be inserted, namely:—

"7-A. No such security as is mentioned in R. 7 (1), Cl. (*a*) shall be required from the Secretary of State for India in Council or, where the Local Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity."

NAGPUR.

Insert the following as new R. 7-A:—

"7-A. No such security as is mentioned in R. 7 (1), Cl. (*a*) shall be required from the Secretary of State for India in Council or, where the Local Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity."

Synopsis.

1. Amendments after 1908.
2. Scope of the rule.
3. "Date of the decree," meaning of.
4. Security and deposit.
5. Security in case of consolidated appeal.
6. Form of security—Proviso.
7. Extension of time.
8. Record not to include unnecessary papers.
9. Delay.
10. Appeal.

1. **Amendments after 1908.**—The following alterations have been introduced by the Amending Act XXVI of 1920:—

(1) The words "Ninety days or such further period not exceeding sixty days as the Court may, upon cause shown, allow" have been substituted for the words "six months".

(2) The words "in cash or in Government securities" after the word "security" have been newly added.

(3) The proviso to sub-R. (1) is new.

2. **Scope of the rule.**—The rule prescribes the course to be followed by the applicant (appellant) after the issue of a certificate as to fitness of appeal. He should furnish security for the costs of the respondent and also deposit the expenses for translating, transcribing, indexing and transmitting the records within the time fixed by clause (1).[1] The rule does not, according to the Chief Court of Oudh, apply to cases where *special leave* to appeal is granted by the Privy Council under S. 112, and the High Court has no jurisdiction to call upon the appellant to deposit security without any order of the Privy Council.[1-a] The High Court of Calcutta,[2] on the other hand, has held, in a case arising under the old Code, that it has been the *practice* of that Court to treat the section as applicable, and that the High Court has power to extend the time for depositing the costs of transmitting the records under the section.

3. **"Date of the decree" meaning of.**—The words "date of the decree" mean the date on which the decree is *pronounced* and not the date on which it is signed by the Judge.[1]

4. **Security and deposit.**—The appellant should furnish security for the costs of the respondent.[1] The security should after the amendment of the section by Act XXVI of 1920 be in *cash* or in *Government securities* unless the Court acting under the proviso[1-a] orders that some other form of security may be furnished. Where Government securities are furnished as security, the market value thereof at the time of deposit should be taken into consideration.[2] Solicitors for the respondent in England can claim payment of

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Order 45, Rule 7—Note 2.

(1) In the matter of *Gour Surn Dass*, (1875) 19 Suth W R 305 (306) [Petitioner has no right to change the estimate of expenses; if he is dissatisfied he can apply to the officer to amend it].

(1-a) *Mata Prasad* v. *Nageshar Sahai*, 1925 Oudh 99 (100): 11 Oudh L J 195: 76 Ind Cas 335.

(2) *Roy Jotindra Nath Chowdhury* v. *Rai Prasanna Kumar Banerjee Bahadur*, (1907) 11 Cal W N 1104 (1105).

Note 3.

(1) *Harendra Lal* v. *Hari Dasi Debi*, (1910) 5 Ind Cas 844 (845): 14 Cal W N 420.

Note 4.

(1) *Rajah Saheb Pershad Sein* v. *Rajah Rajendro Kishore*, (1867) 7 Suth W R 338 (338): Beng L R Sup Vol 662: 2 Ind Jur N S 229.

(1-a) As to securities that could be taken before the amendment, see the following cases:—*Phool Koer* v. *Dabee Pershad*, (1869) 12 Suth W R 187 (187) [Widow's interest should not be taken as security]; *Midnapur Zamindari Co* v. *The Deputy Commissioner of Manbhum*, (1918) 44 Ind Cas 570 (571): 3 Pat L Jour 132 [Decree offered as security for costs. *Held*, acceptance of security does not operate as stay of execution of the decree]; *Girandra Nath* v. *Bejoy Gopal*, (1899) 26 Cal 246 (249): 3 Cal W N 84 [Surety not precluded from questioning the validity of the bond in execution]; *Narayanan* v. *Arunachalam*, (1896) 19 Mad 140 (143, 144) [Security bond can be enforced]; *Soonjharee Koonwar* v. *Ramessur Pandey*, (1866) 5 Suth W R Mis 47 (48) [Security bonds require a stamp].

(2) *Chutterput Singh* v. *Maharaj Bahadur*, (1909) 4 Ind Cas 64 (64): 9 Cal L Jour 559 [In case of Government securities market value at the time of deposit should be taken into consideration].

O. 45, R. 7, Notes 4—7.

their bill of costs from the money deposited as security.[3] A Full Bench of the High Court of Allahabad[4] has held that it is open to the decree-holder by way of caution to attach the security deposited by the judgment-debtor so as to prevent him from dealing with it any further.

5. **Security in case of consolidated appeal.**—When two appeals are consolidated for valuation, security has to be furnished in respect of each of the appeals. It is not enough if security is given in one appeal alone.[1]

6. **Form of security—Proviso.**—If an appellant to the Privy Council wishes to furnish a security in any other form than in cash or in Government bonds, he must apply for a special order to that effect and obtain it simultaneously with the order granting the certificate. It cannot be applied for or granted afterwards.[1]

7. **Extension of time.**—Prior to Act XXVI of 1920 the security or the deposit had to be furnished or made within six months from the date of the decree complained of or within *six weeks* from the date of the grant of the certificate, whichever was the later date. The period of six months has, under the rule as now amended, been reduced to 90 days; but the Court may extend the said period by a further period of sixty days "on cause shown". Under the rule, as it originally stood, it had been held by the Privy Council and by the High Courts that the period of six months could be extended by the High Court for "cogent reasons".[1] It was held that the misapprehension of the appellant as to the date of the re-opening of the High Court could not be considered to be a "cogent reason" justifying an extension of time.[2] As to whether the poverty of the appellant was a "cogent reason," it was held by the High Courts of Madras and the Chief Court of Lower Burma that it was not;[3] while the Chief Court of Punjab held that it was a sufficient ground for extending time.[4] Even under the present rule, the High Courts of Madras and Rangoon have followed their earlier view on the point.[5]

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(3) *Bikramkishore Manikya* v. *Ali Ahmed*, 1931 Cal 734 (734): 58 Cal 1034: 134 Ind Cas 1071.

(4) *Shanta Nandgir* v. *Basudevanand*, 1930 All 225 (242): 1930 All L J 402: 125 Ind Cas 477: 52 All 619 [On appeal from 1929 All 794].

Note 5.

(1) *Bibi Nabi Zohra* v. *Baij Nath Goenka*, (1919) 50 Ind Cas 511 (512): 4 Pat L Jour 198: 1919 Pat H C C 139.

Note 6.

(1) *Arunachala Naidu* v. *Balakrishna and Co*, 1925 Mad 449 (450): 48 Mad L Jour 134: 21 Mad L W 147: 86 Ind Cas 201: 48 Mad 559; *Ma Sein* v. *Sit Paung*, 1926 Rang 44 (44): 4 Bur L Jour 3: 94 Ind Cas 590; *Kirkwood* v. *Maung Sin*, 1921 L B 55 (57): 11 L B R 213: 66 Ind Cas 548.

Note 7.

(1) *Burjore* v. *Bhagana*, (1883) 10 Cal 557 (562): 11 Ind App 7: 4 Sar 498: 8 Ind Jur 216: R and J 76 P C; *Fazal-un-Nissa Begum* v. *Mulo*, (1884) 6 All 250 (253): 1884 All W N 71; *Damodar* v. *Gopal Chand*, (1884) 7 All 79 (93): 1884 All W N 303; *Harendra Lal Roy Chowdhury* v. *Hari Dasi Debi*, (1910) 5 Ind Cas 844 (845): 14 Cal W N 420; *Thakoor Kapilnath* v. *The Government*, (1875-76) 1 Cal 142 (143): 22 Suth W R 17: 13 Beng L R 445; In the matter of the petition of *Soorjmukhi Koer*, (1876-77) 2 Cal 272 (273); *Kidarnath* v. *Nathu Mal*, (1909) 4 Ind Cas 919 (920): 27 Pun L R 1909: 87 Pun Re 1908: 153 Pun W R 1908; *Maqbul-un-nissa* v. *Fazal Ali*, (1919) 50 Ind Cas 907 (908): 6 Oudh L J 149: 1 U P L R (O) 58; *Murlidhar* v. *B L Rai*, (1919) 49 Ind Cas 893 Nag; *Ma Me Gale* v. *Ma Sa Yi*, (1900-07) 1 L B R 329 (332); *Ponnammal* v. *The Bank of Rangoon*, 1921 L B R 28 (29): 1 L B R 108: 65 Ind Cas 450. But see the following which are not good law in view of 10 Cal 557 P C; *Narain Singh* v. *Rustam Khan*, 1881 All W N 76 (76); *Deotadin* v. *Gayadin*, 1882 All W N 55 (55); *Gopeechand*, in the matter of, (1871) 2 Cal 128 (129): 1 Ind Jur 374; *Funeendro Deb Roy Kur* v. *Jogendro Deb*, (1875) 23 Suth W R 220 (221).

(2) *Harendra Lal Roy Chowdury* v. *Haridasi Debi*, (1910) 5 Ind Cas 844 (845): 14 Cal W N 420; *Shamsulnissa* v. *Secretary of State*, (1913) 18 Ind Cas 489 (489): 71 Pun W R 1913: 105 Pun L R 1913.

(3) *Rangasayi* v. *Mahalakshmamma*, (1891) 14 Mad 391 (392); *Ponnammal* v. *The Bank of Rangoon*, (1922) 65 Ind Cas 450 (451): 11 L B R 108: 1921 L B R 28.

(4) *Bagga* v. *Salihon*, (1910) 6 Ind Cas 723 (724): 44 Pun Re 1910: 70 Pun W R 1910: 118 Pun L R 1910.

(5) *Ma Sein* v. *Sit Paung*, 1926 Rang 44 (44): 4 Bur L Jour 3: 94 Ind Cas 590; *Poornanantha-*

O. 45, R. 7, Notes 7—8.

Can the period of six weeks or the period of sixty days be extended by the High Court? It has been held that the period of six weeks cannot be extended by the High Court.[6] There is a conflict of opinion as to whether the period of *sixty days* could itself be enlarged by the High Court. According to the High Court of Bombay, the High Court has, by virtue of R. 9 of the Privy Council rules, such power;[7] while according to the High Courts of Allahabad,[8] Madras,[9] Patna,[10] Rangoon[11] and the Chief Court of Oudh,[12] the High Court has no such power and cannot extend the time beyond that which is provided in this rule.

8. **Record not to include unnecessary papers.**—The Judicial Committee has repeatedly pointed out and condemned the practice of printing an enormous mass of wholly irrelevant and unnecessary matter in the preparation of the record.[1] Only so much of the records as are material to the appeal should be printed and transmitted to the Privy Council.[2] It has been held in the undermentioned cases[3] that where there is an appeal against the regular decree, such proceedings as application for review of the judgment and orders thereon ought not to form part of the record to be transmitted to England.

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chi v. *T S Gopalaswami Odayar*, 1932 Mad 484 (485): 1932 Mad W N 557: 62 Mad L Jour 665: 35 Mad L W 679: 138 Ind Cas 663: 55 Mad 835.

(6) *Ramani Ranjan Bilas Upadhya* v. *Durga Dutt*. *1927 Pat 330 (331): 105 Ind Cas 585; *Kamala Kanta Singh* v. *Bindhu Mukhi Dasei*, 1929 Pat 431 (432); *Ashiq Ali* v. *Arjuman-un-Nissa*, 1923 Oudh 50 (50): 25 Oudh Cas 254: 70 Ind Cas 937. See also *Debi Rai* v. *Prahlad Das*, 1922 All 87 (88): 44 All 242: 20 All L J 51: 65 Ind Cas 340 [Act 26 of 1920 not retrospective].

(7) *Nilkant* v. *Vidya Narasimha Bharathi*, 1927 Bom 217 (221): 29 Bom L R 352: 51 Bom 430: 101 Ind Cas 555 F B; *Revanshidaya* v. *Gudhaya*, 1931 Bom 278 (279): 33 Bom L R 487: 132 Ind Cas 438.

(8) *Ram Dhar* v. *Prag Narain*, 1922 All 43 (44): 44 All 216: 20 All L J 13: 65 Ind Cas 249; *Jagmohan Saran* v. *Sahu Deoki Nandan*, 1923 All 572 (573): 5 L R A Civ 40: 84 Ind Cas 535; *Joti Prasad* v. *Harkesh Singh*, 1928 Notes 28 (*e*): 26 All L J 433.

(9) *Poornananthachi* v. *T S Gopalaswami Odayar*, 1932 Mad 484 (485, 486): 1932 Mad W N 557: 62 Mad L Jour 665: 35 Mad L W 679: 138 Ind Cas 663: 55 Mad 835; *Kachi Reddi Nagireddi* v. *Saki Reddi*, 1924 Mad 44 (44): 18 Mad L W 29: 1923 Mad W N 510: 74 Ind Cas 703.

(10) *Jaikissen Baram* v. *Baijnath Ram Marwari*, 1927 Pat 332 (332): 103 Ind Cas 213: 8 Pat L Tim 779; *Kamala Kanta Singh* v. *Bindhumukhi*, 1929 Pat 431 (432).

(11) *J N Surty (Receiver)* v. *T S Chettiar*, 1927 Rang 20 (28): 4 Rang 265: 98 Ind Cas 417: 5 Bur L Jour 187.

(12) *Hukum Chand Kastiwal* v. *Radha Kishen Moti Lal Chamaria*, 1932 Oudh 249 (249): 9 Oudh W N 1: 136 Ind Cas 336.

Note 8.

(1) *Bijai Raj Kunwar* v. *Thakur Jai Indra Bahadur Singh*, 1922 P C 317 (324): 44 All 435: 9 Oudh L J 385: 31 Mad L Tim 69: 49 Ind App 262: 68 Ind Cas 876: 43 Mad L Jour 682: 36 Cal L Jour 511: 27 Cal W N 221: 79 Ind Cas 250 P C; *Shew Darshan Singh* v. *The Deputy Commissioner, Partabgarh*, 1923 P C 44 (44): 43 Mad L Jour 167: 35 Cal L Jour 593 P C; *Gopal Chandra* v. *Rajanikanta*, 1919 P C 83 (84): 47 Cal 415: 46 Ind App 299: 24 Cal W N 553: 76 Ind Cas 737 P C; *Tarakant Banerjee* v. *Puddomoney Dossee*, (1863-66) 10 Moo Ind App 476 (489): 5 Suth W R P C 63: 1 Suther 631: 2 Sar 184: *Musst Humeeda* alias *Bebee Khajoo* v. *Musst Amatool Mehdee Begum*, (1872) 17 Suth W R 106 (108).

(2) *Khirodamoyee Dasi* v. *Prodyat Kumar*, (1913) 21 Ind Cas 425 (426): 18 Cal L Jour 122; *Raja Rao Venkata Suriya Mahipati Ram Krishna Rao Bahadur* v. *The Court of Wards*, (1897) 20 Mad 395 (398): 24 Ind App 194: 7 Sar 252 P C; *[illegible]tan Koer* v. *Chotay Narain Singh*, (1894) 21 Cal 476 (479) [On an application that a certain limited meaning should be placed on an endorsement by a Bench clerk on certain exhibits after granting of a certificate the Court left the matter to be disposed of by the Privy Council]; *Mt Khoob Koonwar* v. *The Widows of Baboo Moodnarain Singh*, (1861-63) 9 Moo Ind App 1 (10): 1 Suth W R (P C) 36: 1 Sar 813: 1 Suth 465 P C [Original deed impeached as altered should be transmitted]; *Meer Mahomed Tukee Chowdhry* v. *Lachmeeput Singh Doogur*, (1867) 7 Suth W R 291 (292) [Records should be translated into English wherever necessary]. See also *Katchekalayana* v. *Kachirtjaya*, (1867-69) 12 Moo Ind App 495 (502): 2 Beng L R P C 72: 11 Suth W R P C 33: 2 Suth 206: 2 Sar 461 P C; *Deonandan*, In re, (1867) 7 Suth W R 90 (91).

(3) *Imdad Ali* v. *Koothy Begum*, (1841-46) 3 Moo Ind App 1 (7): 6 Suth W R P C 24: 1 Suth 124: 1 Sar 227; *Fukheerudeen* v. *Nujmoonissa*, (1869) 11 Suth W R 145 (145): 2 Beng L R A C 264; *Enaeat Hossein* v. *Roushan Jahan*, (1868) 10 Suth W R 1 (4): 1 Beng L R 1 F B.

O. 45, R. 7, Notes 8—10.

The Registrar of the High Court should determine in the first instance what papers should be included in the paper book.[4]

9. **Delay.**—Where there was a great delay of three years in the preparation of the records, the office was called on to report the reason for the delay so that if the delay was due to inaction on the part of the appellant, the appeal may be certified as not being effectually prosecuted by the appellant.[1] If there is great delay, the Judicial Committee will peremptorily order the Courts in India to transmit the records at once.[2]

10. **Appeal.**—An order refusing to extend the time for furnishing security is not a "judgment" within the meaning of Cl. 15 of the Letters Patent and is not appealable as such.[1]

O. 45, R. 8, Notes 1—2.

Admission of appeal and procedure thereon.

R. **8.** [S. 603.] *Where* such security has been *furnished* and deposit made to the satisfaction of the Court, the Court *shall*—

(*a*) declare the appeal admitted,

(*b*) give notice thereof to the respondent,

(*c*) transmit to *His* Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid and

(*d*) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

Synopsis.

1. **To the satisfaction of the Court.**
2. **Notice to respondent—Cl. (b).**
3. **Effect of omission to notify.**
4. **Form of notice.**
5. **Transmission of record.**

1. **To the satisfaction of the Court.**—A deposit made out of time is not one made to the satisfaction of the Court.[1]

2. **Notice to respondent—Cl. (b).**—Under Cl. (*b*) of the rule the respondent should be served with the notice of the appeal. Notice by substituted service can also be ordered.[1]

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[4] *Sri Pat Singh* v. *Budhu Singh*, 1921 Pat 124 (124): 6 Pat L Jour 114: 2 Pat L Tim 641: 61 Ind Cas 657. See *Shiva* v. *Rani Prayag*, 1922 Cal 479 (481, 482): 26 Cal W N 840: 49 Cal 967: 76 Ind Cas 901 [Any application to alter the Registrar's order must be made to the Bench who granted leave and not to the Bench who heard the appeal—Convenience in practice].

Note 9.

[1] *D R Saklat* v. *Bella*, 1924 Rang 217 (218): 2 Rang 91: 3 Bur L Jour 30: 80 Ind Cas 744.

[2] *Baboo Kasi Persad Narain* v. *Mt Kawalbasi*, (1851-54) 5 Moo Ind App 146 (161): 1 Suth 225: 1 Sar 412. See In the matter of *Gour Surn Dass*, (1875) 19 Suth W R 305 (306) [If the money is not deposited within the time prescribed, application for leave will be stayed].

Note 10.

[1] *Kishen Pershad Pandey* v. *Tiluckdhari Lal*, (1891) 18 Cal 182 (186).

Order 45, Rule 8—Note 1.

[1] *Jagmohan Saran* v. *Sahu Deoki Nandan*, 1923 All 572 (573): L R 5 A 40: 84 Ind Cas 535.

Note 2.

[1] *James Clark* v. *Baboo Rouplaul Mullick*, (1837-41) 2 Moo Ind App 263 (268): 3 Moo P C 252: 1 Sar 188 P C.

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O. 45, R. 8, Notes 3—5.

3. **Effect of omission to notify.**—The accidental omission to notify to the respondents of the admission of an appeal to the Privy Council is not a sufficient ground for a re-hearing of the appeal decided by the Privy Council provided such respondents in fact knew of the admission.[1]

4. **Form of Notice.**—*Vide* App. G, Form No. 10.

5. **Transmission of record.**—*See* Note 8 to R. 7, *ante.*

O. 45, R. 9.

Revocation of acceptance of security.

R. 9. [S. 604.] At any time before the admission of the appeal the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon.

O. 45, R. 9-A.

Power to dispense with notices in case of deceased parties.

R. 9-A. [*New.*] Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court:

Provided that notices under sub-rule (2) of rule 3 and under rule 8 shall be given by affixing the same in some conspicuous place in the Court house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct.

Local Amendment.

RANGOON.

Substitute the following for R. 9-A:—

Power to dispense with notices in case of deceased parties.

"9-A. Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to an opposite party or respondent who did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court, or on or to the legal representative of any such opposite party or respondent if deceased:

Provided that notices under sub-R. (2) of R. 3 and under R. 8 shall be given by affixing the same in some conspicuous place in the Courthouse of the Judge of the district in which the suit was originally brought and by publication in such newspapers as the Court may direct."

Note 3.

[1] *Hardit Singh* v. *Gurmukh Singh,* (1921) 59 Ind Cas 7 (8): 22 Bom L R 550 P C; *Lalta Prasad* v. *Sheikh Azizuddin,* (1897) 19 All 209 (211): 24 Ind App 49: 7 Sar 123 P C.

O.45, R.10, Note 1.

Power to order further security or payment.

R. **10**. [S. 605.] *Where* at any time after the admission of *an* appeal but before the transmission of the copy of the record, except as aforesaid, to *His* Majesty in Council, such security appears inadequate,

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment.

Synopsis.

1. **Scope of the rule.**

Application for enforcement, where to be made. See Note 1, Pt. (1).

1. **Scope of the rule.**—An application for the enhancement of the amount of security for costs furnished by an appellant to the Privy Council, *after admission* of the appeal, ought to be made under this rule and not under R. 9. The latter rule is applicable to applications ***before admission*** of the appeal.[1]

O.45, R.11.

Effect of failure to comply with order

R. **11**. [S. 606.] *Where* the appellant fails to comply with such order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of *His* Majesty in Council,

and in the meantime execution of the decree appealed *from* shall not be stayed.

[1877—S. 606.]

1. **"Fails to comply."**—*See* Notes to R. 7, above.

O.45, R.12.

Refund of balance deposit

R. **12**. [S. 607.] When the copy of the record, except as aforesaid, has been transmitted to His Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under *rule* 7.

Order 45, Rule 10—Note 1.

[1] *Murlidhar* v. *B L Rai*, (1919) 49 Ind Cas 893 (893) Nag.

Powers of Court pending appeal.

R. 13. [S. 608.] (1) Notwithstanding the *grant of a certificate*[3] *for* the admission of any appeal, the decree appealed *from* shall be unconditionally *executed,* unless the Court[2] otherwise directs.

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(*a*) impound any moveable property in dispute or any part thereof, or

(*b*) allow the decree appealed *from* to be *executed,* taking such security from the respondent[4] as the Court thinks fit for the due performance of any order which *His* Majesty in Council may make on the appeal, or

(*c*) stay the execution of the decree appealed *from,* taking such security from the appellant[5] as the Court thinks fit for the due performance of the decree appealed *from,* or of any order which *His* Majesty in Council may make on the appeal, or

(*d*) place any party seeking the assistance of the Court under such conditions or give such other direction[10] respecting the subject-matter of the appeal, as it thinks fit, *by the appointment of a receiver*[11] *or otherwise.*

[1877—S. 608.]

Synopsis.

1. Legislative changes.
2. Court.
3. Stay of execution if can be ordered before the granting of certificate.
4. Taking such security from the respondent.
5. Stay of execution on taking security from the appellant, Cl. (c).
6. Stay of execution in view of application for special leave.
7. Stay of execution after special leave to appeal is granted by the Privy Council.
8. Stay of execution by Privy Council.
9. Security after execution.
10. To give such other directions.
11. By the appointment of a receiver.
12. Powers of the High Court pending appeal to the Privy Council.
13. Appeal.

Application for stay—Practice. See Note 8.
Extent of security. See Note 4, F.-N. (2) and Note 5, F.-N. (2).

1. Legislative changes.—

1. The words "the grant of a certificate for the admission" in Cl. (1) have been substituted for the words "the admission of any appeal under this chapter".

O. 45, R. 13, Notes 1—4.

2. The words "admitting the appeal" which occurred after the word "Court" in the old section have been omitted in Cl. (1) of the present rule. (As to the effect of this omission, *see* Note 3.)

3. The words "by the appointment of a receiver or otherwise" have been newly added in Cl. (*c*).

2. **Court.**—The word "Court" in this rule means the High Court and not the Subordinate Court of original jurisdiction. A subordinate Judge or a District Judge has no jurisdiction to stay execution of a decree of the High Court. The provisions of this rule are meant entirely to govern all questions regarding the execution of the decree under appeal before the Privy Council and the provisions of O. 41, R. 6 do not apply thereto.[1]

3. **Stay of execution if can be ordered before the granting of certificate.**—In cases decided under the old Code it was held by the High Courts of Allahabad,[1] Calcutta[2] and Madras[3] that an application for stay of execution could not be granted before the appeal to the Privy Council was finally admitted. The reason for such a view was the wording of para. 1 of the corresponding S. 608 of the old Code which referred to the "Court *admitting the appeal.*" The High Court of Bombay[4] on the other hand, held, that the words "admitting the appeal" had no reference to the time when the Court was to give directions but merely descriptive of the Court which was to give them and that the High Court could stay execution of its decree although the appeal had not yet been admitted. The words "admitting the appeal" have now been omitted in this rule but the omission has been held not to affect the construction of the rule and that even now no stay can be ordered under this rule before the certificate is granted.[5] It has been held in the cases cited below[6] that the High Court has *inherent power* to stay execution in appropriate cases even before the certificate is granted.

4. **Taking such security from the respondent.**—Under Cl. (*b*) of the rule the Court may allow execution of the decree directing the respondent to furnish security for the due performance of any order which the Judicial Committee may make on appeal.[1] The object of the security is to indemnify the appellant for any loss that may be occasioned by the execution being taken out.[2]

Order 45, Rule 13—Note 2.

(1) *Ram Bahadur* v. *Radhakrishnan,* (1917) 42 Ind Cas 835 (836): 1917 Pat H C C 285: 3 Pat L W 222: 3 Pat L Jour 40; *Maung Po Shein* v. *Maung Po Kin,* 1925 Rang 254 (255): 88 Ind Cas 992: 3 Rang 158: 4 Bur L Jour 50: *Muttealaummal* v. *Chellayammal,* (1868-70) 5 Mad H C R 98 (99). See also *Wise* v. *Rajkrishna Roy,* 1866 Beng L R Sup 541: 6 Suth W R 84 F B.

Note 3.

(1) *Kumar Lal* v. *Rani,* 1890 All W N 92 (92).

(2) *S M Bibi Jarao Kumari* v. *Gopichand Bothra,* (1901) 5 Cal W N 562 (563); *Burra Lal* v. *The Court of Wards,* (1871) 16 Suth W R 289 (289).

(3) *Venkata Reddi* v. *Obala Reddi,* (1909) 4 Ind Cas 106 (107): 20 Mad L Jour 140: 6 Mad L Tim 309.

(4) *Dame Janbai* v. *Sale Mahomed,* (1895) 19 Bom 10 (11, 12).

(5) *Bibi Sona* v. *Mir Abdul Husain Khan,* (1912) 16 Ind Cas 845 (846): 6 Sind L R 86.

(6) *Narumal* v. *Jagatmal,* 1925 Sind 216 (217): 82 Ind Cas 739; *Nand Kishore* v. *Ram Golam,* (1913) 18 Ind Cas 207 (209): 40 Cal 955: 16 Cal L Jour 508.

Note 4.

(1) *Mela Ram* v. *Mussamat Rukman,* (1915) 27 Ind Cas 572 (573): 29 Pun L R 1915: 244 Pun W R 1915.

(2) *Nuffer Chunder* v. *Soorendro Nath,* (1870) 14 Suth W R 410 (411): 6 Beng L R App 126; *Indar Kuar* v. *Lalta Prasad,* (1882) 4 All 532 (542): 1882 All W N 133: 7 Ind Jur 269 [Widow's interest refused to be accepted as secur-

O.45. R.13. Notes 4—6.

Where the High Court orders execution to proceed on the decree-holder furnishing security and the latter does not do so the order, operates in fact, as a stay of execution. The failure on the part of the respondent decree-holder to give security will not therefore deprive him of the benefit of S. 15 of the Limitation Act so as to bar a fresh application for execution after the Privy Council appeal is dismissed.[3]

5. **Stay of execution on taking security from the appellant, Cl. (c).**— The grant of an order for stay of the execution of the decree pending appeal is in the *discretion* of the Court and the appellant should show 'special cause' for the exercise of the discretion in his favour. As a general rule, execution ought not to be stayed unless it would so upset things that in the event of the appeal being successful the *status quo ante* could not be restored or could be restored only with great difficulty.[1] The principle underlying the granting of stay of execution is that "the successful party in litigation, *i.e.*, the ultimately successful party is to reap the fruits of that litigation and not obtain merely a barren success".[2]

Proceedings between a preliminary decree and the final decree, as for instance, in partition suits, are proceedings in the suit and not in *execution.* The High Court has therefore no power to stay such proceedings under this rule. The Privy Council which has *seizin* of the appeal can alone stay such proceedings.[3] Similarly proceedings in a Revenue Court to eject the defendant instituted after obtaining possession in execution of the decree of the High Court are not proceedings in execution of the decree within the meaning of this rule.[4]

Where the Court orders security to be furnished, it is advisable to specify definitely the time within which the security must be tendered, and to give such further directions as may be necessary to ensure the intention of the Court being carried out.[5]

6. **Stay of execution in view of application for special leave.**— The High Court of Calcutta[1] has held that it has inherent power to order stay

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ity]; *Phool Koer* v. *Dabee Pershad,* (1869) 12 Suth W R 187 (187), (Do.); *Mussamut Molka* v. *Mussamat Sumput Konwaree,* (1866) 6 Suth W R Mis 62 (62) [Extent of security].

[3] *Satdeo Narain* v. *Srimati Radhey Kuar,* (1920) 53 Ind Cas 9 (11): 1919 Pat H C C 434: 5 Pat L Jour 39. See also *Ganesh Dutt Singh* v. *Mungree Ram Chowdhry,* (1873) 19 Suth W R 186 (187).

Note 5.

[1] *Khadam Husain Khan* v. *Mt Murad Bibi,* (1912) 15 Ind Cas 187 (188): 87 Pun W R 1912: 234 Pun L R 1912; *Chalikami Appa* v. *Venkatramanayamma,* (1897) 2 Cal W N lix (lix, lx) (Notes); *Sidhee Nazir Ali* v. *Ojoodhyaram,* (1865) 1 Ind Jur N S 185: 5 Suth W R P C 83: 10 Moo Ind App 540: 1 Suth 635: 2 Sar 198 P C.

[2] *Mt Brij Coomaree* v. *Ramrick Dass,* (1878) 5 Cal W N 781 (797, 798); *Khajah Ashanulla* v. *Karunamoyee,* (1879) 4 Cal L Rep 125 (129). See also *Kool Chunder Chuckerbutty* v. *Kumul Chunder Roy,* (1866) 6 Suth W R Mis 17 (17); *Dwarkanath Roy* v. *Wooma Sunduree,* (1870) 14 Suth W R 329 (329); *Ameerunnissa Khatoon* v. *A D Dunne,* (1870) 14 Suth W R 361 (361) [Security for future mesne profits generally taken for three years].

[3] *Ram Narain* v. *Harnam Das,* (1920) 54 Ind Cas 561 (561): 1 U P L R (A) 166: 18 All L J 142: 42 All 170; *Laliteswar Singh* v. *Bhabeswar Singh,* (1909) 1 Ind Cas 812 (812): 13 Cal W N 690: 9 Cal L Jour 561: 6 Mad L Tim 11. See also *Shri Goverdhan Lalji* v. *Shri Chandraprabavati,* 1928 Bom 159 (162): 30 Bom L R 126: 109 Ind Cas 139 [Stay of *suit* refused pending appeal as to maintainability of suit].

[4] *Chet Ram* v. *Ram Singh,* (1921) 64 Ind Cas 152 (152) All.

[5] *Kedarnath Sanyal* v. *Mati Lal Das,* (1920) 57 Ind Cas 382 (384): 24 Cal W N 265.

Note 6.

[1] *Nand Kishore Singh* v. *Ram Golam Sahu,* (1913) 18 Ind Cas 207 (209): 16 Cal L Jour 508: 40 Cal 955 [Holmwood, J., however dissenting].

O.45, R.13, Notes 6—10.

of execution of its decree in view of an application for special leave to appeal to the Judicial Committee.

7. **Stay of execution after special leave to appeal is granted by the Privy Council.**—It has been held by the Privy Council in *Nityamani* v. *Madhusudan Sen,*[1] that the High Court has power to stay execution of a decree although an appeal against that decree has been admitted by special leave of the Privy Council. Their Lordships observed: "The learned Judges of the High Court are in a much better position than the members of the Board to determine in any particular case whether execution ought to be stayed and if so upon what terms and conditions and to what extent stay of execution ought to be granted." The contrary view taken in the earlier decisions[1-a] are no longer good law.

8. **Stay of execution by Privy Council.**—As a general rule, in appeals pending before the Privy Council an application to stay proceedings in execution ought always to be made in the first instance to the High Court which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of the details which the Judicial Committee cannot possess on an interlocutory application.[1] But if the High Court refuses to grant stay, the Privy Council may, if it thinks fit, either order stay itself[2] or direct the appellant to apply again to the High Court with its opinion as to the advisability of granting stay.[3]

9. **Security after execution.**—The High Court can under sub-R. (1), direct the respondent to furnish security for the due performance of any order which may be made by His Majesty in Council, even in cases where the decree has been executed.[1] But the party seeking to obtain such security must show *special cause* such as waste or improper dealing with the property on the part of the respondent.[2]

10. **To give such other directions.**—Where a mortgage suit decreed *ex parte* was directed by the High Court to be reheard and, during the pendency of an appeal to the Privy Council against that order one of the parties applied for stay, it was held by the Calcutta High Court that it had power under this

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Note 7.

(1) 11 Ind Cas 384: 13 Cal L Jour 529: 8 All L J 449: 13 Bom L R 419: 38 Cal 335: 10 Mad L Tim 25: (1911) 2 Mad W N 124: 4 Bur L Tim 123: 38 Ind App 74 P C.

(1-a) *Mohesh Chandra* v. *Satrughan,* (1900) 27 Cal 1 (4): 26 Ind App 281: 4 Cal W N 34: 7 Sar 567 P C; *Tega Singh* v. *Bichitru Singh,* (1904) 4 Ind Cas 452 (453): 10 Cal L Jour 326; *Kunwar Raghubir Singh* v. *Moti Kunwar,* (1910) 7 Ind Cas 188 (189) All. See *Raj Kissen Singh* v. *Baroda Dabee,* (1866) 6 Suth W R Mis 111 (113); Beng L R Sup Vol 605 [A case of restitution].

Note 8.

(1) *Vasudeva* v. *Sadagopa,* (1906) 29 Mad 379 (381): 33 Ind App 132: 8 Bom L R 497: 4 Cal L Jour 101: 10 Cal W N 945: 16 Mad L Jour 299: 1 Mad L Tim 204 P C.

(2) (*Ibid.*); *Chatrapat Singh* v. *Dwarka Nath,* (1895) 22 Cal 1 (3): 21 Ind App 170: 6 Sar 514 P C.

(3) *Jariutool Butool* v. *Hoseinee Begum,* (1865) 10 Moo Ind App 196 (202): 2 Sar 416; *Inder Kumari* v. *Jaipal Kumari,* (1887) 14 Cal 290 (295): 4 Sar 757: 14 Ind App 1: R and J 94 P C.

Note 9.

(1) *Khushaldas* v. *Chimanlal,* 1926 Bom 425 (426, 427): 50 Bom 453: 28 Bom L R 659: 96 Ind Cas 245; *Narayanan Chetty* v. *Arunachalam Chetty,* (1896) 19 Mad 140 (142). But see *Nilkishen Thakoor* v. *Beer Chunder Thakoor Gossain,* (1865) 2 Suth W R Mis 23 (23) [Held High Court has no such power under S 4 Reg. XVI of 1797]; *Joy Narain* v. *Russeek,* (1867) 8 Suth W R 144 (146): Beng L R Sup Vol 744 F B, (Do.); *Khoroo Lal* v. *Kant Lal,* (1866) 5 Suth W R Mis 37 (37), (Do.).

(2) *Juggo Lal Oopadhya* v. *Jankee Bebee,* (1872) 17 Suth W R 521 (521); *Sooruj Monee Dayee* v. *Sudanand Mohapathur,* (1869) 12 Suth W R 296 (298); *Nagalutchmee Ummal* v. *Gopoo Nataraja Chetty,* (1866) 6 Moo Ind App 309 (829): 1 Sar 543.

O. 45, R. 13, Notes 10—13.

rule as well as under its *inherent* powers to stay further proceedings in the suit.[1]

11. By the appointment of a Receiver.—Under Cl. (*d*) of the rule the Court has power to appoint a Receiver to safeguard the interests of the appellant. But the principles on which a Receiver should be appointed are the same as those contained in O. 40. In the absence of any allegation of waste or risk of loss, no Receiver ought to be appointed under this rule.[1] The High Court has power to appoint a Receiver even in cases where special leave to appeal is granted by the Judicial Committee.[2]

12. Powers of the High Court pending appeal to the Privy Council.—

Power to amend decree.—According to the High Courts of Calcutta[1] and Lahore[2] the decree can be amended even after leave to appeal is granted and before the records are transmitted to the Privy Council. The High Court of Allahabad[3] on the other hand seems to hold a contrary view namely that it cannot amend the decree which is the subject of an appeal to His Majesty in Council. *See* Note 9 to S. 152 under the heading "Amendment pending appeal against decree."

Power to add parties.—The High Court has no power to direct the addition of parties after leave to appeal to the Privy Council is granted.[4] (*Compare* also Note 32 to O. 1, R. 10.)

Power to implead legal representatives or to order abatement.—Where legal representatives have to be brought on record on the death of a party pending appeal to the Privy Council, the practice of the Judicial Committee is that, on an application, the High Court will make an enquiry, take evidence and transmit the same to the Privy Council with its own opinion as to the substitution of parties.[5] The same rule of practice would appear to hold in the case of abatement.[6]

13. Appeal.—An order refusing to stay execution in the exercise of the discretion under this rule is not a "judgment" under Cl. (15) of the Letters Patent and is not appealable.[1]

Note 10.

(1) *Sarat Kumar Roy* v. *Official Assignee of Calcutta*, 1931 Cal 79 (81): 34 Cal W N 631: 129 Ind Cas 833.

Note 11.

(1) *Mi Shwe Ma* v. *Mi Mi*, (1911) 12 Ind Cas 198 (198): 4 Bur L Tim 241; *Bibi Sona* v. *H H Mir Abdul Hussein Khan*, (1912) 16 Ind Cas 845 (846): 6 Sind L R 86.

(2) *Raja Wazir Narain Singh* v. *Rani Jagadamba Kueri*, (1920) 52 Ind Cas 407 (408): 4 Pat L Jour 482: 1920 Pat H C C 184.

Note 12.

(1) *Aghora Kumar Ganguli* v. *Mahomed Musa*, (1910) 5 Ind Cas 723 (725): 11 Cal L Jour 155.

(2) *Wazir Chand* v. *Nathu Ram*, 1929 Lah 427 (427): 30 Pun L R 258: 116 Ind Cas 459.

(3) *Risal Singh* v. *Balwant Singh*, (1916) 32 Ind Cas 194 (195) (All) F B.

(4) *Singaravelu Pillai* v. *Murugesa Pillai*, (1911) 12 Ind Cas 69 (69) Mad; *Kalenthal Ammal* v. *Ma Mi*, 1926 Rang 9 (10): 3 Rang 474: 92 Ind Cas 125.

(5) *Haidar Ali* v. *Rasul*, (1889) 16 Cal 184 (185, 186): 15 Ind App 109: 5 Sar 270: 12 Ind Jur 452: R and J 106 P C [The Privy Council will act on the report of the High Court]. See also *Jadunandan* v. *Ramjivan*, (1909) 10 Cal L Jour 331 (333, 335): 4 Ind Cas 454.

(6) *Samarendra* v. *Birendra*, (1909) 4 Ind Cas 456 (457): 10 Cal L Jour 330. See also *Suklat* v. *Bella*, 1924 Rang 217 (218): 2 Rang 91: 3 Bur L Jour 30: 80 Ind Cas 744.

Note 13.

(1) *Raja Yarlagadda Durga Prasad* v. *Raja Yarlagadda Mallikarjuna*, (1901) 24 Mad 358 (359); *Mohabir Prasad* v. *Adhikari Kunwar*, (1894) 21 Cal 473 (475). See also *Abedoonissa* v. *Ameeroonissa*, (1872) 17 Suth W R 464 (464) [Order of District Judge releasing surety —*Held*, no appeal lies therefrom].

O.45, R.14. R. **14.** [S. 609.] (1) *Where* at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

Increase of security found inadequate.

(2) In default of such further security being furnished as required by the Court,—

(*a*) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed *from* as if the appellant had furnished no such security ;

(*b*) if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay *the* further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

O.45, R.15. R. **15.** [S. 610.] (1) Whoever desires to obtain execution[2] of any order of *His* Majesty in Council shall apply by petition,[3] accompanied by a certified copy of the decree[4] passed or order made in appeal and sought to be executed, to the Court from which the appeal to *His* Majesty was preferred[5].

Procedure to enforce orders of King in Council.

(2) Such Court shall transmit the order of *His* Majesty *in Council* to the Court[8] which *passed* the first decree appealed from, or to such other Court as *His* Majesty *in Council* by *such* order may direct, and shall (upon the application of either party) give such directions [8-a] as may be required for the execution of the same ; and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the *provisions* applicable to the execution of its original decrees.

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so

payable shall be estimated according to the rate of exchange[15] for the time being fixed *at the date of the making of the order* by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of *His* Majesty's Treasury for the adjustment of financial transactions between the Imperial and the Indian Governments.

(4) Unless His Majesty in Council is pleased otherwise to direct, no order of His Majesty in Council shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree was complained of or at any proceedings subsequent to the decree of that Court, but such order shall have the same force and effect as if it had been made before the death took place.

[1877—S. 610.]

Local Amendment.

ALLAHABAD.

For R. 15 (1) substitute.—

"15 (1). Whoever desires to obtain.—

(*a*) execution of any order of His Majesty in Council, or

(*b*) where an appeal has been dismissed by His Majesty in Council for want of prosecution, an order of the Court from which the appeal to His Majesty was preferred terminating proceedings and determining the costs, shall apply to the said Court by a petition, accompanied by a certified copy of the decree passed or order made by His Majesty in Council of which execution is desired or to which effect is to be given and a memorandum of all costs incurred in India that are claimed in pursuance thereof."

Synopsis.

1. Legislative changes.
2. "Whoever desires to obtain execution."
3. "Shall apply by petition."
4. "Accompanied by a certified copy."
5. "To the Court from which the appeal to His Majesty was preferred."
6. Jurisdiction of Patna High Court.
7. Functions under the rule merely ministerial.
8. To what Court, order should be transmitted.

8-A. "Shall give such directions," etc.

9. Application by assignee of order in Council.
10. Liability of surety.
11. Restitution.
12. Mesne profits.
13. Interest.
14. Costs.
15. Rate of exchange—Sub-R. (3).
16. Letters Patent Appeal.
17. Dismissal for want of prosecution.
18. Limitation.

Execution against persons not party to appeal. See Note 11, Pts. (1) and (2).

Interest on costs—See Note 13, Pt. (1).

O.45, R.15, Notes 1—4.

1. Legislative changes:—

1. The provision contained in paragraphs 3 and 4 of the corresponding section in the old Code which related to the enforcement of the liability of the surety for costs have been omitted under the present rule, in view of S. 145 of the Code.

2. Para. 4 has been newly introduced by Act XXVI of 1920.

2. "**Whoever desires to obtain execution.**"—It is not necessary in all cases that each person interested in the execution of a particular order of His Majesty in Council should obtain a separate transmission of the order when it has been already transmitted to the lower Court at the instance of one of the successful parties.[1] Under O. 21, R. 15 it is open to some of the decree-holders, who have obtained permission, to execute the Privy Council decree on behalf of all the decree-holders.[2] But where the decree is in favour of several persons declaring that each is entitled to a *separate and distinct share* each plaintiff is bound to apply separately for execution and an order of transmission obtained by some of the plaintiffs alone cannot be taken advantage of by the others.[3] Where a party having obtained an order in council delays or refuses to lodge the order, the opposite party can apply under this rule asking for a summary order against that party to lodge the order so that execution might follow in terms of the judgment of the Board.[4]

3. "**Shall apply by petition**".—The provisions of the rule are mandatory and an execution application filed without having filed a petition for transmission under this rule is incompetent. But where no such objection was taken in previous execution proceedings it cannot be allowed at a later stage of the proceedings.[1]

4. "**Accompanied by a certified copy.**"—A certified copy of the *decree* sought to be executed should be filed along with the petition.[1] A production of a copy of the *judgment* is not enough.[2] But the object of the requirement of a *certified* copy of the decree is only to ensure that proper intimation upon the subject of any order in council should be supplied to the Courts in India. The rule should not be construed as restricting the only possible evidence of the decree or order to the certified copy.[3] Where, therefore, along with an application for the execution of the decree of the

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Order 45, Rule 15—Note 2.

[1] *Karuppayee Ammal* v. *K N Kamarajendra Ramaswami*, 1932 Mad 440 (443): 35 Mad L W 638: 1932 Mad W N 589: 62 Mad L Jour 698; *Balusami Iyer* v. *Venkataswami Naicken*, 1924 Mad 95 (96): 82 Mad L Tim 249: 75 Ind Cas 219.

[2] *Rai Bahadur Baijnath Goenka* v. *Sir Ravaneswar Prasad Singh*, (1920) 58 Ind Cas 212 (213): 1 Pat L Tim 426.

[3] *Maharaja Sir Ravaneswar Prasad Singh* v. *Rai Baijnath Goenka Bahadur*, (1917) 40 Ind Cas 508 (511, 512): 2 Pat L Jour 496: 1 Pat L W 711: 1917 Pat H C C 205.

[4] *Sourendra Mohan Sinha* v. *Hari Prasad Sinha*, 1926 P C 31 (31): 5 Pat 461: 94 Ind Cas 813: 1926 Mad W N 492: 24 Mad L W 84: 53 Ind App 89: 30 Cal W N 938: 28 Bom L R 1260: 51 Mad L Jour 586 P C.

Note 3.

[1] *Bhagwanta Koer* v. *Zamir Ahmad Khan*, 1924 Pat 576 (579): 3 Pat 596: 5 Pat L Tim 451: 1924 Pat H C C 221: 2 Pat L R (Civ) 249: 78 Ind Cas 766.

Note 4.

[1] *Juggernath Sahoo* v. *Judoo Roy*, (1880) 5 Cal 329 (330): 4 Cal L Rep 387.

[2] *Joy Mooruth Kooer* v. *Buldeo Singh*, (1873) 21 Suth W R 444 (445).

[3] *Janaki Ammal* v. *Narayanaswami Iyer*, (1917) 41 Ind Cas 629 (630): 33 Mad L Jour 300: 1917 Mad W N 587; *Hurrish Chunder Chowdhry* v. *Kalisundari Debi*, (1883) 9 Cal 482 (492): 10 Ind App 4: 12 Cal L Rep 511: 4 Sar 406: 7 Ind Jur 161 P C.

O.45, R.15, Notes 4—8.

Privy Council a plain print copy of the decree was filed with an affidavit showing that it was the decree of the Privy Council it was held that it must be held to be a true copy of the decree within the meaning of this rule.[4]

The practice in regard to Privy Council decrees is that the original decree is given to the successful party or to one of the successful parties and it is the duty of that person to file that original decree in the High Court.[5]

5. **"To the Court from which the appeal to His Majesty was preferred".**—The application under Sub-R. (1) should be made to the Court from whose decree the appeal was preferred to the Privy Council. An application made to any other Court is not competent.[1]

6. **Jurisdiction of Patna High Court.**—The High Court of Patna has no jurisdiction to execute an order in Council passed in an appeal from the Calcutta High Court. The proper Court to which an application for execution should be made is the High Court of Calcutta.[1]

7. **Functions under the rule merely ministerial.**—The duties of the High Court in receiving and transmitting orders of His Majesty in Council under this rule are purely ministerial.[1] It is thus not competent for the High Court to consider and discuss the effect or propriety of the order in Council and disallow costs or interest[2] or to hold that the decree of the Privy Council is void and incapable of execution on the ground that one of the appellants died during the pendency of the appeal.[3] If a party feels aggrieved by the order, the proper course for him is to apply to the Privy Council for redress.[4]

8. **To what Court, order should be transmitted.**— The High Court should transmit the order for execution to the Court which passed the decree. Where, however, such Court ceases to have territorial jurisdiction over the matter the order can be transmitted to the Court which has jurisdiction to execute it.[1]

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(4) *Janaki Ammal* v. *Narayanaswami Iyer*, (1917) 41 Ind Cas 629 (630): 33 Mad L Jour 300: 1917 Mad W N 587.

(5) *Harish* v. *Kali Sundari*, (1883) 9 Cal 482 (492): 10 Ind App 4: 12 Cal L Rep 511: 4 Sar 406: 7 Ind Jur 161 P C; *Sourendra Mohan Singh* v. *Hari Prasad Sinha*, 1926 P C 31 (31): 5 Pat 461: 94 Ind Cas 813 1926 Mad W N 492: 24 Mad L W 84: 53 Ind App 89: 30 Cal W N 938: 28 Bom L R 1260: 51 Mad L Jour 586 P C.

Note 5.

(1) *Joy Narain* v. *Goluck Chander*, (1874) 22 Suth W R 102 (102); In re, *Barlow* v. *Orde*, (1872) 18 Suth W R 175 (179): 3 Pun Re 1872 (P C); *Umamoyi Burmonee* v. *Tarinee Pershad Ghose*, (1867) 7 Suth W R 225 (225).

Note 6.

(1) *Lalji Sahu* v. *Rai Bahadur Baijnath Goenka*, (1918) 43 Ind Cas 457 (457): 2 Pat L Jour 684: 1918 Pat H C C 49: 4 Pat L W 133.

Note 7.

(1) *Kally Soondery Debia* v. *Hurrish Chunder Chowdhry*, (1881) 6 Cal 594 (605): 7 Cal L Rep 543: 4 Shom L R 33; *Prem Lal* v. *Sumboo Nath*, (1895) 22 Cal 960 (972); *Pitts* v. *La Fontaine*, (1880) 6 App Cas 482: 50 L J P C 8: 43 L T 519 Fol.: 8 Cal 218; 20 Cal 551; 7 Bom 484 P C Ref. 22 Cal 960; 10 Bom 350

(2) *Rikhi Ram* v. *Dhanpat Rai*, 1930 Lah 674 (675): 123 Ind Cas 277: 31 Pun L R 182: 12 Lah L Jour 93: 11 Lah 365.

(3) *Baijnath Goenka* v. *Ravenswar Pershad Singh*, (1920) 58 Ind Cas 212 (213): 1 Pat L Tim 426. See *Kishen Sahai* v. *Collector, Allahabad*, (1882) 4 All 137: 1881 All W N 152.

(4) *Lingam Krishna* v. *Sri Pasupathi*, (1914) 23 Ind Cas 235 (237): 38 Mad 832: 15 Mad L Tim 143: 26 Mad L Jour 185.

Note 8.

(1) *Girindro Chunder Roy* v. *Jarawa Kumari*, (1893) 20 Cal 105 (106); *Parthasarathi Appa Rao* v. *Maka Venkatadri Appa Rao Bahadur*, (1915) 27 Ind Cas 88 (88): 1914 Mad W N 896. See *Guru Surun Das* v. *Hunooman Pershad Sahoo*, 20 Suth W R 419 (419).

O.45, R.15, Notes 8-A—11.

8-A. "Shall give such directions, etc."—Under Sub-R. (2) of the Rule it is the High Court that can give necessary directions in regard to execution.[1] But it has been held that neither the High Court nor the Subordinate Court has power to stay execution or adjourn an application for execution on the ground that an application for review of the decree was pending before the Privy Council.[2]

9. Application by assignee of order in council.—Where an order of the Privy Council is transmitted under this rule to the District Court as the Court which passed the first decree, the latter Court has jurisdiction to entertain an application made by an assignee of the decree under O. 21, R. 16, to recognise the assignment, and to allow him to execute the decree.[1]

10. Liability of surety.—The liability of the surety can be enforced under S. 145 of the Code. But the surety is not precluded from questioning the validity of the security bond in execution proceedings.[1] Where the surety bond amounts to a mortgage it should be enforced by a separate *suit* and not by way of execution.[2]

11. Restitution.—Where during the pendency of an appeal to the Privy Council, certain property which had been decreed to the plaintiff and which had been delivered to him, was attached and sold away in Court auction in execution of another decree against the plaintiff, and subsequently the Privy Council allows the appeal of the defendant and dismisses the suit, the defendant is entitled to recover back the property by way of restitution. His right to restitution is not affected by the fact that the auction purchaser is not a party to the Privy Council appeal.[1] The fact that the party applying for restitution is not a party to the Privy Council appeal does not disentitle him to apply for such restitution if the order of the Privy Council also enures to his benefit.[2]

As to whether proceedings by way of restitution are or are not proceedings in execution, so as to necessitate an application under this rule, *see* Notes 30 and 33 to S. 144 and the undermentioned cases.[3]

Note 8-a.

(1) *Rani Bijai Raj Koer* v. *Thakur Jai Indra Bahadur Singh*, 1922 Oudh 34 (37): 9 Oudh L J 5: 66 Ind Cas 982; In the matter of *Meer Mazuffer Hossein Chowdhry* v. *Ameeroon Nissa Khatoon*, (1872) 17 Suth W R 340 (341) [Where the Privy Council left the amount due to plaintiff to be determined by the High Court].

The Privy Council itself gave directions in the following cases:—*Dhunput Singh Bahadur* v. *Alexander John Forbes*, (1874) 22 Suth W R 104 (104); *Toondun Singh* v. *Pokhnarain Singh*, (1873) L R 1 Ind App 342 (345): 22 Suth W R P C 199: 3 Sar 390 P C; *Goluck Chunder Dutt* v. *Mohanlal Sookul*, (1866) 5 Suth W R 271 (275).

(2) *Rajendra Prasad Bose* v. *Gopal Prasad Sen*, 1931 Pat 203 (203): 12 Pat L Tim 145: 132 Ind Cas 859.

Note 9.

(1) *Krishna Bhoopathi Deo Garu* v. *Raja of Vijianagaram*, (1914) 23 Ind Cas 235 (237): 38 Mad 832: 15 Mad L Tim 143: 26 Mad L Jour 185.

Note 10.

(1) *Girindra Nath Mukerjee* v. *Bejoy Gopal*, (1898) 26 Cal 246 (249): 3 Cal W N 84.

(2) *Tokhan Singh* v. *Girwar Singh*, (1905) 32 Cal 494 (498, 500): 9 Cal W N 372: 1 Cal L Jour 118.

Note 11.

(1) *Garurdhuj Prasad Singh* v. *Baiju Mal*, (1906) 28 All 337 (339): 3 All L J 110: 1906 All W N 43.

(2) *Baluswami Iyer* v. *Venkataswami Naicken*, 1924 Mad 95 (96): 32 Mad L Tim 249: 75 Ind Cas 219.

(3) *Damodar Das* v. *Brij Lal*, (1915) 30 Ind Cas 77 (78): 37 All 567: 13 All L J 769 [Distinguished in 1922 All 238]; *Sohan Bibi* v. *Baijnath Das*, 1928 All 293 (294): 26 All L J 587: 50 All 767: 112 Ind Cas 876 [Application for restitution governed by Art 183 of the Limitation Act]; *Jugal Kishore* v. *Homeshwar Singh*, 1927 Pat 208 (208): 6 Pat 252: 102 Ind Cas 614 [Proceedings for restitution are not proceedings in execution]; *Ujagar Singh* v. *Puran Singh*, 1930 Lah 961 (967): 129 Ind Cas 204 [Question left open].

O.45, R.15, Notes 12—16.

12. **Mesne profits.**—A party who is dispossessed of immoveable property in pursuance of a decree of the High Court is entitled to get back, by way of restitution not merely the property of which he was dispossessed, but also mesne profits for the period for which he was out of possession.[1]

13. **Interest.**—No interest on costs can be allowed by the High Court or the Court of the first instance, when the order of the Privy Council is silent as to interest.[1] But if interest is awarded by the Privy Council but no *rate* is specified, the executing Court can grant interest at the rate granted in the decree of the High Court or at a reasonable rate.[2] (*See also* Note 17 to S. 34 and Note 35 to S. 35.)

14. **Costs.**—When the successful party in appeal before the Privy Council is awarded the costs of the appeal in England and also the costs incurred in the Indian Courts, he is entitled to get also the costs of translating the records of the appeal and of transmitting them to England.[1] The amount of such costs is left to be ascertained by the High Court and is not assessed by the Privy Council office.[2]

15. **Rate of exchange—Sub-R. 3.**—According to the view taken by the Calcutta High Court[1] the "rate of exchange" means the rate existing at the time when the order in Council is made and not at the time when execution is taken. The High Court of Allahabad has, on the other hand, held that the words "for the time being" refer to the year in which the amount is realised or paid, or execution taken out and not the year in which the decree or order of the Council was passed.[2]

16. **Letters Patent Appeal.**—An appeal lies from an order of a single Judge of the High Court refusing to transmit for execution the order of His Majesty in Council. Such an order is a "judgment" within the meaning of Cl. 15 of the Letters Patent.[1]

Note 12.

(1) *Arunachalam* v. *Arunachalam*, (1892) 15 Mad 203 (210): 2 Mad L Jour 1; *Gooroo Doss Roy* v. *R P Stephens*, (1874) 21 Suth W R 195 (195): 13 Beng L R App 44; *Gogaun Chunder* v. *Laidlay*, (1880) 5 Cal L Rep 189 (191). See also *Rajah Lelanand Singh* v. *Maharajah Luckmissur Singh Bahadoor*, (1869-70) 13 Moo Ind App 490 (496): 14 Suth W R P C 23: 5 Beng L R 605: 2 Suth 353: 2 Sar 599 P C.

Note 13.

(1) *Forester* v. *Secretary of State*, (1877-78) 3 Cal 161 (170): 4 Ind App 137: 3 Sar 717: 3 Suth 405: 1 Pun Re 1877 P C; *Dakhina* v. *Saroda*, (1896) 23 Cal 357 (360); *Tokhan Singh* v. *Girwar Singh*, (1905) 32 Cal 494 (501): 9 Cal W N 372: 1 Cal L Jour 118; *Dorab Ally* v. *Abdool Azeez*, (1879) 4 Cal 229 (230): 3 Cal L Rep 358; *Lekhraj* v. *Mahtab Chand*, (1871) 21 Suth W R 147 (147); *Gooroo Das* v. *Stephens*, (1874) 21 Suth W R 195 (196): 13 Beng L R App 44; *Ameerunnissa* v. *Meer Muhamad*, (1872) 18 Suth W R 103 (104); *Brojo* v. *Anand Moyee*, (1871) 16 Suth W R 302 (302); *Muddum* v. *Morrison*, (1872) 18 Suth W R 253 (254): 9 Beng L R App 22. See also *Sadasiva* v. *Ramalinga*, (1913) 15 Beng L R 383: 2 Ind App 219: 24 Suth W R 193: 3 Sar 319: 3 Suth 190 P C.

(2) *Ameerunnissa* v. *Meer Muhammad*, (1872) 18 Suth W R 103 (103).

Note 14.

(1) *Asgur Ali* v. *Nogendro Chunder*, (1875) 23 Suth W R 463 (463); *Madhub* v. *Bissumbhur*, (1874) 21 Suth W R 411 (411); *Muddum* v. *Morrison*, (1872) 18 Suth W R 253 (254): 9 Beng L R App 22; *Brojo* v. *Anand Moyee*, (1871) 16 Suth W R 302 (302); *Bishenmun Singh* v. *Land Mortgage Bank of India*, (1884) 11 Cal 244 (249): 12 Ind App 7: 4 Sar 588: 9 Ind Jur 85 P C [Privy Council disallowed costs occasioned by the introduction of irrelevant matter in the appeal record].

(2) *Ram Coomer* v. *Prosunno Coomer*, (1884) 10 Cal 106 (108); *Sharoda Pershad Mullick* v. *Lachmeput Singh Doogur*, (1872) 18 Suth W R 89 (90): 9 Beng L R App 23 (Note); In the matter of *Kaleedas Ghose*, (1871) 15 Suth W R 356 (357).

Note 15.

(1) *Dakhina Mohan* v. *Saroda Mohan*, (1896) 23 Cal 357 (359); *Mahomed Abdul Hye* v. *Gajraj Sahai*, (1898) 25 Cal 283 (285): 2 Cal W N 89.

(2) *Param Sukh* v. *Ram Dayal*, (1886) 8 All 650 (652): 1886 All W N 249.

Note 16.

(1) *Hurrish Chunder* v. *Kali Sundari*, (1882) 9 Cal 482 (494): 10 Ind App 4: 12 Cal L Rep

O.45, R.15, Notes 17—18.

17. **Dismissal for want of prosecution.**—Where an appeal preferred against the decree of the High Court is dismissed by the Judicial Committee for want of prosecution, the order is not a judicial determination at all and limitation for execution of the High Court's decree runs from the date of the decree of the High Court.[1]

18. **Limitation.**—An application to execute the decree or order of the Privy Council under this rule is governed by Article 183 of the Limitation Act.[1]

O.45, R.16.

R. **16.** [S. 611.] The orders made by the Court which executes the order of *His* Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees.

Appeal from order relating to execution.

NOTE.—For "The Rules of the Judicial Committee", *see* Appendix.

ORDER XLVI.

REFERENCE.

O. 46, R.1.

R. **1**. [S. 617.] *Where*, before or on the hearing of a suit or an appeal in which the decree is *not subject to appeal*, or *where*, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

Reference of question to High Court.

[1877—S. 617; 1861—S. 28.]

611: 4 Sar 406: 7 Ind Jur 161 P C [Affirming 6 Cal 594 F B]; *Kally Sooundery Debia* v. *Hurrish Chunder Chowdhry*, (1881) 6 Cal 594 (599, 602): 7 Cal L Rep 543: 4 Shome L R 33; *Lilanand* v. *Luckimpur*, (1870) 13 Moo Ind App 490 (494): 14 Suth W R 23: 5 Beng L R 605: 2 Suth 353: 2 Sar 599 P C.

Note 17.

(1) *Abdul Majid* v. *Juwahir Ali*, 1914 P C 66 (67): 39 All 350: 12 All L J 624: 16 Bom L R 395: 19 Cal L Jour 626: 18 Cal W N 963: 27 Mad L Jour 17: 16 Mad L Tim 44: 1 Mad L W 483: 1914 Mad W N 485: 23 Ind Cas 649 P C; *Batuk Nath* v. *Munni De*, 1914 P C 65 (66): 36 All 284: 41 Ind App 104: 12 All L J 596: 16 Bom L R 360: 19 Cal L Jour 574: 18 Cal W N 740: 27 Mad L Jour 1: 16 Mad L Tim 1: 1 Mad L W 729: 1914 Mad W N 437: 23 Ind Cas 644 P C.

Note 18.

(1) *Tribikaram* v. *Badri*, (1916) 36 Ind Cas 633 (634): 20 Cal W N 1051: 1 Pat L Jour 385: 2 Pat L W 361; *Chutturpat Singh* v. *Sait*, (1916) 36 Ind Cas 602 (608): 23 Cal L Jour 645: 20 Cal W N 889: 43 Cal 903; *Luchmun Pershad Singh* v. *Kishun Pershad Singh*, (1882) 8 Cal 218 (223): 10 Cal L Rep 425: 4 Shome L R 261 F B [Art. 180 of Act XV of 1877].

Synopsis.

1. **Legislative changes.**
2. **Scope of the rule.**
3. **Reference lies only where question arises in suit, appeal, or execution of decree.**
4. **"Decree not subject to appeal."**
5. **'Court,' meaning of.**
6. **No reference on question of fact.**
7. **Reasonable doubt.**
8. **Statement of facts and Court's opinion.**
9. **Reference by Presidency Small Cause Courts.**

Applicability of the rule. See Note 3, Pts. (3) to (8-b).

Reference by Court without jurisdiction. See Note 5, Pt. (5).

Practice and procedure. See Note 8.

1. Legislative changes:—

1. The word "final" which occurred in the old section has now been substituted by the words "not subject to appeal". (*See* Note 4.)

2. The words "or the construction of a document . . . . merits" have been omitted.

2. Scope of the rule.—A right of reference is fundamentally distinct from a right of appeal: the former vests in the *Court* and the latter vests in the *suitor*.[1] The object of the provision for reference is to enable the subordinate Courts to obtain, in non-appealable cases, the opinion of the High Court *in advance* on a question of law and thereby avoid the commission of an error which could not be remedied later on.[2] But the right of reference is subject to the conditions prescribed by this rule and unless they are fulfilled, the High Court cannot entertain a reference from a subordinate tribunal.[3] The rule requires the following conditions to be satisfied to enable a subordinate Court to make a reference:—

(1) There must be a *pending* suit or appeal in which the decree *is not subject to appeal*, or a pending proceeding in execution of *such* decree. (*See* Note 3.)

(2) A *question of law* or usage having the force of law must arise in the course of such suit, appeal or proceeding, and

(3) The Court trying the suit or appeal or executing the decree *entertains a reasonable doubt* on such question. (*See* Note 7.)

The provisions of this Order are made applicable to proceedings under the special or local Acts mentioned hereunder.[4]

3. Reference lies only where question arises in suit, appeal or execution of decree.—A reference can be made only in a *suit or appeal* or in *execution of a decree*[1] and only on a matter about which the parties are *litigating*, that is, on a matter wherein the Court is called on to adjudicate on the

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Order 46—Note 2.

[1] *Miyan Bux* v. *Mt. Bodhiya*, 1928 All 371 (375): 26 All L Jour 729: 50 All 839.

[2] *Birendra Kishore Manikya* v. *Secretary of State*, 1921 Cal 262 (264): 48 Cal 766: 25 Cal W N 80: 61 Ind Cas 112: 32 Cal L Jour 433.

[3] *Barling* v. *Secretary of State*, (1903) 30 Cal 458 (462).

[4] The U. P. Municipalities Act No. II of 1916, S. 319; The Dekhan Agriculturists' Relief Act, XVII of 1879 S. 54; The Cantonments Act No. II of 1924; S. 84, The Indian Succession Act, XXXIX of 1925, Ss. 384 and 388.

Note 3.

[1] *Mahammad Haji Zakeria* v. *Habibhai*, (1901) 25 Bom 327 (329): 3 Bom L R 368.

opposite *contentions of the parties.*[2] Thus no reference can be made under this rule in the following cases:—

- (1) In a proceeding against a pleader under the Legal Practitioners Act, 1879.[3]
- (2) In a proceeding under the Land Acquisition Act, 1894.[4]
- (3) In an application for review.[5]
- (4) In an application for a new trial.[6]
- (5) In an application for sanction to prosecute.[7]
- (6) In an enquiry as to the proper Court-fee payable on a memorandum of appeal.[8]
- (7) In an enquiry in an application under S. 15 of the Calcutta Rent Act[8-a] or in any proceedings under the Agra Tenancy Act.[8-b]

The question on which a reference can be made must have arisen *before* or *on* the hearing of a suit or an appeal or in a *pending* proceeding in execution of a decree. A question arising *subsequent* to the hearing of a suit or appeal cannot be the subject of a reference under this rule, unless it arises in execution of the decree.[9]

The question must also be one which *actually arises* for decision in the proceedings before the Court. The rule is not intended to provide for suppositious cases which do not actually arise for decision.[10]

The right of reference is analogous to a right of appeal in that it is not a mere matter of *procedure,* and, consequently, cannot be exercised in proceedings other than those referred to in the section, by the application of S. 141 of the Code which only makes the *procedure* of the Code in respect of suits, applicable to miscellaneous proceedings.[11] (*See* Note 7, S. 141.)

4. **'Decree not subject to appeal'.**—No reference can be made in a suit or appeal unless the decree that might be passed therein is one against which *no appeal lies.*[1] Similarly no reference can be made in a proceeding in

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[2] *Yeshvant* v. *De Souza,* (1888) 12 Bom 78 (79, 80).

[3] *Yeshvant* v. *De Souza,* (1888) 12 Bom 78 (79, 80).

[4] *Ghella Tarachand* v. *The Collector of Ahmedubad,* (1882) Bom P J 257.

[5] *Talim Mundal* v. *Watson & Co,* (1872) 17 Suth W R 94 (94); *Bonomally* v. *Ram Sody,* (1872) 17 Suth W R 95 (96, 97); *Ishan Chunder* v. *Haran Sardar,* (1869) 11 Suth W R 525 (528): 3 Beng L R A C 135.

[6] *Oakshott* v. *British India Co,* (1892) 15 Mad 179 (181). But see *Ishan Chunder Singh* v. *Haran Sardar,* (1869) 11 Suth W R 525 (528): 3 Beng L R A C 135.

[7] *Balwant Rai* v. *Niamat Khan,* 1924 Lah 566 (567): 76 Ind Cas 201.

[8] *Pir Baksh* v. *Faiz Muhammad,* 1906 All W N 180 (180).

[8-a] *D. Tancred* v. *D. N. Mullick,* 1925 Cal 391 (392): 40 Cal L Jour 578: 84 Ind Cas 543: 29 Cal W N 521.

[8-b] *See* Sch. II, List I of the Agra Tenancy Act, III of 1926.

[9] *Balwant Rai* v. *Niamat Khan,* 1924 Lah 566 (567): 76 Ind Cas 261; *Drummond* v. *Lowrie,* (1879) Pun Ro No. 31.

[10] *Mahommad* v. *Ahmedbhai,* (1901) 25 Bom 327 (329): 3 Bom L R 368.

[11] See *Dumodara* v. *Kittappa,* (1911) 10 Ind Cas 879 (880): 36 Mad 16: 21 Mad L Jour 613: (1911) 2 Mad W N 13; *Tancred* v. *Mullick,* 1925 Cal 391 (392): 40 Cal L Jour 578: 84 Ind Cas 543: 29 Cal W N 521.

Note 4.

[1] *Bhadri Narayana* v. *Srinivasa Rao,* 1927 Mad 1179 (1180): 39 Mad L Tim 657: 107 Ind Cas 649: 27 Mad L W 632: 54 Mad L Jour 66; *Barju Biswal* v. *Kunja Behari,* 1931

O. 46, R. 1. Notes 4—7.

execution of a decree unless the *decree* is a non-appealable one.[2] The reason is, that in appealable cases a remedy to correct possible errors is provided by the appeal.[3]

5. **'Court' meaning of.**—The word 'Court' in this rule means a Court of Civil Judicature.[1] Thus a Collector executing a decree transferred to him under S. 68 of the Code[2] or a Rent Controller enquiring into an application under S. 15 of the Calcutta Rent Act[3] or a Registrar acting under the Indian Registration Act[4] is not a 'Court' and cannot make a reference under this rule. Where a Court refuses to entertain an appeal on the ground that it has no jurisdiction to do so, it has no power to make a reference on that matter under this section.[5] (*See also* Note 1 to S. 114, *ante.*)

6. **No reference on question of fact.**—A reference is allowed only on a question of *law* or usage having the force of law. No reference can be made on a question of fact.[1]

7. **Reasonable doubt.**—A reference can be made on a question of law only if the Judge entertains a *reasonable* doubt about it.[1] There cannot ordinarily be a reasonable doubt on a question clearly decided by the rulings of the High Court to which the Judge making the reference is subordinate, unless the authority of those rulings can be questioned in view of a more recent decision of the Privy Council.[1-a] Where, however, the ruling of a High Court is doubted in a later decision of the same Court and has been dissented from by the other High Courts, there may be room for a reasonable doubt sufficient to enable a subordinate Court to make a reference on the question.[2] But even,

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Pat 353 (353): 10 Pat 471: 133 Ind Cas 767: 12 Pat L Tim 909; *Rungji* v. *Bhaiji*, (1887) 11 Bom 57 (58). *Niaz Ali* v. *Muhammad Ramzan*, (1916) 37 Ind Cas 227: 1916 Pun Re No. 130; *Labhu Ram* v. *Amir Chand*, (1916) 35 Ind Cas 638 (633): 1916 Pun L R 73: 105 Pun W R 1916; *Ramphul* v. *Durga*, (1885) 7 All 815 (816): 1885 All W N 245: 10 Ind Jour 75; *Alladin* v. *Jowaya*, 1878 Pun Re No. 40. In re *Monohar Mookerjee*, (1880) 5 Cal 756 (758): 6 Cal L R 228 [Probate application—Decision not final order—No reference].

(2) *Ishwargar* v. *Chudasama*, (1888) 12 Bom 30 (31). *Lakhu Mal* v. *Tulla*, (1880) Pun Re No. 100 [Order in execution appealable—No reference]; *Oriental Loan Association* v. *G. P. Hatch*, (1893) 17 Bom 735 (736). *Debi Parshad* v. *Shama Charan*, (1910) 5 Ind Cas 584 (584) All.

(3) *Krishna* v. *Ramkumar*, (1880) 7 Cal L R 144 (144).

Note 5.

(1) *Ali Bahadur Khan* v. *Bisheshar Singh*, (1920) 54 Ind Cas 564 (584): 22 Oudh Cas 319: 2 U P L R (O) 21: 7 Oudh L Jour 536.

(2) *Ali Bahadur Khan* v. *Bisheshar Singh*, (1920) 54 Ind Cas 564 (564): 22 Oudh Cas 319: 2 U P L R (O) 21: 7 Oudh L Jour 536.

(3) *Tancred* v. *Mullick*, 1925 Cal 391 (391): 40 Cal L Jour 578: 84 Ind Cas 543: 29 Cal W N 521.

(4) *Tullockchand* v. *Gokulbhai*, (1896) Bom P J 219.

(5) *Andrew Anthony* v. *Rev Dupont*, (1882) 4 Mad 217 (218); *Ganga Singh* v. *Kaushi Ram*, (1913) 18 Ind Cas 314 (315): 128 Pun L R 1913: 117 Pun W R 1913: 61 Pun Re 1913.

Note 6.

(1) *Baduruddin* v. *Bismullah*, (1911) 11 Ind Cas 671 (672).

Note 7.

(1) *Bhanaji* v. *De Brito*, (1906) 30 Bom 226 (228): 7 Bom L R 995; *Fillingham G T* v. *Captain C L Dunni*, (1913) 20 Ind Cas 194 (194): 266 Pun L R 1913: 8 Pun Re 1914; *Raghavalu* v. *Thandavaraya*, 1931 Mad 71 (72): 1930 Mad W N 955: 130 Ind Cas 190; *Nicol* v. *Mathura Das*, (1888) 15 Cal 507 (509): 12 Ind Jur 458.

(1-a) *Bhanaji* v. *De Brito*, (1906) 30 Bom 226 (228, 229): 7 Bom L R 995; *Fillingham G. T.* v. *Captain C. L. Dunni*, (1913) 20 Ind Cas 194 (194): 266 Pun L R 1913: 8 Pun Re 1914; *Narukoli* v. *Chima Bhosle*, (1889) 13 Bom 54 (55). *Nainda Pujari* v. *Narayana Shetty*, 1927 Mad 1186 (1187): 39 Mad L Tim 606; *Raghavalu* v. *Thandavaraya*, 1931 Mad 71 (72): 1930 Mad W N 955: 130 Ind Cas 190 [Subordinate Court cannot compare soundness of views on question of law taken by High Court to which it is subordinate with the views of other High Courts.]

(2) *Fatima-ul-Hasna* v. *Baldeo Sahai*, 1926 All 204 (206): 24 All L Jour 69: 48 All 188: 93 Ind Cas 24.

O. 46, R.1, Notes 7—9.

in such a case, the *referring Court* must entertain a reasonable doubt about the question and the mere fact that there are conflicting rulings is not by itself sufficient.[3] Similarly the Court cannot make a reference on a question on which it entertains no doubt merely because the *parties* apply for it.[4]

A reference is not bad merely because the question arises out of the action of a third person not a party to the suit.[5]

8. **Statement of facts and Court's opinion.**—In making the reference the Court should draw up a statement of the facts of the case, formulate the precise question of law or usage having the force of law on which opinion is sought for and must also give its opinion on the question.[1]

Where there was no statement of the case, no statement that the question arose on the trial of a suit and no statement of the Court's opinion, the High Court refused to answer the reference and sent it back for amendment.[2]

9. **Reference by Presidency Small Cause Courts.**—*See* S. 69 of the Presidency Small Cause Courts Act (XV of 1882) as amended by Act IV of 1906 and the undermentioned cases.[1]

O. 46, R.2.

Court may pass decree contingent upon decision of High Court.

R. 2. [S. 618.] The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or *make an* order contingent upon the *decision* of the High Court on the point referred;

but no *decree or order* shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

[1861—S. 29.]

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(3) *Ajodhia Prasad* v. *Raghubir*, (1913) 18 Ind Cas 977 (977): 15 Oudh Cas 880.

(4) *Hurish Chunder* v. *O Brien*, (1870) 14 Suth W R 243 (249): *Dawoodjee* v. *The Municipal Corporation of the City of Rangoon*, 1923 Rang 193 (193): 1 Rang 220: 76 Ind Cas 519.

(5) *Purshottam* v. *Balvant*, (1908) 32 Bom 57 (161): 10 Bom L R 13: 8 Mad L Tim 185.

Note 8.

(1) In the matter of the insolvency of *Din Dial and others*, 93 Pun L R 1902; *Ralli Brothers* v. *Goculbhai*, (1891) 15 Bom 876 (383): Chitty's S C C R 261. (Case under the Presidency Small Cause Courts Act). *Ishwardas* v. *Kalidas*, (1896) 20 Bom 779 (783): Chitty's S C C R 508 (do).

(2) *Dinonath* v. *Weller*, (1867) 7 Suth W R 165 (166).

Note 9.

(1) *Barling* v. *Secretary of State*, (1903) 30 Cal 458 (462). [Condition of this rule must be satisfied]. *Nicol* v. *Mathura Das*, (1888). 13 Cal 507 (509): 12 Ind Jur 458; *Krishna Doss Paramananda* v. *Frederick William*, (1912) 17 Ind Cas 93 (93). (Referring Court entertains a reasonable doubt); *Ishwardas Tribovandas* v. *Kalidas Bhaidas*, (1896) 20 Bom 779 (783): Chitty's S C C R 508. (Existence of such a question of law or usage or construction as therein mentioned is a condition precedent to a reference). *Ralli Brothers* v. *Goculbhai Mulchand*, (1891) 15 Bom 376 (388) Chitty's S C C R 261 (The precise question of law or usage must be formulated); *Bank of Bengal* v. *Vyabhoy Gangji*, (1892) 16 Bom 618 (624): Chitty's S C C R 290. (Reference must be made before the Judge has delivered judgment).

O. 46, R.3, Note 1.

Judgment of High Court to be transmitted and case disposed of accordingly.

R. **3**. [S. 619.] The High Court, *after hearing* the parties *if they appear and desire to be heard*, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

[1877—S. 619; 1861—Ss. 32 and 33.]

1. **Dispose of the case in conformity with the decision of the High Court**.—Upon receipt of the decision of the High Court, it is the duty of the referring Court to dispose of the case in conformity therewith. Thus where a Small Cause Court passed a decree for the plaintiffs, contingent on the opinion of the High Court, and the High Court gave the opinion that the plaintiffs could not recover, it is not open to the referring Court after the receipt of the opinion, to allow the suit to be withdrawn by the plaintiff: judgment should be entered for the defendant.[1] The judgment by the High Court on a reference under this rule is not, by itself, a decree but simply a statement of the grounds in conformity with which the referring Court is to dispose of the case as provided by this rule. Therefore the High Court cannot review its judgment passed on a reference made to it.[2]

O. 46, R.4, Note 1.

Costs of reference to High Court.

R. **4**. [S. 620.] *The* costs (if any) consequent on a reference for the *decision* of the High Court shall be costs in the case.

[1877—S. 620; 1861—S. 34.]

1. **Costs of reference**.—The costs of a reference to the High Court cannot be dealt with separately but must be dealt with when awarding the costs of the suit.[1] The High Court of Bombay, is, however, of opinion that the award of the costs of the reference is in the *discretion* of the Court.[2] This does not seem to be correct on principle. The rule requires that the costs of reference *shall* be costs in the case and S. 35 which gives the Court a discretion to award costs, is expressly made subject to the conditions and limitations prescribed by the rules of the first schedule.

Order 46, Rule 3—Note 1.

[1] *A. Yule & Co.* v. *Md. Hossain*, (1897) 24 Cal 129 (132).

[2] *Ram Chandra* v. *Sitaram*, (1886) 10 Bom 68 (69).

Order 46, Rule 4—Note 1.

[1] *Nicol* v. *Mathoora Dass*, (1888) 15 Cal 507 (510): 12 Ind Jur 458.

[2] *Nicol* v. *Mathhoora Das*, (1888) 15 Cal 507 (510, 511): 12 Ind Jur 458.

O. 46, R.5, Note 1.

Power to alter, etc., decree of Court making reference.

R. **5.** [S. 621.] *Where* a case is referred to the High Court under *rule* 1, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed *or made* in the case out of which the reference arose, and make such order as it thinks fit.

[1877--S. 621.]

1. **Scope of the rule.**—Where the lower Court has not complied with the conditions laid down in R. 1 of this order, the High Court has power under this rule to return the case for amendment in proper form.[1] The rule is also wide enough to enable the High Court to quash the order of reference itself made by the lower Court.[2]

O. 46, R. 6, Note 1.

Power to refer to High Court questions as to jurisdiction in small causes.

R. **6.** [S. 646-A.] (1) *Where* at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit.

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation *to* such other Court as it may in its order declare to be competent to take cognizance of the suit.

1. **At any time before judgment.**—No reference could be made under this rule *after* the passing of the judgment in the case.[1] The rule refers only to such questions as arise during the trial of the suit and not to questions arising on an application for sanction to prosecute which cannot be considered as a trial of the suit.[2]

O. 46, R.7.

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes.

R. **7.** [S. 646-B.] (1) *Where* it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record

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Order 46, Rule 5—Note 1.

[1] *Barling v. Secretary of State,* (1903) 30 Cal 458 (462).

[2] *Krishna Rao v. Lakshman,* 1929 Bom 30 (31): 30 Bom L R 1627: 118 Ind Cas 692.

Order 46, Rule 6—Note 1.

[1] *Diwali Bai v. Sadashiv Das,* (1900) 24 Bom 310 (314): 1 Bom L R 836.

[2] *Balwant Rai v. Niamat Khan,* 1924 Lah 566 (567): 76 Ind Cas 201.

O. 46, R. 7, Note 1.

to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

(2) On receiving the record and statement the High Court may *make* such order in the case as it thinks fit.

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this *rule*, the High Court may make such order as in the circumstance appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this *rule*.

Local Amendments.

ALLAHABAD.

Add after R. 7 to O. 46:—

Rule 38 of O. 41 shall apply, so far as may be, to proceedings under this Order.

BOMBAY.

The following shall be added as R. 8 in O. 46:—

Applicability of R. 38 of O. 41. "8. Rule 38 of O. 41 shall apply, so far as may be, to proceedings under this Order."

OUDH.

Add the following as R. 8:—

"8. Rule 38 of O. 41 shall apply, so far as may be, to proceedings under this Order."

SIND.

Add the following as R. 8 in O. 46:—

Applicability of R. 38 of O. 41. "8. Rule 38 of O. 41 shall apply, so far as may be, to proceedings under this Order."

Synopsis.

1. Scope of the rule.
2. "Court subordinate thereto."
3. "If required by a party shall."
4. District Court should state its reasons.
5. Powers of the High Court under this rule.
6. Interference with questions of fact.

Doubt as to jurisdiction. See Note 1, Pt. (4).

Provincial Small Cause Courts Act. See S. 16, Note 1, Pt. (1).

1. **Scope of the rule.**—S. 16 of the Prov. Small Cause Courts Act. 1887 provides that a suit cognisable by a Court of Small Causes *shall not* be tried by any other Court having jurisdiction within the limits of the jurisdiction of the Court of Small Causes by which the suit is triable. Where an ordinary Court entertains a suit cognisable by a Court of Small Causes it *exercises* a jurisdiction *not vested in it* and if it refuses to entertain an original

O. 46, R.7, **Notes** 1—5.

suit on the ground that it is cognisable by a Court of Small Causes, it *refuses to exercise* a jurisdiction *vested* in it. A reference under this rule is limited to those cases where, the District Court is of the opinion that the Subordinate Court has *held* that it has or has no jurisdiction over the suit, and that such order is erroneous.[1]

The rule is only an enabling one and does not in any way cut down the jurisdiction of the appellate Court.[2] But a District Judge has power under this rule to make a reference whether the case is, or is not, pending in appeal before him.[3] Where a District Munsif returned a plaint as being cognisable only by a Court of Small Causes and the latter Court, however, returned it back as being cognisable only by the Munsif's Court, it was held that the correct procedure was either to proceed under R. 6 of this order itself or send the case to the District Judge for making a reference under this rule.[4]

2. **"Court subordinate thereto".**—The Court of Small Causes is a Court subordinate to the District Judge, and O. 46, R. 7 contemplates and allows a reference, to be made by the District Judge in cases tried by the Court of Small Causes.[1]

3. **"If required by a party. shall".**—Before a reference could be made under this rule it is a necessary condition that it *must appear to the District Court* that the Subordinate Court has erroneously held upon the point of jurisdiction.[1] Where it does so appear, and a *party requires* the District Court to make a reference, it is bound to do so.[2]

4. **District Court should state its reasons.**—A District Court when making a reference under this rule should state its reasons for considering the opinion of the Subordinate Court to be erroneous.[1]

5. **Powers of the High Court under this rule.**—Where a suit which is cognisable only by a Court of Small Causes is tried as an original suit by a District Munsif and the decree is reversed by the Subordinate Judge on appeal there are two remedies open to the aggrieved party:

(1) A revision under S. 115 of the Code.

(2) A reference under this rule.

Order 46, Rule 7—Note 1.

(1) *Makhan Lal* v. *Amir Bakhsh*, (1890) Pun Re No. 91; *Ram Lal* v. *Kabul Singh*, (1903) 25 All 135 (136): 1902 All W N 219; *Madan Gopal* v. *Rhagwan Das*, (1889) 11 All 304 (306): 1889 All W N 75.

(2) *Appa Rao* v. *Bhadrayya*, (1907) 30 Mad 41 (43): 1 Mad L Tim 414.

(3) *Nand Kishore* v. *Lakhpat*, (1900) 3 Oudh Cas 20 (21); *Simson* v. *Mc Master*, (1889) 13 Mad 344 (346).

(4) *Kshetra Nath Bhuiya* v. *Kali Dasi*, (1917) 41 Ind Cas 929 (931): 21 Cal W N 784: 27 Cal L Jour 96.

Note 2.

(1) *Ratan Bipari* v. *Hira Lal*, (1916) 34 Ind Cas 527 (528): 20 Cal W N 1110.

Note 3.

(1) *Madan Gopal* v. *Bhagwan Das*, (1889) 11 All 304 (307).

(2) *Simson* v. *Mc Master*, (1890) 13 Mad 344 (346): *Cantonment Board, Jubbalpore* v. *Phulchand*, (1932) 28 Nag L R 54 (56): 1932 Nag 70: 137 Ind Cas 88; *Suresh Ohunder* v. *Kristo Rangini*, (1894) 21 Cal 249 (251). [Contra 11 All 305 (307) which is not referred to in later cases.]

Note 4.

(1) *Ohhotu* v. *Jawahir*, (1906) 28 All 293 (294): 3 All L J 23: 1906 All W N 29; *Madan Gopal* v. *Bhagwan Das*, (1889) 11 All 304 (306).

Where a *revision* is preferred to the High Court, the latter is bound to set aside the decree of appellate Court as being passed in an appeal which was incompetent and therefore without jurisdiction.[1] It can also set aside the decree of both the Courts and return the plaint for presentation to the proper Court.[2]

Where, however, a *reference* is made under this rule, it has been held by the High Courts of Calcutta[3] and Patna[4] that the High Court is not *bound* to set aside the proceedings in all cases but has full power to consider the matter of jurisdiction or to deal with the case on the merits so as to do substantial justice without necessarily putting the parties to the expense of a fresh trial.

6. **Interference with questions of fact.**—On a reference under this rule the High Court will not as a rule interfere with findings of fact arrived at by the first Court on the evidence before it.[1]

ORDER XLVII.

REVIEW.

Application for review of judgment.

R. 1. [S. 623.] (1) Any person considering himself aggrieved[5]—

(*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,[6]

(*b*) by a decree or order from which no appeal is allowed, or

(*c*) by a *decision* on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

Note 5.

[1] *Kollipara Sitapati* v. *Kankipati Subbayya,* (1909) 1 Ind Cas 543 (544): 33 Mad 323: 6 Mad L Tim 121: 20 Mad L Jour 718 [Overruling 27 Mad 478) *Abdul Majid* v. *Bedyadhar,* (1917) 37 Ind Cas 92 (92): 39 All 101: 14 All L J 984]; *Sankarbhai* v. *Somabhai,* (1901) 25 Bom 417 (418): 3 Bom L R 129.

[2] *Ramasamy* v. *R. G. Orr,* (1903) 26 Mad 176 (179): 12 Mad L Jour 264.

[3] *Parameshwari* v. *Jagat,* (1915) 27 Ind Cas 972 (974): 21 Cal L Jour 141: 19 Cal W N 900; *Suresh Chunder* v. *Kristo Rangini,* (1894) 21 Cal 249 (252).

[4] *Jaduni Pande* v. *Sheonandan Pande,* 1933 Pat 31 (31): 11 Pat 690: 141 Ind Cas 130.

Note 6.

[1] *Ratan Bipari* v. *Hira Lal,* (1916) 34 Ind Cas 527 (529): 20 Cal W N 1110.

O. 47, R. 1. (2) A party who is not appealing from a decree *or order* may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

[1877—S. 623; 1859—S. 376.]

Synopsis.

1. Legislative changes.
2. Scope of the rule.
    3. Review and appeal—Distinction.
    4. Review and amendment—Distinction.
5. "Person considering himself to be aggrieved."
6. "Decree or order . . . . from which no appeal has been preferred."
    7. Filing of appeal pending application for review.
8. Decree or order from which no appeal is allowed—Cl. (b).
9. Decision on reference from Court of Small Causes—Cl. (c).
10. Discovery of new and important matter or evidence.
    11. Discovery of important matter of law.
    12. Exercise of due diligence.
    13. "Was not within his knowledge and could not be produced by him at the time."
    14. Decree rendered ineffectual by reversal. See Note 10, supra.
15. Mistake or error on the face of the record.
16. "Any other sufficient reason."

16-A. Cases where review was allowed on ground of sufficient reason.

16-B. Cases where review was not allowed on the ground that there was no sufficient reason.

17. Review on the ground of subsequent events.

17-A. No review on ground of decision being erroneous on merits.

18. Review on particular ground.—See Note 2 to R. 8.
19. No review of fact after decision in second appeal.
20. Application of the rule to miscellaneous proceedings under the Code.
21. Review in proceedings under other Acts.
22. Review petitions by minors.
23. Consent decree.
24. Ex parte decrees and orders of dismissal for default.
25. Judgment in Letters Patent Appeals.
26. Review of decision before signing decree.
27. Commissioner cannot review.
28. Limitation.
29. Court-fee.
30. Appeal by one party—Review application by another—Cl. (2).
31. Privy Council practice.
32. Appeal.
33. Revision.

Appeal preferred before review—Review application not maintainable. See Note 6, Pt. (1).

Court's duty—Strict proof must be called for before grant of review. See Note 13, Pt. (2).

Grant of review—Objections that can be raised in appeal. See R. 7, Note 4, Pt. (2).

New evidence—Whether should be conclusive. See Note 10, Pt. (3).

Order by one Judge of High Court—Review by another is competent. See R. 2, Note 2, Pt. (20).

Review in probate proceedings. See Note 21, F. N. (1).

Review under the old Code. See Note 1.

Stages in review application. See R. 8, Note 1, Pt. (1).

Wrong exposition of law—Whether a ground for review. See Note 15, Pt. (7); Note 16 (b), Pt. (4-a).

O. 47 R. 1.
Notes
1—2.

1. Legislative Changes.—

Section 623 of the old Code provided that an application for review could be made to the Court which passed the decree or made the order; *or to the Court (if any) to which the business of the former Court has been transferred.* These latter words have been omitted in the present section in view of S. 150 of the Code newly introduced.

2. Scope of the rule.—It has been seen in Note 2 to S. 96, *ante*, that a right of appeal does not exist and cannot be assumed unless expressly given by statute or by rules having the force of statute. The same principle applies to a right of review also. Such a right does not, therefore, exist unless granted by statute.[1] S. 114 of the Code and this order expressly give such a right in certain cases the former being the substantive section containing a brief statement of the Court's general power of review and the latter providing the details of procedure.[2] These provisions constitute an *exception* to the general rule that when once a judgment is signed and pronounced it cannot afterwards be altered or added to (*see* O. 20, R. 3), and, as such, a right of review is exercisable only in the circumstances where it is distinctly provided by the statute.[3]

This rule is, in itself definitive of the limits within which a review is permitted by the Code[4] and, it follows from what has been stated above, that where a case falls within the class of cases contemplated by this rule, the Court cannot have an inherent power of review apart from the provisions of the rule.[5] Where, however, a case falls outside the class of such cases the Courts have, of course, inherent power to review their orders for the ends of justice or to prevent an abuse of the process of the Court.[6]

The existence of a right of review does not bar a suit for the same relief.[7] Nor does the fact that an appeal can be filed against the decree afford

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Order 47, Rule 1—Note 2

(1) *Paramasivam Pillai* v. *Periyanayagath Ammal*, (1916) 34 Ind Cas 503 (503) Mad.

(2) *Indar Mahton* v. *Ramkishun Missir*, 1931 Pat 409 (409): 12 Pat L Tim 652: 134 Ind Cas 630. *See also* Note 1 to S. 114, *ante*.

(3) *Indar Mahton* v. *Ramkishun Missir*, 1931 Pat 409 (409): 12 Pat L Tim 652: 134 Ind Cas 630. *Burra Fakir* v. *Fukeer Doss*, (1873) 20 Suth W R 180 (181).

(4) *Chajju Ram* v. *Neki*, 1922 P C 112 (115): 30 Mad L Tim 295: 3 Lah 127: 16 Mad L W 37: 26 Cal W N 697: 3 Pat L Tim 436: 17 Pun W R 1922: 49 Ind App 144: 24 Bom L R 1238: 36 Cal L Jour 459: 43 Mad L Jour 332: 41 Pun L R 1922: 72 Ind Cas 566 P C: *Rama Raghava Reddi* v. *Raja of Venkatagiri*, 1927 Mad 355 (356): 52 Mad L Jour 123: 25 Mad L W 192: 99 Ind Cas 954; *Ganesh Das* v. *Hari Singh*, 1932 Lah 596 (597): 33 Pun L R 290: 138 Ind Cas 379: 13 Lah 546; *Raghubir Singh* v. *Nathu Mal*, 1926 Jour 159 (4): 92 Ind Cas 1013.

(5) *Ratanchand Khimchand* v. *Damji Dharsey*, 1927 Bom 232 (233): 29 Bom L R 371: 101 Ind Cas 766; *Sundananda Moral* v. *Rakhal Sana*, 1927 Cal 920 (921): 31 Cal W N 822: 104 Ind Cas 136; *Chandi Charan* v. *Monranjan*, (1913) 17 Cal L Jour 416 (420): 18 Ind Cas 275; *Govindoss Krishnadoss* v. *Rajah of Karvetnagar*, 1929 Mad 404 (406); *Ramaraghavareddi* v. *Rajah of Venkatagiri*, 1927 Mad 355 (357): 25 Mad L W 154: 99 Ind Cas 1008; *Narayana Chettiar* v. *P. C. Muthu Chettiar*, 1926 Mad 980 (984): 51 Mad L Jour 219: 1926 Mad W N 890: 97 Ind Cas 1008: 50 Mad 67; *Sitaram* v. *Kaniram*, 1929 Nag 251 (253, 264): 12 Nag L Jour 148: 121 Ind Cas 57; *Anant Potdar* v. *Mangal Potdar*, 1926 Pat 27 (28): 4 Pat 704: 91 Ind Cas 483: 7 Pat L Tim 291; *Rameshwar* v. *Darka Prasad*, 1925 Pat 36 (37): 3 Pat 778: 84 Ind Cas 320: 6 Pat L Tim 309; *Kanshiram* v. *Diwan Chand*, 1933 Lah 169 (171): 141 Ind Cas 188. See also *Parbhas* v. *Nitharlal*, 1924 Cal 1054 (1054): 28 Cal W N 928: 84 Ind Cas 278.

(6) *Kawdu* v. *Berar Ginning Co, Ltd*, 1929 Nag 185 (189): 116 Ind Cas 427; *Yusuf I. A. Lalji* v. *Abdullahbhoy Lalji*, 1930 Bom 294 (295): 32 Bom L R 665: 125 Ind Cas 690 [Order not falling within Rule 1]; *Ram Golam Sahu* v. *Chintaman Singh*, 1926 Pat 218 (227) 1926 Pat H C C 49: 7 Pat L Tim 313: 93 Ind Cas 939: 5 Pat 361 F B; *Mani Lal* v. *Durga Prasad*, 1924 Pat 673 (677): 5 Pat L Tim 425: 1924 Pat H C C 254: 80 Ind Cas 667: 3 Pat 930; *Durga Charan Bose* v. *Lakhi Narain Bera*, (1918) 47 Ind Cas 917 (919) Cal.

(7) *Golab Koer* v. *Badshah Bahadur*, (1909) 2 Ind Cas 129 (143): 13 Cal W N 1197: 10 Cal L Jour 420.

O. 47, R.1, Notes 2—4.

any ground for refusing a review. The reason is that where there are two remedies open to a party, they should not as a rule be construed so as to operate in derogation of each other.[8] But the availability of an appeal as an obvious remedy will be a ground for refusing in the exercise of the Court's discretion, an application for review.[9]

3. **Review and appeal—Distinction.**—A review is not the same thing as, or a substitute for an appeal.[1] The two proceedings differ in very many particulars.

(1) The primary intention of a review is the reconsideration of the subject of the suit by the *same Judge* under certain conditions, while an appeal is a rehearing by another tribunal.[2]

(2) A point which may be a good ground of an appeal may not be a good ground for an application for review.[3] Thus an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal.[4]

(3) A review does not, of necessity reopen questions already decided between the parties. The matter in issue is only reopened when the application for review is accepted while, in the case of an appeal the matter is reopened as soon as an appeal is admitted.[5]

4. **Review and amendment—Distinction.**—A review and an amendment differ in the following particulars:—

(1) In the case of a review the correctness of the *judgment* and the *decree* is questioned, while in the case of an amendment of a decree the correctness of the judgment is assumed, but the jurisdiction to amend arises from the fact that the decree is not in accordance with the judgment.[1]

(2) Where an application for an amendment is allowed there is no need for a *rehearing* of a suit, while if an application for review is allowed a rehearing of the suit becomes necessary.[2]

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(8) *Golab Koer* v. *Badshah Bahadur,* (1909) 2 Ind Cas 129 (143): 13 Cal W N 1197: 10 Cal L Jour 420.

(9) *Muhammad Sultan Sahib* v. *Nagoji Rao,* 1931 Mad 828 (830): 1931 Mad W N 963: 135 Ind Cas 539.

Note 3.

(1) *Syed Muhammad Rowther* v. *Sundara Mudaliar,* 1931 Mad 608 (608): 133 Ind Cas 206; *Ma Kyaw* v. *Ma Kyin,* 1922 U B 16 (17): 64 Ind Cas 695: 4 U B R 27.

(2) *Moharaja Moheshur Singh* v. *The Government of India,* (1865) 3 Suth W R 45 (47) (48): 7 Moo Ind App 283 P C; *Shama Churn Chuckerbutty* v. *Bindaban Chunder Roy,* (1868) 9 Suth W R 181 (185): Ben L R Sup Vol 892.

(3) *Syed Muhammad Rowther* v. *Sundara Mudaliar;* 1931 Mad 608 (608): 133 Ind Cas 206: *Sheo Ratan* v. *Lappu Kuar,* (1883) 5 All 14 (16): 1882 All W N 157: 7 Ind Jur 819; *Illem* v. *Basheer,* (1873-76) 1 Cal 184 (186): 24 Suth W R 382; *Akshoy Kumar Buattacharjee* v. *Dr. M. L. Agarwala,* 1922 Pat 308 (309); *Htim Gyaw* v. *Po Sein Gyi,* 1926 Rang 89 (89): 5 Bur L Jour 9: 95 Ind Cas 541.

(4) *Gurupada Haldar* v. *Upendra Nath Mukerjee,* 1930 Cal 701 (703): 34 Cal W N 696: 129 Ind Cas 365.

(5) *Bhagwan Baksh Singh* v. *Manraji Kuar,* 1922 Oudh 148 (148): 24 Oudh Cas 280: 8 Oudh L J 399: 66 Ind Cas 205.

Note 4.

(1) *Pichayya* v. *Subba Rao,* (1916) 34 Ind Cas 787 (788): 3 Mad L W 499; *Lakshmana Ayyangar* v. *Narayana Ayyangar,* 1924 Mad 225 (226, 227): 18 Mad L W 876: 33 Mad L Tim 221: 76 Ind Cas 786; *Joykishen Mookerji* v. *Ataoor Rohoman,* (1881) 6 Cal 22 (25): 6 Cal L Rep 575: 5 Ind Jur 522: 3 Shome L R 197.

(2) *Pichayya* v. *Subba Rao,* (1916) 34 Ind Cas 787 (788): 3 Mad L W 499.

(3) Where an application for review is granted the result is a new decree superseding the original decree and not merely some amendment thereof.[3]

5. **"Person considering himself to be aggrieved".**—It is only a "person aggrieved" by a decree or order that can apply for a review. A "person aggrieved" means a person who has suffered a *legal grievance,* a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully affected his title to something; it is not sufficient that he has lost something which he would have obtained if another order had been made.[1] A decree or order against a person not a party thereto, is on general principles of law, not binding on him. Such a person, therefore, cannot have a legal grievance against the order or decree, and, consequently, cannot apply for a review of the decree or order under this rule.[2] The Judicial Commissioner's Court of Nagpur, has, however, held that where an order has been made in a proceeding against a company which was not properly a party to the proceeding, a director of the company can file an application for review of the order.[3]

A minor, who is aggrieved by a decree or order passed against him may apply for a review under the same circumstances as an adult.[4] Similarly, the legal representatives of a deceased party who are materially affected by the decree are also entitled to apply under this rule.[5] Where sanction was granted to the Public Prosecutor to prosecute an attorney and an order was made granting leave to the attorney to appeal to the Privy Council it was held that the Public Prosecutor was a person aggrieved by the order granting leave to appeal and was entitled to apply for a review thereof.[6]

6. **"Decree or order . . . . from which no appeal has been preferred."**—If before the making of an application for review, an appeal from the decree sought to be reviewed *has already been filed* and is pending, the Court has no jurisdiction to entertain an application for review.[1] Where,

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(3) *Bhawani Prasad* v. *Laxmi Bai,* (1919) 50 Ind Cas 329 (330): 15 Nag L R 65; *Kannaiya Lal* v. *Baldeo Prasad,* (1905) 28 All 240 (241): 1905 All W N 265.

Note 5.

(1) Halsbury's Laws of England Vol. II p 301; *Jhabha Lal* v. *Shib Charan,* (1917) 37 Ind Cas 76 (77): 15 All L Jour 1: 39 All 152. In ex parte *Sidebotham,* (1879) 14 Ch D 458: 49 L J Bk 41: 42 L T 783: 28 W R 715 Dist. 39 Mad 479: 29 Ind Cas 294.

(2) *Surat Chandra Mukerji* v. *Mahamad Hossein,* (1904) 8 Cal W N 468 (469). *Ashgari Begam* v. *Muhamad Yusuf,* (1921) 61 Ind Cas 534 (535) Lah. See also *Pegoo Jan* v. *Waizoodeen,* (1872) 18 Suth W R 464 (465) [Application on the part of two of several parties. Court cannot modify the decrees in favour of others who have not applied].

(3) *Kawdu* v. *Berar Ginning Co, Ltd,* 1929 Nag 185 (190): 116 Ind Cas 427.

(4) *Madhoo Soodun* v. *Pirhtee,* (1871) 16 Suth W R 231 (232).

(5) *Debi Doss* v. *Narain Pershad,* (1906) 9 Oudh Cas 35 (37).

(6) *Public Prosecutor of Calcutta* v. *Poresh Chandra Ghosh,* (1914) 22 Ind Cas 324 (338): 41 Cal 734: 19 Cal W N 593.

Note 6.

(1) *Balling Vithaling Sakhar Pekar* v. *Shri Devasthan Fund,* 1931 Bom 232 (233): 33 Bom L R 378: 132 Ind Cas 446; *Raja Indrajit Pratap Bahadur Sahi* v. *Amar Singh,* 1923 P C 128 (135): 21 All L Jour 554: 4 Pat L Tim 447: 1 Pat L R 345: 2 Pat 676: 50 Ind App 183: 25 Bom L R 1259: 28 Cal W N 277: 45 Mad L Jour 578: 33 Mad L Tim 233: 18 Mad L W 728: 4 L R P C 123: 74 Ind Cas 747: 5 L R P C 8: 39 Cal L Jour 318: 3 Pun L R 1924 P C; See also *Navivahoo* v. *Turner,* (1889) 13 Bom 520 (534): 16 Ind App 156: 5 Sar 400: 15 Ind Jur 251 P C; *Muhammad Yusuf* v. *Rajaram,* (1916) 35 Ind Cas 867 (868): 85 Pun L R 1916: 163 Pun W R 1916; *Brojonath Koondoo Chowdhry* v. *Jumeerunnissa Bibi,* (1867) 7 Suth W R 218 (218); *Bhabhuti* v. *Gurdas,* 1926 Jour 181 (1): 3 Oudh W N 968: 99 Ind Cas 271; *Lucas* v. *Stephen,* (1868) 9 Suth W R 301 (303, 304): 5 Wym 195; *Baboo Juggur Nath Singh* v. *Afzal Khan,* (1872) 17 Suth W R 130 (130); *Lallmun* v. *Lachuman Singh,* (1866) 1 Agra 133 [Case under the Code of 1859].

O. 47, R. 1, Note 6.

however, the application for review is made first and *thereafter* an appeal is filed against the decree, the jurisdiction to deal with the application is not affected by the pendency of the appeal.[2] But where, before the application is *heard,* such appeal is disposed of on the merits[3] or under O. 41, R. 11[4] the appellate decree supersedes the decree or order appealed from and the result of allowing the application would be to interfere with the decree of the appellate Court; consequently, the Court which passed the decree or order cannot proceed with the application for review. Compare Note 12 to S. 96, *ante* and Notes 10 and 11 to O. 9, R. 13.

Where an appeal is withdrawn and *thereafter,* an application for review is filed, the application may be entertained and disposed of by the Court; the reason being that an appeal once withdrawn must be treated as if it had never been preferred at all within the meaning of this rule.[5] According to the High Court of Allahabad the principle is not affected by the fact that the application for review is filed first and the appeal is withdrawn later.[6] But according to the High Court of Bombay there is no jurisdiction to entertain the application so long as an appeal is pending, and the fact that the appeal is withdrawn *subsequently* will not cure the initial defect in making the application.[7]

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(2) *Chenna Reddi* v. *Pedda Obi Reddi,* (1909) 32 Mad 416 (420): 6 Mad L Tim 135: 2 Ind Cas 802: 19 Mad L Jour 388 F B; *Rang Lal* v. *Lilavati,* 1929 All 375 (376): 119 Ind Cas 561; *Ram Parsan Upadya* v. *Nageshar Pande,* (1920) 54 Ind Cas 764 (765): 18 All L Jour 135: 2 U P L R (A) 43: 42 All 317; *Partap Singh* v. *Jaswant Singh,* (1919) 52 Ind Cas 642 (643): 17 All L Jour 1021: 42 All 79; *Narayan Purshottam* v. *Laxmi Bai,* (1914) 23 Ind Cas 513 (513): 16 Bom L R 189: 38 Bom 416; *Shashi Bhushan Bera* v. *Raghunath Mandala,* (1920) 57 Ind Cas 785 (786) Cal; *Pyari Mohan Kandu* v. *Kalu Khan,* (1917) 41 Ind Cas 497 (498): 44 Cal 1011; *Hurbuns* v. *Thakoor Prosad,* (1883) 13 Cal L Rep 285 (297): 10 Cal 108; *Thakoor Porsad* v. *Baluck Ram,* (1883) 12 Cal L Rep 64 (75): *Bharat Chunder* v. *Ram Ganga,* (1863) 5 Suth W R 59 (60): Ben L R Sup Vol 362; *Bhavani Prasad* v. *Laxmi Bai,* (1919) 50 Ind Cas 329 (331): 23 Cal W N 619: *Sham Lal Sahu* v. *Mt. Nag Koer,* (1922) 65 Ind Cas 125 (125) Pat; *Jagan Nath* v. *Devi Das,* (1904) Pun Re No. 25; See also *Sarju Pershad* v. *Sheo Charan Lal,* (1904) 7 Oudh Cas 299 (302) [The Court should postpone the hearing of the application and see whether the applicant is made a party respondent and given opportunity and the appeal is heard].

(3) *Gour* v. *Nil Madhab,* 1923 Cal 113 (115): 36 Cal L Jour 484: 73 Ind Cas 34; *Peary Mohan Mukerjee* v. *Mohendra Nath Manna,* (1906) 4 Cal L Jour 566 (567); *Jacammal* v. *Palaniappa,* (1869-70) 5 Mad H C R 464 (466); *Khatemannessa Bibi* v. *Upendra Chandra Mandal,* 1928 Cal 804 (805); Ex parte *Bashiagarulu Naidu,* (1862-63) 1 Mad H C R 254 (255); *Secretary of State* v. *Hindustan Co-operative Insurance Society,* 1932 Cal 171 (176): 36 Cal W N 40 [Review application filed after disposal of appeal]; *Ratanchand Khimchand* v. *Damji Dharsey,* 1927 Bom 232 (233): 29 Bom L R 371: 101 Ind Cas 766 (do); *Biswambhar Mirdha* v. *Sarup Chandra Gain,* (1909) 1 Ind Cas 136 (137) Cal (do); *Jodoonath Mookerjee* v. *Punchanum Mookerjee,* (1870) 14 Suth W R 438 (440) (do); *Rajdharee* v. *Mahadeo,* (1869) 11 Suth W R 511 (512) (do); *Oomanand* v. *Satish Chander,* (1868) 9 Suth W R 471 (472) (do); *Kishen Das* v. *Official Liquidator,* (1918) 45 Ind Cas 84 (85): 40 Pun Re 1918: 60 Pun W R 1918 (do).

(4) *Sheo Balak Singh* v. *Mahabir Singh,* 1931 All 704 (704): 133 Ind Cas 432: 1931 All L Jour 945; *Shivappa* v. *Ramachandra,* 1922 Bom 130 (131): 46 Bom 1: 23 Bom L R 597: 63 Ind Cas 910; *Ramappa* v. *Barma,* (1906) 30 Bom 625 (630): 8 Bom L R 842; *Peary Mohan* v. *Mohendra,* (1906) 4 Cal L Jour 566 (567); *Chandra Kanta* v. *Lakshman Chandra,* (1918) 36 Ind Cas 460 (462, 463): 24 Cal L Jour 517: 21 Cal W N 430. *See also* In the matter of the petition of *Jadunnath Mookerjee,* (1871) 6 Ben L R 333 [Application for review filed in Lower Court after dismissal of second appeal—Application does not lie]

(5) *Nanabhai Vallabhadas* v. *Nathabhai Haribhai,* (1872) 9 Bom H C R 89 F B; *Narain Bin Sidoji* v. *Davudbhai Valad Fatebhai,* (1872) 9 Bom H C R 238; *Pandu* v. *Devji,* (1883) 7 Bom 287 (288, 289); *Ram Chandra* v. *Krishnaji,* (1904) 28 Bom 4 (7): 5 Bom L R 615; *Ramappa* v. *Barma,* (1906) 30 Bom 625 (630): 8 Bom L R 842; *Nehora Pande* v. *Inderjit Rai,* (1912) 14 Ind Cas 327 (327) All; *Nandkishore* v. *Anwar Hussain,* (1909) 4 Ind Cas 809 (810): 6 All L J 979: 32 All 71: *Mariamunnissa Bibi* v. *Babu Ram,* 1923 All 541 (542): 21 All L J 377: 73 Ind Cas 1016: 45 All 458: 4 L R A Civ 416; See also *Pandurang* v. *Moro Bhasudev,* (1869) 6 Bom H C R 63 [A case under the Code of 1859]

(6) *Ram Prasad* v. *Asa Ram,* 1921 All 197 (198): 43 All 288: 19 All L J 24: 61 Ind Cas 334.

(7) *Balling Vithalingsakharpekar* v. *Shri Devasthan Fund,* 1931 Bom 232 (233): 33 Bom L 378: 132 Ind Cas 446.

O. 47, R. 1, Notes 7—10.

7. **Filing of appeal pending application for review.**—As has been seen in Note 6, *ante* the *subsequent* filing of an appeal against the decree sought to be reviewed does not affect the jurisdiction of the Court to deal with the application for review but such jurisdiction ought in such cases to be exercised with the greatest care and only in a very strong case.[1] The fact that application for review of a judgment is pending will not, however, preclude the appellate Court from granting in appeal the relief claimed in the application.[2]

8. **Decree or order from which no appeal is allowed—Cl. (b).**—Any decree or order from which no appeal is allowed is open to review.[1]

9. **Decision on reference from Court of Small Causes—Cl. (c).**—Under the Code of 1859 no application lay for review of judgment by the High Court on a reference from a Court of Small Causes.[1] Even under this rule, the High Court has no power to review a judgment passed by it on a reference from a *Subordinate Judge* with Small Cause Court powers. The rule allows a review of judgment on a reference only from a *Court* of Small Causes.[2]

10. **Discovery of new and important matter or evidence.**—Where a litigant has obtained a judgment in a Court of justice, he is, by law, entitled not to be deprived of that judgment without solid grounds. Where, therefore, a review of a judgment is asked for by a party, the greatest care ought to be exercised by the Court in granting a review especially where the ground of review is the discovery of fresh evidence. It is so easy to the party who has lost his case, to see what the weak part of his case was, and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion upon that part of the case must be very strong.[1] The rule that permits a new trial to be granted on account of the discovery of new evidence has, therefore, been fenced round with many limitations. Thus the party asking for a new trial must show that there was no *remissness* on his part in adducing all possible evidence at the trial.[2] Further, the new evidence must be such as is *presumably to be believed* and such that, if adduced, it would *practically be conclusive*, *i.e.*, evidence of such a class as to render it probable almost beyond doubt that the judgment would be *different*.[3] Where it is very *doubtful* whether the evidence, if produced, would have had any effect on the judgment,

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Note 7.

(1) *Chenna Reddi* v. *Pedda Obi Reddi*, (1909) 2 Ind Cas 802 (804): 6 Mad L Tim 135: 19 Mad L Jour 388: 32 Mad 416.

(2) *Mt. Ummakulsum* v. *Ghulam Rasul Khan Burgri*, 1929 Sind 32 (36): 114 Ind Cas 101.

Note 8.

(1) See *Sumer Chand* v. *Beni Prasad*, 1929 All 123 (124): 26 All L J 1395: 112 Ind Cas 380 [Order of dismissal for default].

Note 9.

(1) *Huro Sounduree Chowdrain* v. *Anandnath Roy Chowdhry*, (1865) 3 Suth W R 8 (8).

(2) *Ramchandra* v. *Sitaram*, (1886) 10 Bom 68 (69)

Note 10.

(1) *Nando Lal Mullick* v. *Punchanon Mookerjee*, (1917) 42 Ind Cas 484 (490): 45 Cal 60: 21 Cal W N 1076: 26 Cal L Jour 187.

(2) *Nando Lal Mullick* v. *Punchanon Mookerjee* (1917) 42 Ind Cas 484 (491): 45 Cal 60 21 Cal W N 1076: 26 Cal L Jour 187: *Kesowji* v. *Peninsula Railway Co.* (1907) 31 Bom 381 (388) 9 Bom L R 671: 34 Ind App 115: 2 Mad L Tim 435: 11 Cal W N 721: 17 Mad L Jour 347: 6 Cal L Jour 5: 4 All L J 461 P C; *Chiranjilal Ramlal* v. *Tulsiram Jankidas*, (1920) 56 Ind Cas 734 (738): 31 Cal L Jour 134: 47 Cal 568.

(3) *Young* v. *Kershaw*, (1900) 81 L T 531: 16 T L R 52, referred to in 45 Cal 60: 42 Ind Cas 484 (490): *Brown* v. *Dean*, (1910) App Cas at p 374: 79 L J K B 690: 102 L T 661: 54 Sol J 442 cited in 45 Cal 460: 42 Ind Cas 484 (491): *Hip Foong Hong* v. *Neotia and Company*, 1918 P C 184 (188): In re *Appa Rao*, (1887) 10 Mad 73 (77): 13 Ind App 155: 4 Sar 755 P C: *Debi Dayal* v. *Ambika Prasad*, 1929 All 545 (545): 119 Ind Cas 99; *Heera Lal* v. *Ram Taurack*, (1875) 23 Suth W R 323 (324): *Dhunsook Das* v. *Hurry Baboo*, Bourke O C 115; *Shah Abdul Aziz* v. *Sharfuddin*, (1917) 38 Ind Cas 142 (143) Pat.

O. 47, R.1, Note 10.

there is no ground for review.[4] In *Mahabir Prasad* v. *Collector of Allahabad*[5] where a suit was dismissed on two grounds namely, want of notice as required by law and the plaintiff being illegitimate, and a review was applied for on the ground of discovery of new evidence tending to establish the legitimacy of the plaintiff it was held that a review should not be granted inasmuch as the suit would still have to be dismissed on the question of notice. But the case would be different where the effect of the evidence, if adduced, would be to alter or cancel the decree. Thus the discovery of a document containing an *admission of liability* by the defendant[6] or the discovery of fraud,[7] would be a good ground for review. Similarly where a decree for restitution of conjugal rights was passed and subsequently it was discovered that the parties were related as cousins, such relationship rendering the marriage a nullity, it was held that there was a good ground for review.[8] Again where the parties were not aware of a *previous* judgment passed in another case between them, which if it had been placed before the Court would have resulted in different judgment, there is a good ground for review.[9]

In the undermentioned cases[10] it has been held that it is not necessary for granting a review on the ground of the discovery of new and important matter, that such evidence, if admitted would be conclusive to show that the decision is wrong. This view is against the general trend of decisions and cannot be accepted as correct.

There is a conflict of opinion on the question whether the decision in another case between the same parties *after* the date of the judgment sought to be reviewed would be a sufficient ground for review in cases where such decision if it had been given before the date the judgment sought to be reviewed, would have resulted in a different judgment. Before the date of the Privy Council decision in *Kotagiri* v. *Vellanki*[10-a] the Bombay High Court answered the question in the affirmative[11] while the Allahabad and Calcutta High Courts answered it in the negative.[12] In *Kotagiri's* case it was held by their Lordships of the Privy Council that the section of the old Code corresponding to this rule did not authorise the review of a decree *which*

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(4) *Bakar Ali Khan* v. *Anjuman Ara Begam*, (1902) 5 Oudh Cas 59 (64); *Adit Narayan Singh* v. *Mahabir Prasad Tiwari*, (1917) 38 Ind Cas 196 (199) Pat.

(5) (1914) 23 Ind Cas 514 (515): 12 All L J 382: 36 All 277.

(6) *Faiz Mahomed* v. *Muhammad Zakriya*, (1911) 11 Ind Cas 15 (16): 140 Pun W R 1911: 195 Pun L R 1911.

But a subsequent admission is not a ground for review. See 5 Ind Cas 182. See also further down in the commentary.

(7) *See* Note 22, *infra*.

(8) *Mary Josephine Pompeii Connally* v. *James Sidney Osmond Connally*, 1930 Pat 63 (67): 120 Ind Cas 465.

(9) *Pittam Singh* v. *Hukum Singh*, 1930 All 621 (622); *Judar Chandra Moulik* v. *Manik Sarkar*, (1919) 51 Ind Cas 652 (653): 29 Cal L Jour 313; *Achutha* v. *Mammavu*, (1887) 10 Mad 357 (360) [Decision given before but published after the decision sought to be reviewed]; *Kooar Lal & Gopal* v. *Rukma Bai*, (1898) 11 C P L R 41 (43) (do).

(10) *Srinivasa Ayyangar* v. *Official Assignee*, 1927 Mad 641 (642): 52 Mad L Jour 682: 39 Mad L Tim 11: 103 Ind Cas 377: 26 Mad L W 217: 50 Mad 891: 1927 Mad W N 806; *Saheb Jan* v. *Sufdur Ali*, (1874) 22 Suth W R 288 (289).

(10-a) 24 Mad 1 P C.

(11) *Waghela* v. *Masludin*, (1889) 13 Bom 330 (335): 13 Ind Jur 391.

(12) *Amrit Lal* v. *Madho*, (1884) 6 All 292 (294): 1884 All W N 89: 8 Ind Jur 589; *Johmenjoy Mullick* v. *Dassomoney Dasi*, (1882) 8 Cal 700 (703); *Dwarkanath* v. *Manik Chunder*, (1868) 9 Suth W R 102 (103); *Madhub Chunder* v. *Radhika*, (1867) 7 Suth W R 405 (406). But see *Panchanan Bose* v. *Gurudas Roy*, (1871) 18 Suth W R 317 (318): 9 Beng L R 187 [doubting 12 Suth W R 154].

O. 47. R. 1; Notes 10—11.

was right when it was made on the ground of the happening of some *subsequent event*. It has accordingly been held since then that a subsequent decision in another case[13] or the subsequent reversed of a decision on the basis of which a judgment was given is no ground for review under this rule.[13-a] There are, however, several decisions[14] which have purported to follow the Bombay view, but no reference was made in any of them to *Kotagiri's* case. In the undermentioned case[15] the High Court of Rangoon has further held that the Bombay view cannot be said to have been overruled by the decision of the Privy Council in *Kotagiri's* case and that it is still good law. The reasoning is, however, not very clear. It is submitted that these decisions cannot be accepted as laying down the correct law. The word "evidence," in this rule is not confined to documentary evidence but includes *oral evidence*.[16]

11. Discovery of important matter of law.—The words "new and important matter" in this rule refer to evidence or other matter *in the nature of evidence*, and not to a legal authority in existence at the date of the judgment but not brought to the notice of the Court.[1] Hence no review can be asked for on the ground of the discovery of new authorities which show that the decision is not correct.[2] The contrary view expressed in the cases cited below[3] is, it is submitted, not sound.

But the discovery of a *former* decision between the same parties which operates as *res judicata* is a discovery of new and important matter within this rule.[4]

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(13) *Kali Prasanno Guha Chowdhuri* v. *Bhagbati Debya*, (1921) 64 Ind Cas 324 (325) Cal; *Kumar Sarat* v. *Sripathi Chatterji*, (1919) 50 Ind Cas 119 (122): 23 Cal W N 242; *Dawloo Ma* v. *Karnam Ghowdoppa*, 1930 Mad 579 (581): 126 Ind Cas 486; *Gnanamanikam Ammal* v. *Samson*, 1932 Rang 129 (130).

(13-a) *Sudananda Moral* v. *Rakal Sana*, 1927 Cal 920 (920): 31 Cal W N 822: 104 Ind Cas 136; *Gannabatula Venkamma* v. *Ganbathulu Ranga Rao*, 1922 Mad 227 (227): 1922 Mad W N 304: 15 Mad L W 593: 43 Mad L Jour 33: 31 Mad L Tim 473: 70 Ind Cas 741; *Balwantrao* v. *Farid Saheb*, 1926 Nag 10 (10): 89 Ind Cas 216 [Decree on which decision based subsequently amended].

(14) *Waman Hari* v. *Hari Vithal*, (1907) 31 Bom 128 (136): 8 Bom L R 932; *Ram Lal* v. *Kalka Prasad*, (1911) 10 Ind Cas 244 (245): 8 All L J 584: 33 All 566; *Muthuswami* v. *Shunmugasundaram*, (1913) 19 Ind Cas 214 (214): 13 Mad L Tim 225; *Satramdas Jairamdas* v. *Missir Mangalmal*, (1907) 1 Sind L R 227; *Kishun Deyal Rai* v. *Mt Kulpati Kuer*, (1918) 45 Ind Cas 316 (317): 3 Pat L Jour 372: 1918 Pat H C C 238.

(15) *Maung Kyaw* v. *Ko Aye*, 1927 Rang 189 (189): 5 Rang 261: 103 Ind Cas 258.

(16) *Lalchand* v. *Imdad Ali*, 1928 Nag 279 (279): 108 Ind Cas 439.

Note 11.

(1) *Abdul Sadiq* v. *Abdul Aziz*, (1899) 21 All 152 (153): 1899 All W N 1.

The above view, it is submitted, is based on a sound principle. Because, if it were held that a party is entitled to apply for review on the ground of his discovery of fresh authorities, it would amount to saying that it is for a party to point out to the Court the law to be applied in a case, while the right view is that it is for the Court to find out and apply the correct law to the facts of a case whether the same is brought to its notice or not. See O 6, R 2, Note 2, Pt. (2). Further the language of this rule cannot appropriately be applied to a matter which, being a matter of law, a party is always presumed to know—See Holland's Jurisprudence 3rd Edn., Page 92

(2) *Salleh Mohomed Umar Dossal* v. *Nathumal Kessamal*, 1925 Sind 53 (54): 78 Ind Cas 993: 19 Sind L R 30; *SM Garabini Kumarin* v. *Suraj Narain Singh*, 1924 Pat 250 (253): 3 Pat 134: 5 Pat L Tim 52: 1923 Pat H C C 361: 75 Ind Cas 177; *Atmaram* v. *Punjabrao*, 1925 Nag 284 (385): 87 Ind Cas 1029; *Ramchandra Mahader Rao* v. *Govinda Rao*, 1925 Nag 266 (267): 20 Nag L R 115: 87 Ind Cas 87; *Kishunchand* v. *Mukan Sarup*, 1931 All 91 (92): 11 L R A Rev 362: 132 Ind Cas 815: 1931 All L J 889; *Sheik Abdul Aziz* v. *Munro*, 1921 Pat 139 (140): 1921 Pat H C C 152: 1 Pat L Tim 561: 57 Ind Cas 147; *Gurditta Shah Harichand* v. *Balmokund*, (1928) 112 Ind Cas 277 (278): 1928 Notes 71-a; *Chandi Charan* v. *Manoranjan*, (1913) 18 Ind Cas 275 (277): 17 Cal L Jour 416.

(3) *Sujan Singh* v. *Fateh Mahomed*, 1906 Pun Re No. 124: 97 Pun L R 1907: 162 Pun W R 1906: See also *Govindan Nair* v. *Ithaletty*, 1926 Mad 764 (764): 50 Mad L Jour 943: 1926 Mad W N 442

(4) *See* point 9 to Note 10, *ante*.

O. 47, R.1, Notes 12—13.

12. **Exercise of due diligence.**—In *Kessowji Issur* v. *G. I. P. Railway*[1] their Lordships of the Privy Council observed as follows:—"Now the Code of Civil Procedure permits such applications for review on the ground of such discovery", (*i.e.*, discovery of new and important matter or evidence) "but it enacts very strict conditions so as to prevent litigants lying on their oars when they ought to be looking for their evidence—it enjoins the Judge to require the facts as to the absence of negligence to be strictly proved". Applications for review on the ground of discovery of fresh evidence ought, therefore, to be refused when such evidence could have been produced if reasonable care and diligence had been exercised.[2] There must be strong evidence of diligence in getting all available evidence.[3] When the trial had lasted three years the Privy Council refused to admit fresh evidence as there was no reason shown as to why the new evidence was not timeously submitted.[4] The fact that evidence *was* found susbsequently cannot itself be taken to show that due diligence could not have been exercised; otherwise there could not be any case coming within this rule.[5] The grounds for granting a review on account of the discovery of fresh evidence, may in certain cases, be grounds for extending the time under S. 5 of the Limitation Act.[6]

13. **"Was not within his knowledge and could not be produced by him at the time."**—It must be shown that after the exercise of due diligence the evidence was not within the applicant's knowledge or could not be produced by him at the time.[1] The Court, in fact, has no power to grant a review without calling for strict proof of such allegations.[2] In the under-

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Note 12.

(1) (1907) 31 Bom 381 (388, 389): 9 Bom L R 671: 34 Ind App 115: 2 Mad L Tim 435: 11 Cal W N 721: 17 Mad L Jour 347: 6 Cal L Jour 5: 4 All L J 461 P C.

(2) *Appa Rao, In re,* (1887) 10 Mad 73 (77) 13 Ind App 155: 4 Sar 755; *Turnbull & Co* v. *Duval,* (1902) 6 Cal W N 809 (816) P C [Document could have been discovered from the opposite party]; *Shah Abdul Aziz* v. *Shah Sherfuddin,* (1917) 38 Ind Cas 142 (142) Pat; [Deliberate upon production]; *Nga Tet Pyo* v. *Ma Ngwe Ka,* (1917) 38 Ind Cas 403 (404): (1916) 2 U B R 126; *Harjimal Dhamal* v. *Bhejanmal,* (1908) 2 Sind L R 35 F B [Found in the house]; *Pallia* v. *Mathura Pershad,* (1916) 32 Ind Cas 622 (623): 14 All L J 204: 38 All 280 [Certificate of guardianship available in the city); *Ram Naresh Singh* v. *Jagar Nath Singh,* 1924 All 759 (760): 5 L R A Civ 392: 85 Ind Cas 180 [Evidence could have been got at any time]. See also *Ratanchand* v. *Damji Dharsey,* 1927 Bom 232 (233): 29 Bom L R 371: 101 Ind Cas 766; *Ram Dhun* v. *Joy Narain,* (1869) 12 Suth W R 536 (537): 8 Beng L R App 36 Note; [Where he knew previously where to find it]; *Brojendra Kumar* v. *Wise,* (1869) 19 Suth W R 130 (130), (Do); *Seetanath* v. *Sham Sunduree,* (1870) 14 Suth W R 26 (26): 8 Beng L R App 37 Note.

(3) *Motiram Amulrai* v. *Modern Insurance Co Ltd.* 1933 Sind 110 (111, 112); *Lachan Ram* v. *Debi Pershad,* (1911) 9 Ind Cas 266 (267) All.

(4) *Shivlingappa* v. *Revappa,* (1915) 29 Ind Cas 717 (717): 19 Cal W N 762: 1915 Mad W N 687 P C. See also *Heeralal Gose* v. *Ram Taruck Dey,* (1875) 23 W R 323 (324).

(5) *Connaley* v. *Connally,* 1930 Pat 63 (67): 120 Ind Cas 465.

(6) *Indrarajbhan* v. *Sitaram,* 1921 Nag 174 (176): 78 Ind Cas 527.

Note 13.

(1) *Kariya Manto Kurmi* v. *Ram Sarup,* (1917) 37 Ind Cas 399 (400) All; *Nubokishore* v. *Jadub Chunder,* (1873) 20 Suth W R 426 (426); *Khelat Chunder* v. *Pran Kisto,* (1873) 12 Suth W R 461 (462): 11 Beng L R 428 Note; *Nudar Chand* v. *Hreedoy Mundul,* (1873) 17 Suth W R 458 (458): 11 Beng L R 424 Note; *Umrao Thakur* v. *Gokul Mundal,* (1872) 16 Suth W R 7 (8): 8 Beng L R App 34; *Sitanath* v. *Sham Sundari,* (1872) 14 Suth W R 26 (26): 8 Beng L R App 37 Note; *Jubhoo Sahoo* v. *Jusoda,* (1872) 17 Suth W R 280 (281); *Nissa Bibi* v. *Abdur Rahman,* (1872) 18 Suth W R 413 (414); *Nuffar Chand Paul Chowdhury* v. *A D Sandes,* (1868) 10 Suth W R 432 (432): 8 Beng L R App 35; *Dwarkanath* v. *Kishenlal,* 1863 Marsh 553; *Amritrav* v. *Manaji,* (1866-67) 3 Bom H C R A C 49; *Shamshier Ali* v. *Ramchander,* (1865) 2 Suth W R 174 (175); *Radhey Koonwar* v. *Ajoodhya Pandey,* (1868) 3 Agra 69.

(2) *Potharaju* v. *Adiseshu,* 1925 Mad 578 (578): 21 Mad L W 276: 87 Ind Cas 891: *Nubokishore* v. *Jadub Chunder,* (1873) 20 Suth W R 426 (426); *Venkatarathnam* v. *Varahalu* 1928 Mad 56 (56): 104 Ind Cas 746; *Chiranji Lal* v. *Tulsiram Janki Das,* (1920) 56 Ind Cas 734 (738): 31 Cal L Jour 134: 47 Cal 568. See also *Ahed Kundkar* v. *Mohendra Lal Dey,* (1911) 9 Ind Cas 320 (321) Cal.

O. 47, R.1, Notes 13—15.

mentioned case[3] the High Court of Patna has expressed the view that the words "or could not be produced by him at the time" must refer to the words "was not within his knowledge" and that the whole clause means that the new matters alleged were not within the applicant's knowledge and *as such* could not have been produced by him at the trial. In other words, it seems to be of the opinion that the availability of a piece of evidence *within* the knowledge of the applicant, but which, even after the exercise of due diligence, could not be produced by him at the trial, is not a ground for review. It is submitted that this view is against the language of this rule and cannot be accepted as correct.[4]

14. Decree rendered ineffectual by reversal.—*See* Note 10, *supra.*

15. Mistake or error on the face of the record.—In order that an error may be a ground for review it must be one *apparent on the face of the record,*[1] *i.e.,* an evident error[2] which does not admit of extraneous matter to show its incorrectness.[3] The word "error" is not limited to errors of fact, but includes also errors of law.[4] But the law must be definite and capable of ascertainment.[5] An erroneous view of the law on a debatable point[6] or a wrong exposition of the law[7] or a wrong application of the law[8] cannot be considered a mistake or error on the face of the record.

A review has been held permissible in the following cases:—

(1) Where a judgment is passed without notice to the parties[9] or

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[3] *Ramesh Wardhari Singh* v. *Sadhoo Saran Singh,* 1924 Pat 809 (810): 76 Ind Cas 91.

[4] See *Goor Dyal* v. *Deka Noonya,* (1874) 22 Suth W R 446 (446) [Where applicant had full knowledge of the evidence, but could not even with due diligence produce it, it was held it was a good ground for review].

Note 15.

[1] *Maung Sein Myi* v. *Maung Tun Pe,* 1929 Rang 70 (70): 6 Rang 794: 114 Ind Cas 687.

[2] *Kalu* v. *Vishram,* (1875-77) 1 Bom 543 (546); *Chintamani Pal* v. *Pearu Mohun,* (1870) 15 Suth W R 1 (2): 6 Beng L R 126 F B; *Jogeswar Atha* v. *Ganga Bishnu Ghattack,* (1904) 8 Cal W N 473 (475).

[3] *Babu Vaidyan* v. *Murugesam Pillai,* (1928) Mad W N 595.

[4] *Ma Hta Yi* v. *Ma Pwa Hnit,* 1928 Rang 12 (13): 5 Rang 610: 105 Ind Cas 710; *Muthuswami Pillai* v. *Srinivasier,* (1902) 12 Mad L Jour 194 (195); *Kon Poh* v. *Moung Tay* (1868) 10 Suth W R 143 (144); *Murari Rao* v. *Balvant Dikshit,* 1924 Mad 98 (99): 46 Mad 955: 45 Mad L Jour 309: 18 Mad L W 363: (1923) Mad W N 761: 76 Ind Cas 342; See also *Tadepalli Pichayya* v. *Tadepalli Subba Rao,* (1916) 34 Ind Cas 787 (788): 3 Mad L W 499: *Subbier* v. *Chinnappa Rowthan,* (1915) 26 Ind Cas 366 (367): 1915 Mad W N 22; *Ma Hta Yi* v. *Ma Pwa Hnit,* 1928 Rang 12 (12): 5 Rang 610: 105 Ind Cas 586; *Ali Akbar* v. *Khurshed Ali,* (1905) 27 All 695 (696): 1905 All W N 154: 2 All L J 465 [Suit dismissed on the ground that the stamp paid was insufficient—Review may be granted on the ground that the stamp was sufficient—This is "other sufficient reason"].

[5] *Ma Chit* v. *Maung Pyo,* 1892-96 U B R 287; *Ma Myit* v. *Kin Kin,* 1902-03 U B R Vol II Civ Pro P 3.

[6] *Tinnevelly Mills Co Ltd* v. *Mohideen Pichai Taraganar,* 1929 Mad 209 (210, 212); 1928 Mad W N 911: 117 Ind Cas 712; *Girdhar Lal* v. *Kapadyani Municipality,* 1930 Bom 317 (318, 319): 32 Bom L R 610: 128 Ind Cas 19. *Laxman* v. *Mt. Shevantibai,* 1927 Nag 252 (258); 102 Ind Cas 6.

[7] *Sitaram* v. *Raniram,* 1929 Nag 251 (253): 12 Nag L Jour 148: 121 Ind Cas 57 F B; *Jagannath* v. *Sriniras,* 1925 Nag 362 (363): 88 Ind Cas 112; *Great Indian Peninsula Railway* v. *Harakchand Hemchand,* 1929 Nag 58 (58): 112 Ind Cas 653; *Indraraj Singh* v. *Komal Ram Singh,* 1928 Nag 277 (278): 109 Ind Cas 253; *Akshy Kumar Bhattacharjee* v. *Agarwala,* 1922 Pat 308 (308) [Error with regard to the basis of calculation of limitation period]; *Syed Mahomed Ismail* v. *Janki Saran,* (1932) 13 Pat L Tim 384 (386): 1932 Pat 275: 11 Pat 519: 139 Ind Cas 533; See also *Kamla Prasad Choudhuri* v. *Kunj Behari Mandar,* 1922 Pat 119 (120): 1922 Pat H C C 1: 5 Pat L Jour 344: 1 Pat L Tim 625: 2 U P L R (Pat) 159: 57 Ind Cas 11: [Failure to raise a point of law]: *Girdharlal Mansukhbhai Gnadhi* v. *Kapadvanj Municipality,* 1930 Bom 317 (319): 32 Bom L R 610: 128 Ind Cas 19; But see *Sourendra Nath Mitra* v. *Jatindra Nath Ghose,* 1929 Cal 17 (19) 32 Cal W N 811: 115 Ind Cas 357. [Error of law by reason of which Court declines to enter into merits of case is error apparent on face of record].

[8] *Laxman* v. *Mt Shevantibai,* 1927 Nag 252 (253): 102 Ind Cas 6

[9] *Bankey Behari Lal* v. *Abdul Rahman,* 1932 Oudh 63 (66): 8 Oudh W N 1267: 135 Ind Cas 695; *Muthu Pillai* v. *Lakshminarayan.*

O. 47, R.1, Note 15.

in a form not legally correct.[10]

(2) Where a suit is dismissed for default in the presence of the plaintiff's pleader[11] or for non-joinder of parties.[12]

(3) Where a suit based on plaintiff's title is decreed simply on the ground that the defendant has not proved his title.[13]

(4) Where a woman is arrested in execution of a decree.[14]

(5) Where the Court fails to notice the provisions of S. 21 or of S. 98 of the Code[15] or fails to notice the bar of limitation applicable to the facts appearing on the record[16] or fails to apply the apposite law.[16-a]

(6) Where an adjudication is annulled in the absence of a prayer by either party.[17]

(7) Where the Court has omitted to try a material issue.[18]

(8) Where the want of jurisdiction is apparent on the face of record.[19] But where the parties invite the jurisdiction of the Court deliberately, they cannot turn round and object to it when the judgment is unfavourable to them.[20]

(9) Where the appellate Court reverses the finding of the lower Court without coming to a conclusion as to the incorrectness thereof.[21]

1928 Rang 177 (178): 6 Rang 254: 111 Ind Cas 80. [Suit dismissed on a date when parties had not been directed to be present]. *Maung Sein Myi* v. *Maung Tun Pe,* 1929 Rang 70 (71): 6 Rang 794: 114 Ind Cas 687; *Debi Baksh* v. *Shambu Dial,* 1926 All 384 (386): 48 All 281: 24 All L J 266: 94 Ind Cas 877 [Amendment without notice]; *Bhola Nath Chatterjee* v. *Maharajadhiraj of Burdwan,* 1932 Cal 265 (266): 54 Cal L Jour 490: 137 Ind Cas 430 [Order setting aside sale without notice].

(10) *Som Nath* v. *Ram Bilas,* (1914) 24 Ind Cas 113 (114): 1 Oudh L J 193.

(11) *Khasomal* v. *Bacho,* 1929 Sind 38 (39): 115 Ind Cas 314; *Bhagwan Prasad* v. *Madan Murari Lal,* 1929 All 811 (812): 1929 All L J 1183: 119 Ind Cas 15.

(12) *Girish Chunder* v. *Juramoni,* (1900) 5 Cal W N 83 (85).

(13) *Sheo Mangal Singh* v. *Jagmohan Singh,* 1925 Oudh 829 (330): 12 Oudh L Jour 30: 86 Ind Cas 29.

(14) In re the petition of *Radhi,* (1888) 12 Bom 228 (230).

(15) *Mukundsa* v. *Motiram,* 1929 Nag 73 (74): 12 Nag L Jour 13: 116 Ind Cas 645: 25 Nag L R 104 [S 21 not noticed]: *Husani Begam* v. *The Collector of Muzafarnagar,* (1889) 11 All 176 (182): 1889 All W N 27: 13 Ind Jur 316 [S. 98 not noticed].

(16) *Kawdu* v. *Berar Ginning Co, Ltd,* 1929 Nag 185 (190): 116 Ind Cas 427; *Ramu Rai* v. *Dayal Singh,* (1894) 16 All 390 (394): 1894 All W N 131; *Debi Sahai Gulzari Mal* v. *Basheshar Lal Bansi Dhar,* 1928 Lah 919 (919): 112 Ind Cas 540.

(16-a) *British Equitable Assurance Co, Ltd* v. *Secretary of State for India,* 1928 Nag 305 (306): 11 Nag L Jour 184 [Failure to apply the apposite law—Review lies].

(17) *China Venkatapayya* v. *Punayya,* 1932 Mad W N 153 (158) F B.

(18) *Husain Ali* v. *Nasirudin,* (1871) 16 Suth W R 134 (134); *Bihari Lal* v. *Troyluckho Mayi,* (1869) 12 Suth W R 223 (224): 3 Beng L R A C 346.

(19) See also *Faiz Muhammad* v. *Muhammad Zakriya,* (1911) 11 Ind Cas 15 (16): 140 Pun W R 1911: 195 Pun L R 1911. [Suit clearly cognisable by Small Cause Court—Small Cause Court dismissing suit on the ground that the suit was not Small Cause—Review lies]; *Ram Prasad Pramanik* v. *Sri Charan Mandal,* (1917) 41 Ind Cas 276 (277): 21 Cal W N 1109: 27 Cal L Jour 594.

(20) *Hazra Sardhar* v. *Kunja Behary Nag Chowdhury,* (1918) 44 Ind Cas 161 (161) Cal; *Ram Autuar* v. *Muhammad Abdul Hasan Khan,* (1915) 36 Ind Cas 83 (84): 3 Oudh L J 268; *Maratib Khan* v. *Musst Moujo,* (1882) Pun Re No. 94; In the matter of the petition of *Tufani Singh,* (1871) 6 Beng L R App 141. See also *Sabapathi* v. *Subraya,* (1878-80) 2 Mad 58 (60): 3 Ind Jur 210.

(21) *Jai Narain Lachmi Narain* v. *G. I. P. Ry Co,* 1930 Lah 37 (38): 11 Lah 158: 31 Pun L R 419: 123 Ind Cas 845.

(10) Where the judgment was not clear as to whether the defendants were liable individually or not.[22]

(11) Where a suit was, by mistake, dismissed where it ought to have been decreed on the findings of the Court.[23]

(12) Where a calculation of an amount is wrongly made.[24]

(13) Where the judgment used certain expressions wrongly when it plainly meant something different.[25]

(14) Where the law was indisputable that a certain property was not exempt from liability for the suit claim and the defendants did not claim any such exemption but the judgment without any discussion on the point, exempted the property from liability.[26] (Under the circumstances it was clear that the error was not the result of any exposition of law). *See also* the following cases.[27]

Where the Court granted a claim for personal relief, a prayer for which could not on a proper construction of a doubtfully worded clause in the plaint, be made out, the error is not one apparent on the face of the record justifying a grant of review.[28] So also is the failure to give a formal finding on an issue tried and decided[29] or allowing the petitioner to prove fraud which was not pleaded.[30]

It was held in the undermentioned cases[31] that the fact that the Court had overlooked a previous ruling of the High Court on a point of law, may, be an error apparent on the face of the record. A contrary view has been taken in the cases noted below.[32] It is submitted that the latter view is correct. As was observed by the Madras High Court in *Babu Vaidyan* v. *Murugesam Pillai*[33] "it is difficult to see how an error can be said to exist on the face of

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(22) *Firm, Bhagwan Das Parsram* v. *Jado Nath*, 1926 Lah 236 (236): 92 Ind Cas 898.

(23) *Oudh Bihari Pande* v. *Mahadeo Sahi*, (1912) 13 Ind Cas 646 (646) All.

(24) *Akbar Ali* v. *Mukhdoom Buksh*, (1876) 25 Suth W R 63 (64). See also *Nand Kishore Singh* v. *Ram Gulam Sahu*, (1912) 17 Ind Cas 221 (222): 16 Cal W N 1089: 39 Cal 1037 [Where it was held that there was no error and that therefore there was no ground for review].

(25) In the matter of the petition of *Khalil Ahmad*, (1908) 30 All 309 (309, 310): 5 All L J 405: 1908 All W N 133.

(26) *Ram Das* v. *Sundar Singh*, 1929 Lah 424 (425): 30 Pun L R 593: 118 Ind Cas 396

(27) *Ganesh Ram* v. *Rohinee Dassee*, (1870) 14 Suth W R 236 (236). [Mistake about document]; *Nagbhushanam* v. *Jagannaikulu*, 1925 Mad 1031 (1032) 22 Mad L W 231 49 Mad L Jour 671: 90 Ind Cas 775. [Wrong statement about admission by party]; *Baliram Piraji* v. *Yeshwanta M A Mt Tulsi*, 1924 Nag 190 (191): 75 Ind Cas 829 [Where decree was in consonance with the judgment but there was the erroneous direction in the judgment that the pre-emption price should be paid to defendant No. 1 instead of defendant No. 3]; *Manikavasaka Desika Gnana Sambanda Pandaram Sannadhiar* v. *Sundaram Pillai*, (1909) 4 Ind Cas 1141 (1141): 5 Mad L Tim 284: *Mt. Rukhmabai* v. *Ganpatrao*, 1932 Nag 177 (179): 28 Nag L R 221: 140 Ind Cas 409. [Omission to consider important facts on record is ground for review.]

(28) *Syed Mahomed Ismail* v. *Janki Saran*, 1932 Pat 275 (276): 13 Pat L Tim 384: 11 Pat 519: 139 Ind Cas 533.

(29) *Sabapathi* v. *Subraya*, (1878-80) 2 Mad 58 (60): 3 Ind Jur 210.

(30) *Syed Mahomed Rowther* v. *Sundara Mudaliar*, 1931 Mad 608 (608): 133 Ind Cas 206

(31) *Murari Rao* v. *Balavanth Dikshit*, 1924 Mad 98 (99). 46 Mad 955; 45 Mad L Jour 809: 18 Mad L W 363: 1923 Mad W N 761: 76 Ind Cas 342; See also *Sharup Chand* v. *Pat Dassee*, (1887) 14 Cal 627 (630, 631): *Sakho Narayan Khandalkar* v. *Narayan Bhikaji Khandalkar*, (1869) 6 Bom H C R (A C) 238 [Remand order passed by High Court—ruling which will affect such order not brought to notice of Court—Proper course is to apply for review]

(32) *Opporti Padhi* v. *Palila Ujjulla*, 1927 Mad 998 (1000): 106 Ind Cas 514 [1924 Mad 98 and 1925 Cal 304 doubted]; *Babu Vaidhyan* v. *Murugesam Pillai*, 1928 Mad W N 595 (599) See also *Maula Baksh* v. *Sajawal Shah*, (1929) 141 Ind Cas 427 (427) Lah.

(33) 1928 Mad W N 595 (598).

the record where you have to travel outside the record to see if the judgment is correct or not."

Where the view of the law on which a judgment is based is *subsequently* overruled or modified by a superior Court, it cannot be a mistake or error on the face of the record.[34]

16. **"Any other sufficient reason".**—There has been a great diversity of judicial opinion as to the exact meaning of this expression, "any other sufficient reason." In *Chajju Ram* v. *Neki*[1] their Lordships of the Privy Council, after reviewing the case law declared that the expression should be interpreted as meaning a reason sufficient on grounds *at least analogous to those specified immediately previously.* (*See* in this connection, Preamble Note 7, point 30). There is still a great diversity of opinion as to what is and what is not, a reason "analogous" to the reasons specified. According to the High Court of Rangoon, the word "analogous" is distinguishable from the expression "*ejusdem generis*" and the former word, as used by the Privy Council, is wider than the expression "*ejusdem generis*".[2] The want of uniformity in the decisions on this subject even after the Privy Council decision is apparently due to the fact that, in most cases, it is a matter for argument whether any reason is analogous to the reasons specifically mentioned in the rule.[3] The case-law bearing on the subject has been summarised in Notes 16-A and 16-B, *infra.*

16-A. **Cases where review was allowed on ground of sufficient reason.**—It has been held that a review can be granted in the following cases:—

(1) Where the decree or order has been passed under a misapprehension of the true state of circumstances.[1]

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(34) *Salleh Mahomed Umar Dossai* v. *Nathumal Kissamal*, 1925 Sind 53 (54): 78 Ind Cas 998: 19 Sind L R 30; *Srimati Garibani Kumarin* v. *Suraja Narain Singh*, 1924 Pat 250 (253): 3 Pat 134: 5 Pat L Tim 52: 1923 Pat H C C 361: 75 Ind Cas 177; But see *Brindaban Chandra Gosh* v. *Damodar Prasad Panday*, 1925 Cal 304 (305): 29 Cal W N 148: 85 Ind Cas 65.

Note 16.

(1) 1922 P C 112: 30 Mad L Tim 295: 3 Luck 127: 16 Mad L W 37: 26 Cal W N 697: 3 Pat L Tim 435: 17 Pun W R 1922: 49 Ind App 144: 24 Bom L R 1238: 36 Cal L Jour 459: 43 Mad L Jour 332: 41 Pun L R 1922: 72 Ind Cas 566 P C.

See also the following cases:—

Seth Sorabji v. *Seth Dwarkadas*, (1929) 113 Ind Cas 887 (891) N: 1929 Notes 18-d: *Ganesh Das* v. *Hari Singh*, 1932 Lah 596 (597): 138 Ind Cas 379: 33 Pun L R 290: 13 Lah 546. *Sadasheo* v. *Vithoba*, 1927 Nag 368 (368): 100 Ind Cas 30; *Krishna Ram* v. *Rai Rukamin Sawak*, 1882 All W N 102 (102). But see *The Himalayan Bank, Ltd* v. *Dora E Jervis*, 1894 All W N 148 (148) [No longer law after the Privy Council decision]; *Narain Das* v. *Chiranji Lal*, 1925 All 364 (365): 23 All L J 56: 6 L R All (Civ) 159: 86 Ind Cas 168: 47 All 361. [Not good law].

The words used in the corresponding provisions of the Code of 1859 were general and hence it was held that the Court's discretion in saying what was sufficient reason for review was not limited in any way—see for instances the following cases:—*Reasut* v. *Abdullah*, (1877) 2 Cal 131 (140, 141); *Huree Pershad* v. *Nand Kishore*, (1872) 17 Suth W R 479 (479).

(2) *K K S A R Firm* v. *Maung Kya Nun*, 1928 Rang 81 (82): 5 Rang 675: 107 Ind Cas 161.

(3) See the observations of Mookerjee, J, in *Kumar Gopika Raman Ray* v. *Mahar Ali*, 1924 Cal 872 (874): 39 Cal L Jour 247: 81 Ind Cas 738 where he said that the question whether a particular reason is analogous to either the one or the other of the reasons specified in the rule may lead to very refined if not subtle arguments.

Note 16-A.

(1) *Kyone Hoe* v. *Kyon Soon Sun*, 1925 Rang 314 (317): 3 Rang 261: 91 Ind Cas 509 [Where the Court thought that the counsel agreed to consent order when as a matter of fact he did not—*Held*, it was analogous]; *Kumar Gopika Raman Ray* v. *Mahar Ali*, 1924 Cal 872 (874): 39 Cal L Jour 247: 81 Ind Cas 738 [Mistaken impression that a party had waived a certain objection]; *Bijadhur Bhagut* v. *Jeat Chamar*, 1924 All 518 (520): 22 All L J 647: 5 L R All (Civ) 404: 80 Ind Cas 601 [Misunderstanding or slip which has led to an erroneous statement of fact in a judgment]; *Shamsuddin Biswas* v. *Molannessa Bibi*, 1926 Cal 941 (943): 95 Ind Cas 800 [Mistakenly holding that a certain question is not in dispute]; *Gopal Chandra* v. *Soloman*, (1886) 13 Cal 62 (66) [Omission to notice contents of document]; *Bhubaneswari Koer* v. *Ajodhia Singh*, (1911) 11 Ind Cas 102 (103): 15 Cal L Jour 389 [After appointment of Receiver decree granted to a party may be set aside on review]; *Lakshmana Nadan* v. *Pakhia Nadathi*, (1911) 9 Ind Cas 273 (274): 9 Mad L Tim 361 [Court's misimpression

(2) Where a party has not had a fair opportunity of producing his evidence.[2]

(3) Where the Court has failed to consider important evidence.[3]

(4) Where the Court has failed to consider important facts on the record.[4]

(5) Where the Court has failed to consider an important plea or issue.[5]

(6) Where the case is an exceptional one[6] as where the point involved is one of general importance.[7]

(7) Where the Court has omitted to notice certain provisions of the Code.[8]

For other instances, *see* the undermentioned cases.[9]

16-B. Cases where review was not allowed on the ground that there was no sufficient reason.—It has been held that review cannot be granted in the following cases:—

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as to the stamp affixed on the suit document]; *Kadir Bakhsh* v. *Abdul Rahman*, 1887 All W N 105 (105).

[2] *K K S A R Firm* v. *Maung Kya Nyun*, 1928 Rang 81 (82): 6 Rang 675: 107 Ind Cas 161 [Summons to witness returned unserved as witness could not be found—Court with a view to avoid the case pending idly declining to adjourn the case for giving a further opportunity to the party concerned to secure his attendance and deciding suit —Witness subsequently found out and party applying for review—Application granted]; *Mt Tirbeni Kunwar* v. *Mohan Lal*, 1922 All 366 (367): 66 Ind Cas 558 [Party ill on date of hearing—Evidence not produced—Review allowed]; *Kunjan* v. *Chandra Has*, 1925 Oudh 266 (266): 11 Oudh L J 682: 86 Ind Cas 515: 28 Oudh Cas 4 [Want of opportunity to plaintiff to rebut defendant's evidence is sufficient ground]; *Ram Lal* v. *Rung Lal*, (1872) 17 Suth W R 47 [Improper refusal to admit evidence].

[3] *Mahadev* v. *Sappani*, (1876-78) 1 Mad 396 (401): 2 Ind Jur 747.

[4] *Mt Rukhmabai* v. *Ganpatrao*, (1932) 28 Nag L R 221 (224, 225): 1932 Nag 177: 140 Ind Cas 409.

[5] *Behari Lal Nandee* v. *Tryoluckho Moyee Burmonee*, (1869) 12 Suth W R 223 (224): 3 Beng L R (A C) 346; *Hassan Ali* v. *Nasiruddin*, (1871) 16 Suth W R 134 (134); *J P Wise* v. *Huro Lal Giree Gossain*, (1871) 16 Suth W R 150 (151); *Sunder Singh* v. *Nihala*, (1911) 9 Ind Cas 545 (546): 26 Pun L R 1911: 42 Pun W R 1911.

[6] *Govindan Nayar* v. *Ithaletty*, 1926 Mad 764 (764): 50 Mad L Jour 493: 1926 Mad W N 442.

[7] *Pokardas Jashiomal* v. *Forbes Campbell and Co, Ltd*, (1914) 19 Ind Cas 363 (364): 6 Sind L R 127; *Sulleman Hussein* v. *New Oriental Bank Corporation*, (1891) 15 Bom 267 (274): Chitty's S C C R 252. See also *J N Surty* v. *T S Chettiar Firm*, 1927 Rang 20 (23): 4 Rang 265: 98 Ind Cas 417: 5 Bur L Jour 187.

[8] *Wahed Ali* v. *Chanda Mia*, (1919) 52 Ind Cas 29 (30): 30 Cal L Jour 250 [Omission to notice certain provisions of the Code—Review allowed].

[9] *Maung Pu* v. *Ma Yit*, 1930 Rang 162 (164): 126 Ind Cas 644 [Taking too strict view of title of suit and its prayer and overlooking need for doing substantial justice]; *Tunuguntla Chinna Venkatappayya* v. *Chilankuri Punnayya*, 1932 Mad W N 153 (158) F B [Ordering a thing not prayed for by either party]; *Subbaraya* v. *Sundaresa*, (1932) 36 Mad L W 586 (589): 1933 Mad 5: 140 Ind Cas 226: 1932 Mad W N 1262 [Discovery of a reasonable ground for adjournment is a sufficient ground for reviewing an order refusing to grant an adjournment]; *Sripat* v. *Hubdar*, 1925 Oudh 643 (644): 2 Oudh W N 678: 90 Ind Cas 115 [Appeal dismissed under O. 41, R 11 without notice to appellant as required by that rule—Review lies]; *Girish Chander* v. *Juramoni De*, (1901) 5 Cal W N 83 (85) [Suit dismissed for non-joinder of parties—Review lies]; *Abdul Rahim* v. *Racha Rai*, (1877) 1 All 363 (366): 1 Ind Jur 818 [Material documentary evidence discredited without being examined—Review lies]; *Harihar* v. *Madab Chandra*, (1871) 20 Suth W R 459 (464): 14 Moo Ind App 152: 8 Beng L R 566: 2 Sar 713: 2 Suth 484 P C [*Onus* of proof placed wrongly—Review lies]; *Sulleet Mohun Roy Chowdhry* v. *Sowtra Bebee*, (1868) 10 Suth W R 42 (43) [Unfairness of trial—Review lies]; *Vertannes* v. *Muthiah Chetty*, (1913) 19 Ind Cas 48 (50): 6 Bur L Tim 53 [Case decided on a point not raised by any party —Review lies]; *Gungapershad* v. *Maharani*, (1884) 12 Ind App 47 (51): 11 Cal 379: 4 Sar 621: 9 Ind Jur 158 P C [Case disposed of on new point—Party surprised—Review lies]; *Haimabati Devi* v. *Pran Krishna Banerjee*, 1921 Cal 393 (395): 27 Cal W N 193: 75 Ind Cas 262 [Compromise decree—Facts making compromise not binding on one of the parties—Review lies]. See also *Vellaya* v. *Jaganatha*, (1884) 7 Mad 307 (309) [While the discovery of a fresh authority may not entitle a party to a review of judgment, yet when a Judge is satisfied that his judgment has proceeded on an erroneous view of the law, the words of S 623 are wide enough to allow him to review his judgment and to decide according to law]; *Hira* v. *Musst Malo*, 1881 Pun Re No 128; *Amir Hasan* v. *Ahmad Ali*, (1887) 9 All 36 (40, 42): 1886 All W N 293: *Jatra Mohan* v. *Aukil Chandra*, (1896) 24 Cal 334 (336): 1 Cal W N 314 [Review granted on ground of certain decisions not having been considered].

O. 47, R. 1
Note
16-B.

(1) Where it is asked for to enable the applicant to raise points which he could and ought to have raised at the former hearing.[1]

(2) Where the review is asked for on the ground that if another opportunity were given to the applicant to establish his case he could prove the judgment of the Court to be wrong.[2]

(3) Where the review is asked for on the ground that the case has been mismanaged by the party's counsel.[3]

(4) Where review of an *ex parte* decree or an order of dismissal for default is sought for on the ground that the case ought not to have been decided *ex parte* or dismissed for default.[4]

Note 16-B.

(1) *Gopalchandra* v. *Solomon*, (1886) 13 Cal 62 (65); *Kamala Prasad Chandhur* v. *Kunj Behari Mandar*, 1922 Pat 119 (120): 1922 Pat H C C 1: 5 Pat L Jour 344: 1 Pat L Tim 625: 2 U P L R (Pat) 159: 57 Ind Cas 11; *Mahommad Azmat Ullah Khan* v. *Abdul Hamid*, 1926 Lah 655 (656): 96 Ind Cas 832; *Makin* v. *Ma Mein Gale*, 1892-96 U B R 284; *Mottai Goundan* v. *Ramaswami Ayyangar*, (1933) 141 Ind Cas 381 (383) Mad; *Sialkot Mission* v. *Sir Bisheshardas Daga*, 1928 Nag 144 (144): 109 Ind Cas 95; *Ganesh* v. *Vithal*, 1922 Bom 114 (116): 64 Ind Cas 156: 46 Bom 79: 23 Bom L R 745; *Modhori Saran* v. *Parbati*, 1925 All 552 (553): 23 All L J 534: 6 L R A (Civ) 454: 88 Ind Cas 658: 47 All 881; *Shyam Lal* v. *Chandrika Dat Ram*, 1926 Jour 189: 13 Oudh L J 507; *Adit Narayan Singh* v. *Mahabir Prasad Tiwari*, (1917) 38 Ind Cas 196 (199) Pat; *Corea* v. *Peiris*, (1910) 5 Ind Cas 50 (55): 14 Cal W N 86 P C; *Munshad Bibi* v. *Luchmeput*, (1868) 9 Suth W R 129 (129); *Bhawabal Singh* v. *Rajendra Pratap*, (1870) 5 Beng L R 321: 13 Suth W R 157; *Hussaina* v. *Sahib Nur*, (1914) 22 Ind Cas 785 (786): 208 Pun W R 1913: 103 and 197 Pun L R 1914; *Prosunno Nath* v. *Judoo Nath*, (1868) 9 Suth W R 589 (589); *Musst Ramdei* v. *Nandan Singh*, (1913) 19 Ind Cas 689 (689) All. See also *Sabapathi* v. *Subraya*, (1878) 2 Mad 58 (60): 3 Ind Jur 210 [Point abandoned—No review for raising that point]; *Mariam Begam* v. *Sayed Mahommad*, (1900) 3 Oudh Cas 279 (280), (Do.); *Fakirbhai* v. *Sorabji*, 1886 Bom Print Judgt 95 [Oversight committed by the plaintiff in the conduct of his case and whereby he apprehends adverse result in subsequent suit to be brought by him is no ground for amending the decree under this rule]; *Jijibhoy N Surty* v. *T S Chettiar*, 1928 P C 103 (103): 5 Oudh W N 479: 30 Bom L R 842: 47 Cal L Jour 510: 54 Mad L Jour 696: 109 Ind Cas 1: 6 Rang 302: 26 All L J 657: 32 Cal W N 845: 55 Ind App 161: 28 Mad L W 207 P C [*Quaere* whether a party is entitled, by a proceeding in review, to take a point not taken by him at the original hearing].

[But see *Nikki* v. *Gujar Mal*, (1917) 42 Ind Cas 54 (55): 94 Pun W R 1917: 114 Pun L R 1917 (Review cannot be rejected simply on the ground that the counsel of the applicant had neglected to press the matter at the time of argument)].

(2) *Bindubashi Roy Chowdhury* v. *Secretary of State for India*, 1924 Cal 774 (775): 51 Cal 70: 40 Cal L Jour 163: 79 Ind Cas 745 [Available evidence not produced by Government who was a party—Fresh opportunity by means of a review cannot be granted]; *Gita Ram* v. *East Indian Railway*, (1914) 23 Ind Cas 394 (395) All; *U Po Thein* v. *O A K R M Firm*, 1928 Rang 34 (35, 36): 5 Rang 699: 106 Ind Cas 368; *Nagala* v. *Nagathan*, (1912) 14 Ind Cas 837 (839): 5 Bur L Tim 57; *Binda Prasad* v. *Raghubir Saran*, (1915) 29 Ind Cas 994 (995); 13 All L J 673: 37 All 440; *Manwar Shah* v. *Nizamalikhan*, (1920) 57 Ind Cas 145 (147) Nag; *Nadathi* v. *Aseervada*, (1919) 53 Ind Cas 44 (46) Mad; *Choonee Munder* v. *Chundee Lal*, (1870) 14 Suth W R 334 (335); *Burramollah* v. *Nilchand Dutt*, (1872) 17 Suth W R 484 (484); *Chunder Churn* v. *Loodun Ram*, (1876) 25 Suth W R 324 (325); *Koteemooddeen* v. *Heerun Mundal*, (1875) 24 Suth W R 186 (187); *Roy Megraj Bahadoor* v. *Bejoy Gobind Burrae*, (1875) 23 Suth W R 438 (439): 1 Cal 197; *Jadub Ram* v. *Ram Lochun*, (1873) 19 Suth W R 189 (190); *Tekaet Khood Narain Singh* v. *Toolsee Roy*, (1871) 15 Suth W R 9 (10, 11).

[But see *Bhagela Kuer* v. *Abdul Rahiman*, (1917) 40 Ind Cas 79 (80) Pat (Court can in the interests of justice grant a review to the party affected by the non-production of a document before judgment notwithstanding his gross negligence)].

(3) *Prag Dutta* v. *Kanhaiya Lal*, (1918) 48 Ind Cas 918 (919): 5 Oudh L J 695 [Failing to produce evidence on account of wrong advice of counsel]; *Trimbak* v. *Krishna Rao*, 1929 Nag 89 (90): 11 Nag L J 238: 115 Ind Cas 178 [Appellant's counsel unprepared—Court refusing adjournment]; *Narayana Chettiar* v. *Muthu Chettiar*, 1926 Mad 980 (983): 51 Mad L Jour 219: 1926 Mad W N 890: 97 Ind Cas 1008: 50 Mad 67 [Absence of pleader is not sufficient ground]; *Gangabai* v. *Ghansaram*, 1921 Nag 3 (4): 4 Nag L J 16: 62 Ind Cas 253, (Do.).

[But see *Pridhanmal* v. *Ladoo*, 1931 Sind 3 (4): 130 Ind Cas 545: 25 Sind L R 242 (Mis-conception of pleader is sufficient reason)].

(4) *Santu* v. *Arjan Das*, (1912) 13 Ind Cas 318 (318): 131 Pun W R 1912 [*Ex parte* decree]; *Manphul Singh* v. *Hakim Hamid Ali Khan*, 1923 All 576 (577): 21 All L J 416: 4 L R A (Civ) 276: 74 Ind Cas 528 [Dismissal for default]; *Srinivasam Pillai* v. *Rukmani Ammal*, 1928 Mad 964 (965, 967): 55 Mad L Jour 330: 28 Mad L W 358: 1928 Mad W N 701, (Do.); *Ramaraghara Reddi* v. *Rajah of Venkatagiri*, 1927 Mad 355 (355, 356): 52 Mad L Jour 123: 25 Mad L W 192: 99 Ind Cas 954, (Do.).

[But see *Ghansham* v. *Lal*, (1887) 9 All 61 (64): 1886 All W N 296 F B. See also *Bankey Behari Lal* v. *Abdul Rahman*, 1932 Oudh 63 (65): 8 Oudh W N 1267: 135 Ind Cas 695 (Where application is dismissed without hearing the parties, there is mistake apparent on the face of the record)].

(5) Where the Court has proceeded on a wrong exposition of the law or has wrongly decided on a question of law.[4-a] *See also* Note 15, *ante.*

For other instances, *see* the following cases.[5]

17. **Review on the ground of subsequent events.**—As has been seen in Note 10, *ante*, the happening of a *subsequent* event is not a valid ground for review.[1] Thus a subsequent legislation altering the law,[2] or a subsequent admission of a party as to the matter litigated[3] is not a ground for review. Where a suit is decreed on condition of the plaintiff complying with certain requirements within a particular time and it is subsequently found that the period allowed by the decree is insufficient for the fulfilment of the conditions imposed, it has been held that the Court has jurisdiction to review the judgment and enlarge the period.[4]

17-A. **No review on ground of decision being erroneous on merits.**—A review cannot be granted on the ground that the decision is erroneous on the merits, such a ground being appropriate for an appeal and not for an application for review.[1]

(4-a) *Chaju Ram* v. *Neki*, 1922 P C 112 (113, 114): 3 Lah 127: 16 Mad L W 37: 26 Cal W N 697: 3 Pat L Tim 435: 17 Pun W R 1922: 30 Mad L Tim 295: 43 Mad L Jour 332: 49 Ind App 144: 24 Bom L R 1238: 36 Cal L Jour 459: 41 Pun L R 1922: 72 Ind Cas 566 P C; *Onkar Lala* v. *Yado Prasad*, (1928) 107 Ind Cas 908 Nag: 1928 Notes 41-C; *Trimbak* v. *Krishna Rao*, 1929 Nag 89 (90) [Omission to consider certain aspects or phases of question of limitation is no ground for review]; *Ruqaiya Khanam* v. *Fazl Haq*, 1921 Oudh 260 (260): 24 Oudh Cas 154: 63 Ind Cas 344; *Madho Prasad* v. *Sukh Din*, 1925 Oudh 644 (645): 85 Ind Cas 752 [Error of law is, no ground for review]; *Nem Dass* v. *Kunj Behari Lal*, 1930 Oudh 392 (394): 7 Oudh W N 741: 126 Ind Cas 677; *Ma Kyaw* v. *Ma Kyin*, 1922 U B 16 (17, 18): 64 Ind Cas 895: 4 U B R 27 [Review applied for on the ground that judge had overlooked certain decisions—No review]; *Kanshi Ram* v. *Diwanchand*, 1933 Lah 169 (170): 141 Ind Cas 188; *Ganesh Das* v. *Hari Singh*, (1932) 33 Pun L R 290 (291): 1932 Lah 596: 138 Ind Cas 379; *Hiralal* v. *Lomkaran*, (1928) 108 Ind Cas 750 (751) Lah: 1928 Notes 33-a; *Hussaina* v. *Sahib Nur*, (1914) 22 Ind Cas 785 (786): 208 Pun W R 1913: 103 and 197 Pun L R 1914 [Omission to rely on certain provisions of the Law cannot be a ground for review]; *Abdul Gani* v. *Sito Singh*, 1925 Pat 368 (369): 6 Pat L Tim 40: 86 Ind Cas 143; *Nobin Kishen Mukerjee* v. *Shib Pershad Pattack*, (1868) 9 Suth W R 161 (161); *Ellen* v. *Mohd Basheer*, (1875-76) 1 Cal 184 (185, 186): 24 Suth W R 382; *Fergusson* v. *The Government*, (1868) 9 Suth W R 158 (160).

(5) *K A Muhammad Sultan Sahib* v. *Nagoji Rao*, 1931 Mad 828 (829, 830): 1931 Mad W N 963: 135 Ind Cas 539 [Execution against surety—Failure to give notice to surety to show cause why decree should not be executed against him is no ground for reviewing order for execution]; *Syed Mahomed Ismail* v. *Janki Saran*, (1932) 13 Pat L Tim 384 (385): 1932 Pat 275 [Rulings discovered by Court *suo motu*—No opportunity given to party to explain—No review]; *Raghu Singh* v. *Mahant Krishna Dayal Gir*, 1924 Pat 258 (259): 2 Pat 765: 82 Ind Cas 502 [Omission to refer to certain evidence in the judgment is no ground for review]; *Sheo Ratan* v. *Lappu Kuer*, (1883) 5 All 14 (16): 1882 All W N 157: 7 Ind Jur 319 [The fact that the High Court has in second appeal found a fact not determined by the lower Courts, or wrongly imagined that an issue had not been tried by them, is not a ground for review]; *Bibi Jagaran* v. *Bibi Zohra*, (1917) 42 Ind Cas 970 (970) Pat [Pardanashin lady—Case neglected by agent—No review]; *Ma Naw Naw* v. *V E S S M Somasundaram Chetty*, 1925 Rang 187 (188): 2 Rang 655: 85 Ind Cas 324 [Negligence of agent—No review]; *Govindaswami Naicken* v. *Kally*, 1893-1900 L B R 540 [Revision application—Revision not competent but appeal competent—Revision application itself treated as appeal Procedure irregular—But as it is a purely technical matter, it is no ground for review]; *Rakub Doss* v. *Sooraj Mul*, Bourke O C 131 [Erroneous decision on immaterial point is not sufficient ground]; *Cowell* v. *Mahadeb Mundul*, (1872) 17 Suth W R 182 (182) [New point allowed to be raised but no surprise caused to the other party—No review]; *Muhammad Shah Khan* v. *Muhammad Yar Khan*, 1885 All W N 123 (123) [Inconsistent view by the same Judge is no ground for review]; *Raman* v. *Karunath Tharakan*, (1878-80) 2 Mad 10 (11, 12): 1 Ind Jur 87: 1 Mad L R 140 [No review on ground of previous decision having done injustice].

Note 17.

(1) See also *Annamalei Chettiar U R M N M* v. *Subramaniya Ayyar*, (1908) 4 Mad L Tim 86 [13 Bom 330 must be deemed to be overruled by the decision in 24 Mad 1]; *Neki* v. *Chajju Ram*, (1917) 48 Ind Cas 137 (138): 111 Pun W R 1918 [Subsequent review order].

(2) *Gyanji Pomaji Marwadi* v. *Ningappa Marbasappa Arleeswar*, 1928 Bom 308 (310): 30 Bom L R 668: 52 Bom 434: 111 Ind Cas 633; *Sarfaraj Khan* v. *Ramchandra*, 1924 Nag 70 (71): 73 Ind Cas 4.

(3) *Golamali Jemadar* v. *Abdul Karim Sarkar*, (1910) 5 Ind Cas 182 (183): 14 Cal W N 244: 11 Cal L Jour 26.

(4) *Narain Das* v. *Chiranji Lal*, 1925 All 364 (365): 23 All L J 56: 6 L R All (Civ) 159: 86 Ind Cas 168: 47 All 361; *Krishnamacharlu* v. *Venkatasubbiah*, 1926 Mad 1059 (1060): 24 Mad L W 443: 1926 Mad W N 713: 97 Ind Cas 795; *Ankayya* v. *Subadrayya*, 1932 Mad 223 (224): 35 Mad L W 57: 1932 Mad W N 72: 138 Ind Cas 121; *Mt Ram Kumari* v. *Deonandan Singh*, 1925 Pat 452 (453): 1925 Pat H C C 151: 90 Ind Cas 79.

Note 17-A.

(1) *Prosunnonath Dutt* v. *Jadunath Paul*, (1868) 9 Suth W R 589 (589) [Failure to remand a

O. 47, R. 1, Notes 18—20.

18. **Review on particular ground.**—*See* Note 2 to R. 8.

19. **No review of fact after decision in second appeal.**—The High Court in second appeal cannot enter into questions of fact (*see* S. 100). It follows from this that after the disposal of a second appeal, no review thereof will lie on the ground of a discovery of a new and important evidence as to a question of fact.[1]

20. **Application of the rule to miscellaneous proceedings under the Code.**—The rule applies to all decrees and orders under the Code under the circumstances mentioned in the rule.[1]

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case—No review lies on such ground]; *Nem Das v. Kunj Behari Lal*, 1930 Oudh 392 (394): 7 Oudh W N 741: 126 Ind Cas 677 [Deliberate order limiting purview of enquiry—No review]; *Joggobindhoo Bose v. Wise*, (1869) 12 Suth W R 409 (410) [Application on the ground of improper remand—Review not granted]; *Shaikh Munooroodeen v. Kadir Buksh*, (1875) 24 Suth W R 410 (411); *Banee Madhub Bose v. Kalu Churn Singh Roy*, (1875) 24 Suth W R 387; *Roy Megraj v. Beejoy Gobind Burral*, (1875-76) 1 Cal 197 (200): 23 Suth W R 438; *Khalil v. Yaqin-ud-din*, (1916) 35 Ind Cas 342 (343): 135 Pun L R 1916: 147 Pun W R 1916; *Krishna Ram v. Rai Rukmin Sewak*, 1882 All W N 102 (102); *Lachman Singh v. Mohan*, (1879) 2 All 497 (505); *Gita Ram v. East Indian Railway Company*, (1914) 23 Ind Cas 394 (395) All; *Ma Kyaw v. Ma Kyin*, 1922 U B 16 (17, 18); *Khalil v. Yiginuddin*, (1916) 35 Ind Cas 342 (343): 135 Pun L R 1916: 147 Pun W R 1916.

Note 19.

[1] *Mariamunnissa Bibi v. Babu Ram*, 1923 All 541 (542): 21 All L J 377: 73 Ind Cas 1016: 45 All 458: 4 L R All (Civ) 416; *Nand Kishore v. Anwar Hussain*, (1909) 4 Ind Cas 809 (810): 6 All L J 979: 32 All 71; *Bandhan Singh v. Chet Narain*, 1895 All W N 131 (131); *Hari Ganu Bhandirge v. Hari Ganu Shinde*, 1929 Bom 225 (226): 31 Bom L R 436: 118 Ind Cas 255; *Ramchandra v. Krishnaji*, (1904) 28 Bom 4 (7, 8): 5 Bom L R 615; *Sailabala Dei v. Gadadhar*, 1922 Cal 165 (165): 36 Cal L Jour 76: 27 Cal W N 918: 70 Ind Cas 408; *Rajani Kanta Das v. Kali Prasanna Mukerjee*, (1915) 26 Ind Cas 281 (281): 41 Cal 809; *Bhyrup Nath v. Kally Chunder*, (1871) 16 Suth W R 112 (114); *Panchanan v. Radhanath*, (1870) 4 Beng L R A C 213; *Jackammal v. Palaniappa Chetty*, (1869-70) 5 Mad H C R 464 (465, 466); *Raru Kutti v. Mamad*, (1895) 18 Mad 480 (481).

[But see *Gulam Mahade v. Ramakrishna Mudaliar*, (1900) 10 Mad L Jour 134 (135) (*Per* Subremania Iyer, J.—**Review lies in such a case**—Davies, J. contra); *Lala Mal v. Gulam Muhammad*, 1862 Pun Re No. 145 F B].

Note 20.

[1] *Bepin Behari v. Abdul Barik*, (1916) 35 Ind Cas 613 (614): 21 Cal W N 80: 24 Cal L Jour 446: 44 Cal 950; *Motivahu v. Premvahu*, (1892) 16 Bom 511 (513); *Deen Dyal Purmanic v. Ram Kumar Chowdhry*, (1868) 10 Suth W R 345 (346); *Shama Churn Bhutt v. Payne and Co*, (1872) 18 Suth W R 292 (292) [Sub-Judge hearing appeal referred to him has power to review]; **Order rejecting plaint.**—*Rameshwardhari Singh v. Sadhu Saran*, 1923 Pat 354 (355): 4 Pat L Tim 261: 72 Ind Cas 629: 2 Pat 504; **Order refusing to admit appeal.**—*Burramollah v. Nilchand Dutt*, (1872) 17 Suth W R 484 (484): In the matter of the petition of *Barmutollah*, (1872) 10 Beng L R 156; *Joy Kumar v. Isil*, (1872) 18 Suth W R 475 (475): 10 Beng L R 155; **Order rejecting memorandum of appeal for deficient stamp.**—*Sirda Singh v. Christian*, (1920) 55 Ind Cas 502 (503) Pat; **Order dismissing appeal for default.**—*Majajenessa Bibi v. Sheik Didary*, (1916) 32 Ind Cas 86(87) Cal; *Kanez Fatima v. Deoki Prasad*, (1897) 24 Cal 350 (354): 1 Cal W N 21 F B; **Order in execution proceedings.**—*Girdhari Singh v. Hurdeo Narain*, (1876) 3 Ind App 230 (236): 26 Suth W R P C 44: 3 Sar 637: 3 Suth 294 P C [Decision under Code of 1859—Privy Council did not treat the reivew of the order as a nullity]; *Narayanabhai v. Gangakrishna*, (1867) 4 Bom H C R (A C) 87; *Babu Lal v. Chanda*, (1915) 27 Ind Cas 589 (590): 6 Pun W R 1915: 38 Pun L R 1915; *Kapiluddin Ahmed v. Kamaruddin Ahmad*, (1910) 5 Ind Cas 148 (149) Cal; *Asoka Kumar Roy Chowdhry v. Khettramoni Dasi*, (1898) 2 Cal W N 606 (607); *Haradhun v. Chunder Mohan*, 1862 Suth W R 66 (67): 1 Hay 577: Marsh 205 F B; *Lotf Ali v. Court of Wards*, (1866) 6 Suth W R Mis 127 (127); *Coates v. Kashi Ram*, 1903 Pun Re No 76: 170 Pun L R 1903; *Cochrane v. Heeralal*, (1867) 7 Suth W R 79 (80); *Dhaninder Das v. Bakshi Harihar Prasad Singh*, (1918) 48 Ind Cas 129 (130): 3 Pat L Jour 571; *Raja Pudmanand Singh v. Durga Pershad Doobey*, (1899) 4 Cal W N 39 (40). See also *Nilratan v. Ram Ratton*, (1900) 5 Cal W N 627 (629) [Executing Court recording satisfaction on application of both parties—Decree-holder applying for re-opening of proceedings on the ground that he had acted under mistake of calculation—Application maintainable under S 47]. *See* however, In re *Banwari Lal*, 1879 Pun Re No 143 F B; **Order as to costs.**—*Braja Sundar v. Jagannath*, 1922 Pat 1 (2): 3 Pat L Tim 67: 6 Pat L Jour 284: 68 Ind Cas 768; **Order on application in forma pauperis.**—*Ranchod v. Bezanji*, (1896) 20 Bom 86 (90, 91); *Adarji v. Manikji*, (1879-80) 4 Bom 414 (415); In the matter of *Rani Umasundari Debi*, (1870) 5 Beng L R App 29. See also *Mahomed Hazee Chowdhry v. Doollub Bibi*, (1869) 11 Suth W R 22 (22): 5 Beng L R 318 Note [Question left open].

But see *Bhag Singh v. Ghuseeta Mull*, 1868 Pun Re No 73; *Umda Bibi v. Naima Bibi*, (1898) 20 All 410 (411, 412): 1898 All W N 95; *Subbaraya Devai v. Sundaresa Devai*, 1933 Mad 5 (6): 36 Mad L W 586: 140 Ind Cas 226: 1932 Mad W N 1262]; **Order on application for leave to appeal to Privy Council.**—*Hume, Public Prosecutor of Calcutta v. Poresh Chundra Ghosh*, (1914) 22 Ind Cas 324 (333): 15 Cr L Jour 52: 41 Cal 734: 19 Cal W N 593; *Nand Kishore Singh v. Ram Gulam Sahu*, (1912) 17 Ind Cas 221 (222): 16 Cal W N 1089: 39 Cal 1037; *Gobinath Birbar v. Goluck Chander Bose*, (1889) 16 Cal 292 (293) Note: 13 Ind Jur 339.

[But see *Ameerunnissan Begam v. Indurjit Kunwar*, (1866) 6 Suth W R (Mis) 97 (98) [After appeal to Privy Council has been admitted, no review lies against order of High Court granting leave]. See also In re *Woomatara Debia*, (1866) 6 Suth W R (Mis) 120 (120).]

Decree based on award.—*Jogesh Chandra*

O. 47, R. 1, Note 21.

21. Review in proceedings under other Acts.—As to a right of review of orders passed in proceedings under other Acts, *see* the undermentioned cases.[1] This rule does not apply to the following cases:—

(1) A decision which becomes final under S. 5 of the Court-Fees Act, 1870.[2]

Deb v. *Jagat Chandra Deb*, (1919) 52 Ind Cas 696 (696) Cal; *Buta* v. *Guni Das*, 1881 Pun Re No. 111; **Dismissal for want of prosecution or for splitting causes of action.**—*Mahomed Azeemoollah* v. *Ali Buksh*, (1873) 5 N W P 74; *Ram Sundar Singh* v. *Ram Baudhan Singh*, (1875) 7 N W P 126; *Jussa Singh* v. *Noora*, 1672 Pun Re No 36 [Splitting cause of action]; **Order in revision.**—*Kuhan Chand* v. *Mussamat Indar Kaur*, 1898 Pun Re No 23; *Umar Din.* v. *Ala Baksh*, 1901 Pun Re No 54 F B: 45 Pun L R 1901; **Order ex parte admitting appeal after time.**—*Venkatrayudu* v. *Nagadu*, (1886) 9 Mad 450 (451); **Order allowing withdrawal of appeal.**—*Patloji Bin Bhiwaji* v. *Ganu Bin Ramji*, (1891) 15 Bom 370 (374): 1890 Bom Print Judgt. 336.

Note 21.

[1] **Judgment of Court of Small Causes can be reviewed.**—*Madan Mohan* v. *Purno Chandra*, (1884) 10 Cal 287 (298); *Ratan Krishen* v. *Raghunath*, (1882) 8 Cal 287 (290): 10 Cal L Rep 275; *Shumsher Ally* v. *Kurkut Shah*, (1881) 6 Cal 236 (237): 6 Cal L Rep 549; *Isan Chunder Banerjee* v. *Luchun Gope*, (1880) 5 Cal 699 (700): 5 Cal L Rep 599; *Sitaram* v. *Hukm Singh*, (1879) Pun Re No 29 F B.—**Order rejecting application under S. 76 of the Registration Act.**—*Reasut Hossein* v. *Hadjee Abdullah*, (1876-77) 2 Cal 131 (139): 3 Ind App 221: 26 Suth W R 50: 3 Sar 221 P C; **Order in insolvency can be reviewed by the Insolvency Court.**—*Ayyaswami Chetty* v. *Official Receiver, Coimbatore*, 1932 Mad 63 (65): 61 Mad L Jour 719: 1931 Mad W N 924: 34 Mad L W 735: 135 Ind Cas 750; *Challa Abireddi* v. *Chala Venkatareddi*, 1927 Mad 175 (176): 51 Mad L Jour 60: 23 Mad L W 644: 1926 Mad W N 256: 94 Ind Cas 351; In the matter of *Thuckur Bhagvandas Harjivan*, (1879-80) 4 Bom 489 (494); *Moolchand Ram* v. *Sarjoog Pershad*, (1908) 7 Cal L Jour 268 (269, 270); In re *Megraj Purohit*, 1924 Cal 83 (83): 27 Cal W N 916: 80 Ind Cas 840; **Revenue Court acting under Bengal Rent Act can review its orders.**—*Koer Hurchand Singh* v. *Musst Roopa Koer*, (1872) 4 N W P 171; *Monikurnika Chowhdrain* v. *The Collector of Mymensingh*, (1871) 16 Suth W R 159 (160); *Soobulchunder Gooho* v. *Tumeerudeen Chowdry*, (1870) 14 Suth W R 414 (414); *Radha Pershad Singh* v. *Sunsar Roy*, (1870) 14 Suth W R 27 (28); *Srinath Dutt* v. *Ram Gopal Chatterjee*, (1869) 11 Suth W R 108 (108).

But see *Mahomed Tuckee* v. *Musst Ahmedee Begum*, (1871) 3 N W P 22 [Under Act X of 1859 (Bengal) no general power of review].

Subordinate revenue Courts in Oudh can review their orders—*Partab Bahadur Singh* v. *Badlu*, (1918) 48 Ind Cas 276 (276): 21 Oudh Cas 254; *Bhagwan Baksh Singh* v. *Sardar Singh*, (1917) 39 Ind Cas 147 (148): 4 Oudh L J 97; *Tirbhuwan Dutt* v. *Balak Ram Misra*, (1915) 27 Ind Cas 587 (588): 2 Oudh L J 14; **Contentious probate proceedings—Orders can be reviewed.**—*Kyone Hoe* v. *Kyon Soon Sun*, 1925 Rang 314 (317): 3 Rang 261: 91 Ind Cas 509; *Parma* v. *Nek Ram*, (1915) 29 Ind Cas 133 (134): 13 All L J 441: 37 All 380; In the matter of the petition of *Rukmin*, (1875-78) 1 All 287 (288); In re *Pitambar Girdhar*, (1880-81) 5 Bom 638 (641); In the matter of the petition of *Poona Koer*, (1875-76) 1 Cal 101 (102): 24 Suth W R 376; *Hameeda Bibi* v. *Noor Bibi*, (1868) 9 Suth W R 394 (395).

But see *Sivu* v. *Chennamma*, (1869-70) 5 Mad H C R 417 (418).

Order in appeal from decision of Collector under Madras Act, VIII of 1865—Review lies.—*Subramania Pillai* v. *Perumal Chetty*, (1868-69) 4 Mad H C R 251 (253); **Order of Financial Commissioner of Punjab—Chief Court, if can review.**—*Bijja Singh* v. *Namdar*, 1871 Pun Re No. 16 [Can review]; *Niamutulla* v. *Kaimudin*, 1881 Pun Re No 5 [Cannot review]; **Order under the Companies Act, (1882).**—*The Mussoorie Bank, Ltd* v. *The Himalaya Bank, Ltd*, (1894) 16 All 53 (57): 1893 All W N 205; **Order of demand under S 12 of the Court Fees Act.**—*Chandamani Koer* v. *Basdeo Narain Singh*, (1919) 49 Ind Cas 442 (449): 4 Pat L Jour 57; **Decision under S 16 of the Divorce Act—Review lies.**—*Hariettee A King* v. *James S King*, (1881-82) 6 Bom 416 (435); **Decree of Special Judge under Dekkan Agriculturists Relief Act.**—*Balkrishna Indrabhan* v. *Mahadeo Babjee Kulkarni*, (1898) 22 Bom 520 (524); *Ram Singh* v. *Babu Kissan Singh*, (1895) 19 Bom 116 (119); *Badaricharya* v. *Ramachandra Gopal Savant*, (1895) 19 Bom 113 (115); *Ramachandra Narain Kulkarni* v. *Draupadi Koom Narain*, (1896) 20 Bom 281 (283); *Bamboji Bin Patloji* v. *Babaji Bin Mahadu*, (1888) 15 Bom 650 (652); **Orders of District Munsif under S 73 of the Madras Village Munsifs' Courts' Act.**—*Paramasivam* v. *Periyanayagathammal*, (1916) 32 Ind Cas 527 (528) Mad; **Land Acquisition proceedings.**—*Sakti Narain Singh* v. *Bir Singh*, (1920) 58 Ind Cas 510 (511): 2 U P L R 50: 1 Pat L Tim 219: 5 Pat L Jour 253; **Proceedings under the Bengal Tenancy Act, 1885.**—*Bolanath Chatterji* v. *Maharajadiraja of Burdwan*, 1932 Cal 265 (266): 54 Cal L Jour 490: 137 Ind Cas 430; *Chandra Dhur Dev* v. *Bhola Roi*, 1921 Pat 284 (286): 1921 Pat H C C 301: 2 Pat L Tim 372: 62 Ind Cas 80; *Ram Prasad* v. *Daud Durzi*, (1919) 53 Ind Cas 39 (40): 30 Cal L Jour 1; *Achha Mian* v. *Durga Churn*, (1898) 25 Cal 146 (154): 2 Cal W N 137; *Miscellaneous.*—*Matangini Devi* v. *Girish Chunder Chougdar*, (1903) 30 Cal 619 (623): 7 Cal W N 433 [Case under Public Demands Recovery Act, I of 1895 (Bengal—Open to review]; *Prayag Lal* v. *Jai Narayan*, (1895) 22 Cal 419 (424) [Case under Public Demands Recovery Act, Bengal]; *Baijnath Ram Goenka* v. *Nand Kumar Singh*, (1913) 18 Ind Cas 956 (956): 17 Cal W N 485: 13 Mad L Tim 487: 17 Cal L Jour 583: 15 Bom L R 500: 40 Cal 552: 1913 Mad W N 553: 40 Ind App 54 P C [Case under Bengal Land Revenue Sales Act (VII of 1868)—Not open to review]; *Smith* v. *Secretary of State*, (1878) 3 Cal 340 (346) [Case under Administrator-General's Act (II of 1874)—Review lies].

[2] *Ranga Pai* v. *Baba*, (1897) 20 Mad 398 (400). See also *Balkaran Rai* v. *Gobind Nath Tewari*, (1890) 12 All 129 (156, 157): 1890 All W N 39 F B.

**O. 47, R. 1.
Note 21.**

(2) A judgment delivered in an income-tax case on a statement made by the Commissioner of Income-tax. The reason is that it is neither a decree nor an order.[3]

(3) Orders under U. P. Act (XII of 1881).[4]

(4) Orders under the U. P. Land Revenue Act.[5]

(5) Orders in proceedings under Ch. 7 of the Presidency Small Cause Courts Act.[6]

(6) Proceedings under the Guardian and Wards Act appointing or refusing to appoint guardians.[7]

(7) Proceedings under S. 8 of the Presidency Towns Insolvency Act.[8]

(8) Proceedings under the Bengal Estates Partition Act.[9]

As to the applicability of this rule to proceedings under other Acts, *see* the following:—

(1) S. 17, Cl. (2) of the Bengal, Agra, and Assam Civil Courts Act (XII of 1887) enacts that, that section shall not be applicable to cases provided for by this rule.

(2) S. 15, Cl. (3) of the Gujarat Taluqdars Act (VI of 1888) makes this order applicable to the decisions of the Taluqdari Settlement Officer.

(3) Under S. 153-A of the Bengal Tenancy Act (VIII of 1885) the applicant has to state in an application for review of a judgment or order under that Act the injury sustained by him, and the Court cannot entertain the same, unless the applicant deposits the amount, if any, due from him. (*See* S. 153-A of that Act.)

(4) S. 251 of the Agra Tenancy Act (III of 1926) empowers the Courts to review their decisions in accordance with the provisions of this rule.

(5) S. 265, sub-S. (3) of the Chota Nagpur Tenancy Act (VI of 1908) makes the provisions of this order applicable to proceedings under that Act in so far as they are not inconsistent with those contained in that Act.

(6) Under S. 388, sub-S. (3) of the Succession Act (XXXIX of 1925) the order of a District Judge, subject to the provisions relating to review of judgment in the Civil Procedure Code, is final.

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(3) In re *Kajori Mal Kalian Mal,* 1930 All 209 (211): 1930 All L J 78: 122 Ind Cas 741.

(4) *Wazir Singh* v. *Thakur Kishori Rawanji,* (1897) 19 All 522 (523): 1897 All W N 139.

(5) *Mt Siraj Fatima* v. *Mahomed Ali,* 1932 All 293 (801): 1932 All L J 437 F B.

(6) *Framroz Dosabhi* v. *Dalsukhbhai Fulchand,* 1921 Bom 180 (181): 45 Bom 972: 23 Bom L R 383: 61 Ind Cas 567.

(7) *Sharfan* v. *Bholi,* 1922 Lah 395 (396): 4 Lah L Jour 274; *Ralia* v. *Manglan,* (1912) 15 Ind Cas 559 (559): 211 Pun W R 1912: 174 Pun L R 1912: 116 Pun Re 1912; *Farid* v. *Mitho,* 1906 Pun Re No 143: 12 Pun W R 1907: 106 Pun L R 1907.

(8) In the matter of *L W Nassee, an insolvent Mansukhlal Dolatchand and Co,* 1929 Rang 229 (231, 232): 7 Rang 201: 118 Ind Cas 615; In re *Morarji Jairam Naranji,* 1932 Bom 569 (570): 34 Bom L R 1175: 139 Ind Cas 587.

(9) *Ramabahadur Singh* v. *Keshva Prasad Singh,* 1930 Pat 130 (133): 8 Pat 830: 121 Ind Cas 456: 11 Pat L Tim 494.

O. 47, R. 1, Notes 22—23.

22. Review petitions by minors.—A minor can apply for a review of a judgment passed against him on the ground that his guardian has conducted the case with gross negligence[1] or on the ground that no sanction had been obtained for a compromise entered into on his behalf by his guardian *ad litem*.[2] In all such applications he will be bound by the provisions of this rule.[3] There is no provision in the Code empowering the Court when passing a decree against a minor, to reserve to the minor the right of questioning the decree, after attaining majority, and the absence of such a provision is not a ground for review of the judgment otherwise properly passed.[4] (*See also* O 32, R. 3, Note 5 and O. 32, R. 7, Note 5.)

23. Consent decree.—Where facts are brought to the notice of the Court showing that a compromise ought to be treated as a *nullity* an application for review is a proper mode of raising the question whether the compromise should be treated as a *nullity* or not.[1] A compromise decree entered into by a vakil or agent might be set aside on the ground that the vakil or agent had no power.[2] There is conflict of opinion as to whether the discovery of fraud or undue influence in obtaining the consent decree can be a valid ground of review, some cases holding that it is[3] and some that it is not.[4] The true view, however, seems to be that in such cases a suit is the proper remedy in the generality of cases though motions for a new trial may be convenient in some cases.[5] An application for review

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Note 22.

(1) *Beni Prasad* v. *Laljaram,* (1916) 35 Ind Cas 63 (64): 14 All L J 438: 38 All 452; *Ram Sarup* v. *Shah Latafut Hossein,* (1902) 29 Cal 735 (737); *Jogeshwar Narain Singh* v. *Roy Radha Raman,* (1912) 16 Ind Cas 543 (545) Cal [May be granted in special circumstances]. See also *Eshan Chundra Safooi* v. *Nandamoni Dassee,* (1884) 10 Cal 357 (367); *Lalla Sheo Churn Lal* v. *Ramnandan Dobey,* (1895) 22 Cal 8 (13).

But see *Baramdeo Prasad* v. *Banarsi Prasad,* (1906) 3 Cal L Jour 119 (130) [Minor cannot apply for review merely on the ground of fraud. See also *Manlaswami* v. *Gurram Tatayya,* 1926 Mad 1079 (1080): 51 Mad L Jour 389: 98 Ind Cas 787 [Suit will lie].

(2) *Ram Ghulam Sahu* v. *Sham Sahai Das,* (1921) 62 Ind Cas 234 (235): 5 Pat L Jour 379: 1 Pat L Tim 663: 1920 Pat H C C 358; *Karmali Rahimbhoy* v. *Rahimbhoy Habibbhoy,* (1889) 13 Bom 137 (146); *Barhamdeo Prasad* v. *Bhanarsi Prasad,* (1906) 3 Cal L Jour 119 (130).

(3) *Modhoo Soodhun Singh* v. *Raja Prither Bullub Paul,* (1871) 16 Suth W R 231 (232).

(4) *Gursandas Natha* v. *Ladkavahu,* (1895) 19 Bom 571 (575, 576).

Note 23.

(1) *Peary Choudhury* v. *Soonoory Das,* (1915) 27 Ind Cas 628 (628): 19 Cal W N 419; *Hakim Gir* v. *Basdeo Sahi,* (1911) 10 Ind Cas 894 (895): 15 Cal L Jour 408: 17 Cal W N 631; *Ram Gopal Majumdar* v. *Prosanna Kumar Samad,* (1905) 2 Cal L Jour 508 (509): 10 Cal W N 529. See also *Lalji Sahu* v. *Collector of Tirhut,* (1871) 15 Suth W R 23 (24): 6 Beng L R 648 P C.

(2) *Bhut Nath Sircar* v. *Ram Lal Sircar,* (1902) 6 Cal W N 82 (85); *Devendra Nath Sarkar* v. *Ram Rachpal Singh,* 1926 Oudh 315 (315): 3 Oudh W N 277: 93 Ind Cas 302: 13 Oudh L J 482.

[But see *Bhagwan Dut* v. *Ram Dut,* 1928 Oudh 418 (423): 5 Oudh W N 812.]

(3) *Khitish Chandra Chatterjee* v. *Nagendra Nath Mandal,* 1929 Cal 513 (513): 49 Cal L Jour 425: 33 Cal W N 572: 119 Ind Cas 371; *Chandra Mohan Ghorai* v. *Prosanna Kumar Maity,* (1921) 64 Ind Cas 259 (260) Cal; *Peary Choudhury* v. *Sonoor Das,* (1915) 27 Ind Cas 628 (629): 19 Cal W N 419; *Munshi Moruful* v. *Surendra,* (1912) 15 Ind Cas 893 (895): 16 Cal W N 1002; *Rasik Chandra Choudhury* v. *Rajani Ranjan Chowdhury,* (1906) 10 Cal W N 286 (286); *Abdul Haque* v. *Abdul Hafez,* (1910) 5 Ind Cas 648 (649): 14 Cal W N 695: 11 Cal L Jour 636; *Aushootosh Chandra* v. *Tara Prosanna,* (1884) 10 Cal 612 (615); *Alamelu Ammal* v. *Rama Ayyar,* 1922 Mad 446 (446): 16 Mad L W 440: 43 Mad L Jour 290: 1922 Mad W N 495: 31 Mad L Tim 132: 70 Ind Cas 425 [Misrepresentation]; *Vilakathala Raman* v. *Vayalil Pachu,* (1914) 25 Ind Cas 213 (213): 27 Mad L Jour 172; *Abdul Majid* v. *Fazl Haq,* 1878 Pun Re No 58.

(4) *Galstaun* v. *Kumar Premathanath Roy,* 1929 Cal 470 (472): 124 Ind Cas 525: 33 Cal W N 883; *Fool Coomary* v. *Woodoy,* (1898) 25 Cal 649 (652); *Barhamdeo* v. *Bhanarsi,* (1906) 3 Cal L Jour 119 (130); *Golab Koer* v. *Badshah Bahadur,* (1909) 2 Ind Cas 129 (132): 13 Cal W N 1197: 10 Cal L Jour 420; *Mirali Rahimbhoy* v. *Rehmobhoy,* (1891) 15 Bom 594 (598); *Nathu Mal* v. *Raghubir Singh,* 1926 All 50 (52, 54): 6 L R All (Civ) 569: 89 Ind Cas 943: 23 All L J 1029. 48 All 160; *Babu Dwarkadish Prasad Singh* v. *Maharaja Kesho Prasad Singh,* 1924 All 398 (400): 46 All 215: 22 All L J 118: 5 L R All (Civ) 46: 82 Ind Cas 1022; *Purmessuree Narain* v. *Rameesuddin,* (1806) 5 Suth W R 226 (226). See also *Ram Lagan Sahu* v. *Ram Brich Koeri,* (1919) 50 Ind Cas 497 (497): 4 Pat L Jour 205.

(5) *Hip Foong Hong* v. *H Neotia,* 1918 P C 184 (188).

O. 47, R. 1, Notes 23—25.

may be made when the consent decree is sought to be impeached on the ground of clerical error or when it does not represent what the Court intended to decide.[6]

24. Ex parte decrees and orders of dismissal for default.—*See also* Notes 8 and 9 to O. 9, R. 13. The rule applies to all cases whether they are disposed of in the presence of the parties or *ex parte* in the absence of the defendants.[1] As to whether the fact that an application under O. 9, R. 13 could have been preferred and that it was barred on the date of the review application is a bar to review, *see* Note 9 to O. 9, R. 13. But an application to set aside an *ex parte* decree cannot by itself be treated as one for review.[2] A dismissal for default other than the failure to appear, is also open to review.[3] Where the dismissal is for default of appearance the failure to apply under O. 9, R. 9 or under O. 41, R. 19 will not, according to the High Courts of Madras, Calcutta and Lahore, bar an application for review,[4] though the reason for the failure to appear will not, of itself, amount to "sufficient cause" within the meaning of this rule and will not be a valid ground of review.[5] The High Court of Allahabad[5-a] and Patna[5-b] have taken a contrary view. It has been held by the High Court of Lahore that where an application for restoration is *made and dismissed*, an application for review thereafter will be barred.[6]

25. Judgment in Letters Patent Appeals.—*See* Notes to Cl. 15 of the Letters Patent and Note 1 to S. 114, *ante*.

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(6) *Gulab Koer* v. *Badshah Bahadur*, (1909) 2 Ind Cas 129 (136): 13 Cal W N 1197: 10 Cal L Jour 420; *Mirali Rahimbhoy* v. *Rahmoobhoy Habibhoy*, (1891) 15 Bom 594 (599).

Note 24.

(1) *Harihur Pershad Narain Singh* v. *Buddu Pershad*, (1883) 13 Cal L Rep 254 (255); *Rash Behari Mandal* v. *Hemanta Kumar*, 1925 Cal 1023 (1024): 41 Cal L Jour 349: 88 Ind Cas 921; *Bama Charan Das* v. *Gadadhar Das*, 1929 Cal 322 (325): 56 Cal 21; *Ali Azim* v. *Ram Manick*, (1869) 12 Suth W R 195 (196); *Poresh Nath* v. *Khettro Monee*, (1873) 20 Suth W R 284 (284) [But there must be an application therefor]; *Chunilal Hajarimal* v. *Sonibai*, (1897) 21 Bom 328 (330); *Jiwandas Virbhandas* v. *Khemchand Ramdas*, 1929 Sind 110 (111): 116 Ind Cas 101 [*Ex parte* order]; *Mutto* v. *Ilahi Begam*, (1884) 6 All 65 (66): 8 Ind Jur 321; *Amir Hasan* v. *Ahmad Ali*, (1887) 9 All 36 (42): 1886 All W N 293.

(2) *Ma Naw Naw* v. *V E S S M Somasundaram Chetty*, 1925 Rang 187 (188): 2 Rang 655: 85 Ind Cas 324; *Santu* v. *Arjan Das*, (1912) 13 Ind Cas 318 (318): 131 Pun W R 1912. See however *Kashi Ram* v. *Gopi Mal*, (1910) 6 Ind Cas 482 (483): 7 Pun L R 1910: 24 Pun W R 1910.

(3) See *Anant Potdar* v. *Mangal Potdar*, 1926 Pat 27 (27): 4 Pat 704: 91 Ind Cas 483: 7 Pat L Tim 291; *Janat* v. *Kamilashah*, (1921) 60 Ind Cas 948 (949): 14 Sind L R 239 [Assumed]; *Fatimunnissa* v. *Deoki Pershad*, (1897) 24 Cal 350 (354): 1 Cal W N 21 F B; *Swaminatha* v. *Paul*, (1911) 12 Ind Cas 351 (352): 10 Mad L Tim 569: 22 Mad L Jour 148: 1912 Mad W N 547.

(4) *Virupakshi Gowd* v. *Bandappa*, (1919) 50 Ind Cas 327 (327): 37 Mad L Jour 59: 9 Mad L W 311: 1919 Mad W N 246 [Following 26 Cal 598]; *Raj Narain* v. *Ananga Mohan Bhandari*, (1899) 26 Cal 598 (601); *Fateh Chand* v. *Musammat Menghi Bai*, (1913) 19 Ind Cas 481 (485): 108 Pun W R 1913: 181 Pun L R 1913: 109 Pun Re 1913; *Kashi Ram* v. *Gopi Mal*, (1910) 6 Ind Cas 482 (483): 7 Pun L R 1910: 24 Pun W R 1910.

But see *Inder Singh* v. *Ram Singh*, (1909) 1 Ind Cas 900 (901): 33 Pun Re 1909: 31 Pun W R 1909: 44 Pun L R 1909; *Koilash Mondol* v. *Nabadwipchandra Ker*, (1896) 2 Cal W N 318 (319).

(5) *Ramaraghava Reddi* v. *Rajah of Venkatagiri*, 1927 Mad 355 (356): 52 Mad L Jour 423: 25 Mad L W 192: 99 Ind Cas 954; *Srinivasam Pillai* v. *Rukmani Ammal*, 1928 Mad 964 (965): 55 Mad L Jour 330: 28 Mad L W 358: 1928 Mad W N 701.

(5-a) *Manphul Singh* v. *Hakim Hamad Ali Khan*, 1923 All 576 (577): 21 All L J 416: 4 L R All (Civ) 276: 74 Ind Cas 528.

(5-b) *Deo Dip Singh* v. *Gopal*, (1917) 38 Ind Cas 53 (53): 1 Pat L Jour 547; *Raja Sheo Raj* v. *Girijanand*, (1920) 58 Ind Cas 191 (192): 1 Pat L Tim 573.

(6) *Abdulla* v. *Morad Shah*, 1873 Pun Re No 52; *Abdul Razak* v. *Md Sharif*, 1925 Lah 517 (518): 86 Ind Cas 616.

But see *Radha Vallabh* v. *Awchit Rajaram*, 1933 Nag 39 (40): 28 Nag L R 295: 141 Ind Cas 48.

26. **Review of decision before signing decree.**—Where in order to be consistent in the decree finally passed, the Court has to pass orders under O. 41, R. 33 the same relief can be given in a petition put in by way of review.[1]

27. **Commissioner cannot review.**—A commissioner appointed for taking accounts may, in his discretion, and on proper grounds reopen the inquiry into any one or more of the items, before his report is made, for until then he decides nothing that is final and conclusive.[1]

28. **Limitation.**—The period of limitation for applications of review of judgments of Provincial Small Cause Courts, the High Courts in the exercise of their Original Civil Jurisdiction, and other Courts are respectively 15, 20 and 90 days from the date of the decree or order sought to be reviewed. (*See* Arts. 161, 162 and 173 of the Limitation Act, 1908.) In computing the period of limitation the applicant is entitled to deduct, under S. 12 of the Limitation Act, 1908, the time spent in obtaining a copy of the decree or order[1] though, as will be seen in Note 29, *infra,* such time cannot be excluded for the purposes of the Court-fee payable on the application. But he cannot exclude the time occupied by a previous application for review.[1-a] The Court may also under S. 5 of the Limitation Act, 1908, admit the application after the expiry of the period of limitation on sufficient cause being shown for not making the application within the prescribed period. No definite set of rules can be laid down to govern the discretion of a Court under S. 5 of the Limitation Act. It depends on the circumstances of each case.[2] The fact that an appeal is pending[3] or that the applicant is a minor[4] or that applicant's legal advisers were ignorant of the contents of a document in their possession at the time of the original hearing[5] or that a new exposition of the law has been

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Note 26.

(1) *Gopala Ayyangar* v. *Nummachi Reddiar,* 1923 Mad 392 (402): 17 Mad L W 254: 74 Ind Cas 416.

Note 27.

(1) *Fernandez* v. *Rodrighes,* 1924 Bom 231 (232): 47 Bom 593: 25 Bom L R 280: 82 Ind Cas 598.

Note 28.

(1) *Fazal* v. *Umar,* 1925 Lah 377 (378): 7 Lah L Jour 129: 88 Ind Cas 1019: 26 Pun L R 167; *Chokkalingam* v. *Lakshmanan,* (1920) 55 Ind Cas 444 (445): 1920 Mad W N 228: 11 Mad L W 217: 38 Mad L Jour 224.

(1-a) *Vaman* v. *Malhari,* (1902) 26 Bom 485 (490): 4 Bom L R 121; *Kashinath* v. *Lackheenarain,* 1864 Suth W R (Gap) 91 (92).

[But see *Rai Memathu* v. *Nematullabu,* (1918) 46 Ind Cas 14 (15): 20 Bom L R 434: 42 Bom 295].

(2) In the matter of the petition of *Soloman Gopaul Chander Lahiry,* (1885) 11 Cal 767 (776).

See also the following cases—*Joogul Kishore Singh* v. *Oogur Narain Singh,* (1867) 8 Suth W R 483 (486) [12 years delay excused]; *Haimabati* v. *Pran Kishna,* 1921 Cal 393 (394): 27 Cal W N 193; 75 Ind Cas 262 [Decision under the Indian Soldiers Act IX of 1918—Limitation for review is three months under S 10 of the Act]; *Mussammat Bagoojan* v. *Chowdhry Zukoorul Huq,* (1870) 13 Suth W R 69 (70); *Anjoonnissa* v. *Soorjo,* (1869) 11 Suth W R 56 (57): 2 Beng L R A C 181 [Three years]; *Bunkoo Lal Singh* v. *Basoomunissa Bibi,* (1867) 7 Suth W R 166 (166); *Ramgutta Das* v. *Gholam Ahmed Khondkar,* (1863) Suth W R 84 (85) F B; *Maya Das* v. *Jowala Sahai,* 1905 Pun Re No 9 (Rev): 1906 Pun L R 65; *Hyat* v. *Rahimuddin,* 1876 Pun Re No 114; *Debi Das* v. *Narain Prasad,* (1906) 9 Oudh Cas 35 (37); *Nikki* v. *Gujar Mal,* (1917) 42 Ind Cas 54 (55): 94 Pun W R 1917: 114 Pun L R 1917; *Indraraj Bhau* v. *Sita Ram,* 1921 Nag 174 (176): 78 Ind Cas 527. See also *Kasurareni Ramaswami* v. *Bommadevar Venkatanarasima Naidu Bahadur Zamindar Varu,* (1916) 32 Ind Cas 1000 (1001): 3 Mad L W 244: (1916) 1 Mad W N 277.

(3) *Secretary of State* v. *Hindustan Co-operative Insurance Society, Ltd,* 1932 Cal 171 (175): 36 Cal W N 40; *Gulam Husen* v. *Musa Miya,* (1884) 8 Bom 260 (263); *Fakera* v. *Basapa,* (1871) 8 Bom H C R (A C) 234.

(4) *Gopal Narhar Safray* v. *Hanmant Ganesh Safray,* (1881-82) 6 Bom 107 (110): 6 Ind Jur 313; *Appa Rao,* In re, (1887) 10 Mad 73 (77): 13 Ind App 155: 4 Sar 755 P C; *Madho Das* v. *Rukman,* (1878-80) 2 All 287 (289).

(5) *Gopal Chandra* v. *Solomon,* (1886) 13 Cal 62 (65). See also *Baboo Rameesuddin Ahmed Cazee* v. *Baboo Purmessuree Narain Singh,* (1866) 5 Suth W R 226 (226) [Review sought on the ground that the previous Munsif had extorted the compromise by undue pressure].

made since the decision[6] is not a sufficient cause for excusing the delay in filing the application within time.

There is nothing in this order to suggest that the application for review must be within the same period which is allowed to a party for the alternative remedy by way of appeal or application for restoration of suit which has been dismissed for default of appearance.[7]

29. **Court-fee.**—An application for a review of a judgment of the trial Court if presented *on or after* the 90th day from the date of the decree is chargeable with the same fee as is leviable on the *plaint*. An application for review of an appellate judgment if presented on or after the 90th day from the date of the decree is similarly chargeable with the same fee as is leviable on the *memorandum of appeal*.[1] Such applications presented before the 90th day from the date of the original or appellate decree, as the case may be, are chargeable with one half of the fee leviable on the plaint or the memorandum of appeal. (*See* Articles 4 and 5 of Schedule I of the Court-Fees Act, 1870.) Under S. 14 of the said Act the Court may, even in a case where the application is presented on or after the 90th day, order the refund of so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before such day.[1-a] The fact that an application, filed actually beyond the 90 days, may be within the time for the purposes of limitation by virtue of the application of Ss. 5 and 12 of the Limitation Act, does not exempt the applicant from paying the full fee chargeable on the plaint or memorandum of appeal; the two Acts are not *in pari materia*.[2]

As to the fee payable where a portion of the judgment is sought to be reviewed, *see* the undermentioned cases.[3]

The word "judgment" in Articles 4 and 5 above referred to does not include an *interlocutory order*. Consequently an application for review of an interlocutory order is chargeable only like any other ordinary application.[4]

The presentation of an insufficiently stamped application for review is not a valid presentation.[5]

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(6) *Sham Churn* v. *Bindabun*, (1868) 9 Suth W R 181 (185); Beng L R Sup Vol 892 F B; *Roy Goodur* v. *Achebur Lal*, (1870) 13 Suth W R 120 (120); *Pran Kishen Buttacharjee* v. *Buksh Cazee*, (1868) 10 Suth W R 26 (26); *Dwarkanath Dos Biswas* v. *Manik Chunder Das*, (1868) 9 Suth W R 102 (103); *Madhub Chunder* v. *Radhika*, (1867) 7 Suth W R 405 (406); *Onoop Chunder* v. *Ekkowree*, (1866) 6 Suth W R 167 (168); *Bolkee Lal* v. *Monjee Lal*, (1872) 17 Suth W R 163 (163).

(7) *Khasomal* v. *Bacho*, 1929 Sind 38 (39): 115 Ind Cas 314.

Note 29.

(1) *Husaini Begam* v. *The Collector of Muzafarnagar*, (1889) 11 All 176 (179): 1889 All W N 27: 13 Ind Jur 316.

(1-a) In the matter of *Doorga Prosunno Ghose*, (1882) 9 Cal L Rep 479 (480).

(2) In re *Kota*, (1886) 9 Mad 134 (138): 9 Ind Jur 423; *Hira Lal Ramdhan* v. *Mt Gangabai*, (1894) 7 C P L R 111 (112).

(3) In re *Sheikh Maqbul*, (1909) 1 Ind Cas 209 (210): 6 All L J 215: 31 All 294 [Whole fee leviable on the plaint or memo. of appeal must be paid]; *Nobin Chandra Chuckerbutty* v. *Mahomed Uzir Ali Sarkar*, (1899) 3 Cal W N 292 (294), (Do.); *Venkatarama Naick* v. *Chinnathambi Reddi*, (1871-74) 7 Mad H C R App 1 (2) [Fee leviable is that which would be payable if the review were granted and not necessarily on the whole value of the suit]; *Manohar*, In re, (1879-80) 4 Bom 26 (28).

(4) *Jagannath* v. *Mulchand*, (1909) 1 Ind Cas 999 (1000): 31 All 262: 6 All L J 151 [Application to High Court chargeable with fee Rs 2]; *S J Desouza* v. *Secretary of State for India*, 1892 Bom Print Judt 383.

(5) *Munro* v. *The Cawnpore Municipal Board*, (1890) 12 All 57 (60): 1889 All W N 197.

O. 47, R. 1, Notes 29—33.

No Court-fee need be paid on an application for review presented in a suit in *forma pauperis*.[6] *See* O. 33, R. 8 of the Code. But the applicant must have been declared a pauper in the suit at the time of the application. Otherwise he would have to pay the full fee chargeable on the application under law.[7]

30. **Appeal by one party—review application by another—Cl. (2).**—The fact that an appeal has been preferred by one party does not preclude the other parties from applying for review[1] except where—

(1) the grounds of such appeal are common to the applicant and the appellant, or

(2) being a respondent he can present his case in the appellate Court.

The expression "where the ground of such appeal is common to the applicant and the appellant" means that the *grounds of appeal* and the *grounds of review* are the same. Where a party who has not appealed applies for review on the ground of discovery of new and important matter, after the appeal by another party is summarily dismissed, the ground of review is different from the grounds of appeal and therefore the application is maintainable.[2] Where the applicant has the opportunity to present his case before the appellate Court, the lower Court has no jurisdiction to proceed with the application.[3] A respondent in an appeal has the right to apply for review of appellate Court judgment.[4]

31. **Privy Council practice.**—As to the powers of the Privy Council to rehear appeals, *see* Note 9 to S. 112.

32. **Appeal.**—*See* R. 7, *infra*.

33. **Revision.**—*See* Note 27 to S. 115, *ante* and Note 16 to R. 7, *infra*.

O. 47, R. 2.

To whom applications for review may be made.

R. 2. [S. 624.] *An* application for review of a *decree or order* of a Court, *not being* a High Court, upon *some* ground *other than* the discovery of such new and important matter or evidence as *is referred to in rule* 1 *or the existence of* a clerical or *arithmetical mistake or* error apparent on the face of the decree, shall be made only to the Judge who *passed the decree or made the order sought to be reviewed*; *but any such application may, if*

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[6] *Umda Bibi* v. *Naima Bibi*, (1898) 20 All 410 (411): 1898 All W N 95. But see *Ma Nein Yone* v. *P D Patel*, 1930 Rang 280 (281): 8 Rang 423: 127 Ind Cas 470.

[7] *Karam Khan* v. *Buta Khan*, 1895 Pun Re No 91.

Note 30.

[1] *Bunkoo Lal* v. *Basoomunissa*, (1867) 7 Suth W R 166 (166).

[2] *Chandra Kanta* v. *Lakshman*, (1916) 36 Ind Cas 460 (462): 24 Cal L Jour 517: 21 Cal W N 430.

[3] *The Punjab Sind Bank, Ltd, Lyallpur* v. *Ram Kishun*, (1916) 35 Ind Cas 529 (530): 156 Pun L R 1916; *Jagar* v. *Ram Sahi*, (1911) 11 Ind Cas 343 (343): 14 Oudh Cas 108; *Gauri Shankar* v. *Jagannath*, (1921) 63 Ind Cas 841 (841) All; *Sarju Pershad* v. *Sheo Charan Lal*, (1904) 7 Oudh Cas 299 (302).

[4] *Arayalpurath* v. *Cheekkladen Ahmed*, (1909) 2 Ind Cas 204 (205) Mad.

O. 47, R. 2, **Notes 1—2.**

the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule (2) proviso (a), be disposed of by his successor.

[1877—S. 624.]

Synopsis.

1. Legislative changes.
2. Review by successor in office.

Applicability of the rule to Small Cause Courts. See Note 2, Pt. (21).

1. Legislative changes:—

There was no section in the Code of 1859 corresponding to this section. The cases decided under that Code[1] are now only of academic importance.

2. Review by successor in office.—This rule must be read as a proviso to R. 1.[1] The policy underlying the rule is that an application for review should be entertained and considered by the very Judge who made the decree or order.[2] Reading Rr. 1 and 2 as they ought to be, it follows that—

(1) every application for review on which *notice has been ordered to issue* by the Judge who passed the decree or made the order may be *disposed* of by his successor in office.[3]

(2) an application based on the ground of the discovery of new and important matter or evidence[4] or the existence of a clerical or arithmetical mistake or error apparent on the face of the record[5] can be *entertained* and disposed of by the successor in office. An application made both under O. 9, R. 13 and O. 47, R. 1 and registered as one under O. 47, R. 1, may,

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Order 47, Rule 2—Note 1.

[1] *Aman Ali* v. *Kasim Ali*, (1866) 6 Suth W R 316; *Rao Baneeram* v. *Newaz Bibee*, (1867) 8 Suth W R 511; *Kangalee Churn Joshi* v. *Dursunee Dossee*, (1872) 18 Suth W R 198; *Gorsi Dass* v. *Narain Dass*, (1864) Suth W R 287 (287); *Mathura Mohan Roy* v. *Hari Kishen Roy*, (1872) 18 Suth W R 286; *Roy Megraj Bahadur* v. *Beejoy Gobind Burral*, (1875) 23 Suth W R 438: 1 Cal 197; *Banee Madhub* v. *Kalee Churn*, (1875) 24 Suth W R 387 (387); *Muneroodeen* v. *Kadir Buksh*, (1875) 24 Suth W R 410 (411); *Gopi Mal* v. *Ahmed Hassan*, 1879 Pun Re No 144.

Note 2.

[1] *Sarangapani* v. *Narayanasamy*, (1885) 8 Mad 567 (568).

[2] *Moheshur Singh* v. *Government of India*, (1857-59) 3 Suth W R 45 (48): 7 Moo Ind App 283 P C.

[3] *Allahdiya* v. *Muhammad Ali Khan*, 1892 All W N 103 (103); *Ganpat* v. *Jivan*, (1892) 16 Bom 603 (605); *Karoo Singh* v. *Deo Narain Singh*, (1884) 10 Cal 80: 13 Cal L Rep 261; *Fazel Biswas* v. *Jamadar Sheik*, (1886) 13 Cal 231 (231); *Sadaruddin* v. *Ekram Uddin*, (1918) 20 Ind Cas 670 (672): 18 Cal W N 22: 19 Cal L Jour 225; *Azizuddin* v. *Badaruddin*, 1884 Pun Re No 134: *Diwan Singh* v. *Jowahir Mal*, 1885 Pun Re No 97 (Note); *Hansraj* v. *Jhandu Mal*, 1894 Pun Re No 7; *Fazal Dad* v. *Umar Baksh*, 1925 Lah 377 (377): 7 Lah L Jour 129: 88 Ind Cas 1019: 26 Pun L R 167; *Nand Singh* v. *Sher Singh*, 1933 Lah 130: 141 Ind Cas 392; *Ramasami* v. *Kurisu*, (1890) 13 Mad 178 (187, 188) F B; *Gita Ram* v. *East Indian Railway Co*, (1914) 23 Ind Cas 394 (395) All; *Subbier* v. *Chinnappa Rowthen*, (1915) 26 Ind Cas 366 (366): 1915 Mad W N 22; *Dunyapat* v. *Ganesh*, (1900) 3 Oudh Cas 363 (365). See also *Cheru Kurup* v. *Cheru Khanda*, (1889) 12 Mad 509 (510); *Durga Das* v. *Jhandu Mal*, 1887 Pun Re No 6. See however, *Pancham* v. *Jhinguri*, (1882) 4 All 278 (281): 1882 All W N 26.

[4] *Ram Lal* v. *Kalka*, (1911) 10 Ind Cas 244 (245): 8 All L J 584: 33 All 566; *Waghela Raisanji* v. *Shaik Masludin*, (1889) 13 Bom 330 (335): 13 Ind Jur 391; *Muthusamy Pillai* v. *Shunmugasundaram Pillai*, (1913) 19 Ind Cas 214 (215): 13 Mad L Tim 225; *Kishun Deyal Rai* v. *Kulpati Kuer*, (1918) 45 Ind Cas 316: 3 Pat L Jour 372: 1918 Pat H C C 238. See *Rameshwardhari Singh* v. *Sadho Saran Singh*, 1924 Pat 809 (810): 75 Ind Cas 91.

[5] *Kathyumma* v. *Muhammad Kutty*, 1926 Mad 1083 (1084): 24 Mad L W 447: 97 Ind Cas 545; *Lachmi Narain* v. *Ram Prasad*, (1900) 3 Oudh Cas 316 (320). See also *Baliram Piraji* v. *Yeswant*, 1924 Nag 190 (191): 75 Ind Cas 829; In the petition of *Mathura Prasad*, (1875-78), 1 All 296 (198): 1882 All W N 42: 6 Ind Jur 594 F B.

however, be changed by the successor as one made under O. 9, R. 13 of the Code and disposed of on that basis.[6] A successor in office may also entertain applications for amendment of the decree under S. 152 of the Code.[7]

(3) an application based on any *other ground* than those referred to in the paragraph above can be entertained only by *the Judge who made the order or passed the decree.*[7-a] Thus a successor in office cannot grant a review of the decree or order passed by his predecessor in office on the ground that such decree or order is incorrect,[8] or on the ground that *notice of hearing* was not given,[9] or on the ground that the guardian *ad litem* of a minor party had no sanction to refer the matter to arbitration[10] or on the ground that the case was wrongly dismissed by his predecessor for default[11] or on the ground that the right to proceed against other properties was not reserved by the original Judge.[12] It will be illegal for a District Judge to transfer a review petition filed before a Subordinate Judge to his own file,[13] or to transfer an application for review filed before him to a Subordinate Judge.[14] A successor in office of a Judge who has been transferred[15] or who has retired,[16] or who is dead[17] cannot entertain such application for review. Similarly, where a Court has been abolished and suits have been transferred to another Court the Judge of that Court cannot grant a review except on the two grounds mentioned in this rule.[18] But where a Judge of an Additional Sub-Court was transferred

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(6) *Mahabir* v. *Balkishen*, 1922 Pat 376 (377): 1 Pat 48: 62 Ind Cas 927: 1922 Pat H C C 76: 3 Pat L Tim 29.

(7) *Muhammad Sulaiman* v. *Muhammad Yar Khan*, (1889) 11 All 267 (293): 1889 All W N 55: 13 Ind Jur 427 F B; *Gulab Chand Ranka* v. *Mt Kalabati Sarkaran*, 1932 Pat 321: 13 Pat L Tim 576: 139 Ind Cas 903 [Power of successor under S 152 is wider than under O. 47, R 2].

(7-a) *Govindswamy* v. *Nago Rao Dewan*, (1873) 10 C P L R 62 (64); *Shamsar Ali* v. *Jagannath*, (1912) 16 Ind Cas 203 (204): 17 Cal W N 403; *Ma Kyaw* v. *Ma Kyin*, 1922 U B 16 (18): 64 Ind Cas 895: 4 U B R 27. See also *Ramnath* v. *Gowhur*, (1870) 2 N W P H C R 230 [Decision by Sub-Judge—Review application to District Judge—Latter should return it for presentation to proper Court].

[But see *Sundar Dass* v. *Saroda Charan*, (1909) 13 Cal W N xci (91-n).]

(8) *Behari Lal* v. *Munglonath*, (1880) 5 Cal 110 (112): 4 Cal L Rep 371; *Roy Meg Raj* v. *Beejoy Gobind*, (1876) 1 Cal 197 (199): 23 Suth W R 438; *Raman* v. *Karunatha Tharakan*, (1877) 2 Mad 10 (11, 12): 1 Ind Jur 87: 1 Mad L R 140; *Badam Singh* v. *Mt Kasturi Kunwar*, 1931 All 605 (606): 1931 All L J 595: 133 Ind Cas 466.

(9) *Khema* v. *Dhangi*, (1890) 14 Bom 101 (102): *Bahadoo* v. *Fatteh Khan*, 1906 Pun Re No 82: 107 Pun L R 1907: 119 Pun W R 1906.

(10) *Ananda Krishna* v. *Jogendra Nath*, (1908) 8 Cal L Jour 294 (298).

(11) *Inder Singh* v. *Ram Singh*, (1909) 1 Ind Cas 900 (901): 33 Pun Re 1909: 31 Pun W R 1909: 44 Pun L R 1909.

(12) *Manindra Chandra* v. *Balaram Das*, (1910) 5 Ind Cas 725 (726): 11 Cal L Jour 161.

(13) *Golam Esha* v. *Hurrish Chunder*, 1864 Suth W R (Mis) 29.

(14) *Brij Lal* v. *Sitaram*, (1919) 50 Ind Cas 910 (911) Nag.

(15) *Pancham* v. *Jhinguri*, (1882) 4 All 278 (280): 1882 All W N 26. See also *Mahomed Hadi* v. *Sadiq Hussain*, 1927 Oudh 131 (131): 13 Oudh L J 544: 100 Ind Cas 425.

(16) *Bhagmani Kuar* v. *Ram Narain*, 1882 All W N 96 (96).

(17) *Sitla Din* v. *Ram Narain Singh*, (1929) 120 Ind Cas 386: 1929 Notes 21 (*d*): 6 Oudh W N 707 and 815.

(18) *Sarangapani* v. *Narayanasamy*, (1885) 3 Mad 567 (568).

O. 47, R. 2, Note 2.

as the Subordinate Judge of the Principal Sub-Court it was held that the latter could review his own order passed while he was the Additional Subordinate Judge.[19]

(4) an application for review of a decree or order passed by a Judge of the High Court can be made to, or disposed of by, his successor in office.[20] This rule has no application to the High Court.

The rule has no application to Courts of Small causes.[21] *See* O. 50, *infra.*

The expression "the Judge who passed the decree" means the Judge who *decided the case* and not the Judge who merely *signed* the decree.[22]

O. 47, R. 3, Notes 1—2.

Form of applications for review.

R. **3**. [S. 625.] The *provisions* as to the form of *preferring* appeals shall apply, *mutatis mutandis*, to applications for review.

[1877—S. 625.]

Synopsis.

1. **Applicability of the rule.**
2. **Form, contents and presentation of application.**
3. **Application by legal representative of party.**
4. **Limitation.**

1. **Applicability of the rule.**—This rule is not applicable to Small Cause Courts. *See* O. 50. As to the powers of review of Small Cause Courts, *see* S. 17 of the Provincial Small Cause Courts Act and the undermentioned cases.[1]

2. **Form, contents and presentation of application.**—Applications for review should be drawn up in the same manner as appeals and should set forth concisely the grounds of objections to the decision of which a review is sought, without argument or narrative and such grounds should be numbered consecutively.[1] The Court should not travel beyond the grounds mentioned in the application.[1-a] According to the High Court of Allahabad, it is not

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(19) See *Kasiswar Ray* v. *Satya Bham Das*, 1927 Cal 312 (313): 45 Cal L Jour 142: 31 Cal W N 332: 101 Ind Cas 133: 54 Cal 374. [But see *Ram Baran* v. *Bhagwati Pandey*, 1925 All 804 (806): 23 All L J 674: 6 L R All (Civ) 372: 89 Ind Cas 295: 47 All 751.]

(20) *Basanta Kumar* v. *Kusum Kumari*, (1917) 38 Ind Cas 584 (586): 44 Cal 28 [Assumed].

(21) *Natha* v. *Allah Din*, 1905 Pun Re No 63: 104 Pun L R 1905: 88 Pun W R 1905.

(22) *Tamijuddi Sheikh* v. *Satya Sankar Ghoshal*, (1916) 32 Ind Cas 101 (102): 20 Cal W N 391.

Order 47, Rule 3—Note 1.

(1) *Muhammad Fazal Ali* v. *Karim Khan*, 1894 Pun Re No 108 ["At the time of presenting the application" are directory and not mandatory]; *Jenu* v. *Budhiram*, (1905) 32 Cal 339 (341, 342): 1 Cal L Jour 43, (Do.); *Kailaschandra Sannel* v. *Dawlut Sheikh*, (1860) 14 Suth W R 42 (43): 5 Beng L R App 57; In the matter of *Mohun Sahoo*, (1869) 11 Suth W R 245 (245, 246); *Gobind* v. *Mohan*, 1894 Pun Re No 5; *Ramaswamy* v. *Kurisu*, (1890) 13 Mad 178 (182) F B; *Jogi Ahir* v. *Bishen Dayal Singh*, (1891) 18 Cal 83 (85); *Somabhai Hirachand*, v. *Wadilal Premchand*, (1907) 9 Bom L R 883 (885) [Case under Act XI of 1865 now repealed]; *President, Municipal Committee, Delhi* v. *Sullur*, 1881 Pun Re No 60, (Do.).

Note 2.

(1) *Mahadji Ramchandra* v. *Vithal*, (1862-65) 1 Bom H C R 185.

(1-a) *Puran Chandra* v. *Nilmadhub*, (1900) 5 Cal W N 485 (486); *Buri* v. *Mula Singh*, (1911) 11 Ind Cas 427 (428): 113 Pun W R 1911: 208 Pun L R 1911: 73 Pun Re 1911; *Akshoy Kumar Bhattacharjee* v. *Ashutosh Bhattacharjee*, 1928 Cal 73 (73): 105 Ind Cas 4.

O. 47, R. 3, Notes 2—4.

necessary that it should be accompanied by the copy of the decree, order or judgment sought to be reviewed,[2] while, according to the High Court of Bombay it is necessary to do so.[3] The application should be presented to the Judge and not to the *Munsarium*.[4] The informalities in presenting a review petition cannot be raised after the decree is passed in terms of review.[5]

The rule only relates to the *form* of the application for review. It does not extend the right of a party who goes for a review, and give him a right of appeal against an order refusing to restore an application for review, by reason of the fact that an appellate order under such circumstances is appealable under O. 43, R. 1 (*t*).[6] An application for execution made after 90 days from the date of the decree and which does not mention any circumstances to show why it could not be made within 90 days, cannot be treated as an application for review.[7]

3. **Application by Legal representative of party.**—The legal representative of a deceased party to a suit can apply for a review in the circumstances in which the party himself could have applied.[1]

4. **Limitation.**—Time requisite for a copy of the judgment, order or decree cannot be deducted in computing the period of limitation for applying for review.[1] A pauper may apply for review of judgment with the same indulgence under S. 5 of the Limitation Act as to delay in making the application as a person who is not a pauper.[2] The time occupied in prosecuting a prior application for review cannot be deducted in calculating the period of limitation.[3] Nor the time taken in prosecuting an appeal.[4]

O. 47, R. 4.

Application where rejected.

R. 4. [S. 626.] (1) *Where* it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

Application where granted.

(2) *Where* the Court *is* of opinion that the application for review should be granted, it shall grant the same:[2]

Provided that—

(*a*) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree *or order*, a review of which is applied for: and

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(2) *Wajid Ali Shah* v. *Nawal Kishore*, (1895) 17 All 213 (216): 1895 All W N 61.

(3) *Adurji Edulji* v. *Manickji Edulji*, (1879-80) 4 Bom 414 (415).

(4) *Munro* v. *The Cawnpore Municipal Board*, (1890) 12 All 57 (59): 1889 All W N 197.

(5) *Nawab Muhammad Kabir Khan* v. *Mussammat Bhag Bhari*, 1897 Pun Re No 17; *Mt Sallman* v. *Abdul Aziz*, 1925 All 777 (778): 6 L R All (Civ) 434: 93 Ind Cas 996; *Narayan Purushotham Gargote* v. *Laxmibai Datto Bhagwan*, (1914) 23 Ind Cas 513 (513): 16 Bom L R 189: 38 Bom 416.

(6) *Girdhari Lal* v. *Zorawar Singh*, 1925 All 57 (58): 5 L R All (Civ) 608: 80 Ind Cas 649: 47 All 1.

(7) *Bhukan Sarvan* v. *Piare Lal*, 1931 All 218 (219): 1931 All L J 103: 130 Ind Cas 839.

Note 3.

(1) *Debi Dass* v. *Narain Pershad*, (1906) 9 Oudh Cas 35 (36).

Note 4.

(1) *Jagatpal Singh* v. *Jageswar Bakhsh Singh*, (1899) 2 Oudh Cas 302.

(2) *Lakshmi* v. *Ananta Shanbaka*, (1878-80) 2 Mad 230 (231): 3 Ind Jur 452.

(3) *Vaman Sakharam Joshi* v. *Mulhari Bin Mahadu*, (1902) 26 Bom 485 (490): 4 Bom L R 121.

(4) *Gulem Husen Mahomed* v. *Sayad Musa-Miya Hamad Ali*, (1884) 8 Bom 260 (263).

(*b*) no such application shall be granted on the ground of discovery of new matter or evidence[5] which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed *or made*, without strict proof[6] of such allegation.

[1877—Ss. 626, 629; 1859—S. 378.]

Synopsis.

1. Legislative changes.
2. "Where the Court is of opinion . . . . it shall grant the same."
3. Review without notice to the opposite party.
4. Form of notice—See Appendix G, Form No. 14.
5. "Discovery of new matter or evidence."
6. "Strict proof."
7. Second application for review—See O. 47, R. 7 below.
8. Death of party pending review.
9. Appeal—See O. 47, R. 7.
10. Revision—See S. 115, Note 27.

1. Legislative changes:—

(*a*) The words "and the Judge shall record with his own hand his reasons for such opinion" which occurred in the concluding part of para. 2 of the old section have been omitted.

(*b*) Cl. (*c*) of the old section has been transferred to R. 2 of this Order.

The other alterations do not involve any alteration in the Law.

By reason of the change mentioned in (*a*) above the decisions mentioned below have been rendered obsolete.[1]

2. **"Where the Court is of opinion . . . . it shall grant the same".**—Where an application for review is made on any of the grounds specified in R. 1 and the Court is of opinion that the review should be granted, it should be granted.[1] It is improper, to admit a review petition and hear the case afresh, and thereafter dismiss the petition; where, at the re-hearing, the Court comes to the conclusion that there is no reason to interfere, the proper course is not to pass an order dismissing the review application but to pass an order to the same effect as the one under review.[2]

3. **Review without notice to the opposite party.**—Before granting an application for review it is necessary that notice of the application should be given to the opposite party. Otherwise the order granting review will be a nullity.[1] A notice of an application by the plaintiff for review of an order

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Order 47, Rule 4—Note 1.

(1) *Shankar Baksh* v. *Bulwant Singh*, (1900) 27 Cal 333 (335): 2 Bom L R 596: 27 Ind App 79: 4 Cal W N 203: 7 Sar 686 P C; *Manicka Mudaliar* v. *Gurusamy Mudaliar*, (1900) 23 Mad 496 (498); *Bhairon* v. *Ram Sahai*, (1888) 3 All 316 (320); *Gyanund Asram* v. *Bepin Mohun Sen*, (1895) 22 Cal 734 (737); *Ashrafannissa* v. *Inaet Hossein*, (1870) 13 Suth W R 439 (440): 5 Beng L R 316.

Note 2.

(1) *Hira Singh* v. *Allah Buksh*, (1917) 38 Ind Cas 769 (770): 115 Pun Re 1916.

(2) *Bhagwati Prasad* v. *Achhaibar Singh*, 1923 Oudh 93 (94, 95): 9 Oudh L J 531: 26 Oudh Cas 24: 74 Ind Cas 214.

Note 3.

(1) *Abdul Hakim Chowdhury* v. *Hem Chandra Das*, (1915) 30 Ind Cas 165 (166): 42 Cal 433; *Muhammad Ibrahim Moola* v. *S R Jandass*, 1923 Rang 49 (50): 1 L B R 394: 1 Bur L Jour 200: 70 Ind Cas 144; *Zahuruddin* v. *Nuruddin*, (1904) 14 Mad L Jour 7 (7, 8); *Rupchand Khemchand* v. *Balwant Narayan*, (1887) 11 Bom 591 (594, 595); *Taj Muhammad* v. *Kanshi Mal*,

O. 47, R. 4. Notes 3—6.

passed in a suit must be served on *all* the defendants and not merely on the opposing defendants who had appeared when the decree or order sought to be reviewed was passed.[2] The reason is that the expression "opposite party" in proviso (*a*) of the rule is not restricted to cases in which such party has actually appeared. It includes all parties interested in supporting the order or decree sought to be set aside.[3] There is a difference of opinion as to whether where an appeal is dismissed under O. 41, R. 11 or a suit is dismissed before summons to the defendant, or an application for execution is summarily dismissed before notice to the judgment-debtor, the respondent defendant, or judgment-debtor as the case may be, is an "opposite party" within the meaning of this rule. The High Courts of Madras[4] and Patna[5] have held that he is, while the High Courts of Calcutta[6] and Lahore[7] have held that he is not.

4. **Form of Notice.**—*See* Appendix G, Form No. 14.

5. "**Discovery of new matter or evidence**".—The expression means the same thing as the expression "new and important matter or evidence" in R. 1 above.[1] *See also* Notes to R. 1, *supra*.

6. "**Strict proof**".—No application for review should be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be produced by him when the decree or order was passed or made, without *strict proof* of such allegation.[1] Where a

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(1913) 19 Ind Cas 864 (864): 135 Pun W R 1913: 237 Pun L R 1913; *Golaboo* v. *Ram Dayal*, (1867) 8 Suth W R 304 (304); *Kommareddy Ramchandrayya* v. *Venkataratnam*, 1926 Mad 133 (134): 22 Mad L W 582: 1925 Mad W N 804: 92 Ind Cas 800.

(2) *Chandi Charan Laha* v. *Manoranjan Chattopadhya*, (1913) 18 Ind Cas 275 (277): 17 Cal L Jour 416.

(3) *Surajpal Pandey* v. *Uttim Pandey*. 1922 Pat 281 (283): 3 Pat L Tim 117: 1921 Pat H C C 337: 6 Pat L Jour 625: 63 Ind Cas 99.

(4) *Narayana Chettiar* v. *Muthu Chettiar*, 1926 Mad 980 (981, 982): 51 Mad L Jour 219: 1926 Mad W N 890: 97 Ind Cas 1008: 50 Mad 67.

(5) *Suraj Pal Pandey* v. *Uttim Pandey*. 1922 Pat 281 (283): 3 Pat L Tim 117: 1921 Pat H C C 337: 6 Pat L Jour 625: 63 Ind Cas 99.

(6) *Surandera Prasad Lahire Chowdhury* v. *Aftabuddin Ahmed*, 1922 Cal 234 (235): 26 Cal W N 391: 70 Ind Cas 43 [Suit dismissed for non-payment of deficiency in Court-fees before summons to defendant].

Summary dismissal of appeal under O 41, R 11.—*Official Trustee of Bengal* v. *Benode Behari Ghose Mal*, 1925 Cal 114 (114): 51 Cal 943: 84 Ind Cas 147; *Janki Nath* v. *Prabhasani Dasi*, (1915) 30 Ind Cas 898 (899): 22 Cal L Jour 99: 19 Cal W N 1077: 43 Cal 178; *Joy Koomar* v. *Esharee Nand*, (1872) 18 Suth W R 475 (476): 10 Beng L R 155.

Dismissal of appeal under O 41, R. 11—Order reviving the appeal cannot be questioned by another Division Bench.—*Haldhar Jha* v *Syed Shah Mahammad Ashraf Alam*, (1914) 25 Ind Cas 880 (881): 22 Cal L Jour 95; *Mohd Hasan* v. *Abdul Hamid*, (1919) 50 Ind Cas 431 (433) Cal.

(7) *Abdul Karim* v. *Chaudhri Ramsing*. 1924 Lah 350 (351): 69 Ind Cas 506 [Execution application—Dismissal for default]. See however *Firm, Gopal Mal Ganda* v. *Hara Chand*, 1923 Lah 303 (304): 75 Ind Cas 656.

Note 5.

(1) *Chiranjilal Ram Lal* v. *Tulsiram Jankidas*, (1920) 56 Ind Cas 734 (735, 736): 31 Cal L Jour 134: 47 Cal 568 F B.

Note 6.

(1) *Kessowji Issur* v. *G I P Ry Co*, (1907) 31 Bom 381 (389, 390): 9 Bom L R 671: 34 Ind App 115: 2 Mad L Tim 435: 11 Cal W N 721: 17 Mad L Jour 347: 6 Cal L Jour 5: 4 All L J 461 P C; *Kariya Mahto Murmi* v. *Ram Sarup*, (1917) 37 Ind Cas 399 (400) All; *Pallia* v. *Mathura Prasad*, (1916) 32 Ind Cas 622 (623): 14 All L J 204: 38 All 280; *Musst Radhey Koonwar* v. *Aioodhya Pandey*, (1868) 3 Agra 69; *Dwarkanath Chowdhry* v. *Kishenlal Chowdhery*, Marsh 553: 2 Hay 650; *Ratanchand Khim Chand* v. *Damji Dharsey*, 1927 Bom 232 (234): 29 Bom L R 371: 101 Ind Cas 766; *Amritrao* v. *Manaji*, (1866-67) 3 Bom H C R (A C) 49; *Bhola Nath Chatterjee* v. *Maharajadhiraj of Burdwan*, 1932 Cal 265 (266): 54 Cal L Jour 490: 137 Ind Cas 430; *Ambika Charan* v. *Bhani Ram*, (1921) 64 Ind Cas 219 (219) Cal; *Chiranji Lal Ram Lal* v. *Tulsiram Jankidas*, (1920) 56 Ind Cas 734 (738, 740): 31 Cal L Jour 134: 47 Cal 568; *Ahed Khundkar* v. *Mohendra Lal Dey*, (1911) 9 Ind Cas 320 (321) Cal; *Goor Dyal* v. *Deka Noonya*, (1874) 22 Suth W R 446 (446); *Nubo Kishore* v. *Jadub Chunder*, (1873) 20 Suth W R 426 (426); *Brojendro* v. *Wise*, (1873) 19 Suth W R 130 (130); *Khelat Chunder* v. *Pran Kristo*, (1873) 12 Suth W R 461 (462): 11 Beng L R 428 (Note); *Nudarchand Bhooya* v. *Reedoy Mundul*, (1873) 17 Suth W R 458 (459): 11 Beng L R 424 (Note); *Sitanath* v. *Shama Sundari* (1872) 14 Suth W R 26 (26): 8 Beng L R App 37; *Ramdhan Chuckerbutty* v. *Jainaranan Panja*, (1872) 12 Suth W R 536 (537): 8 Beng L R App 36 (Note); *Nissabibee* v. *Abdoor Rahman*, (1872) 18 Suth W R 413 (414); *Jhubhoo* v. *Mt Jusoda*, (1872) 17 Suth W R 230 (231); *Nuffer Chand* v. *Sandes*, (1872) 10 Suth W R 432 (432): 8 Beng L R App 35; *Umrao* v. *Gokul*, (1871) 16 Suth W R 7 (8): 8 Beng L R App 34; *Gunesh Ram* v. *Rohinee*, (1870) 14

Court grants a review without calling for strict proof of the allegation that the new matter was not within the knowledge of the petitioner, the order is in contravention of this rule and is without jurisdiction.[2] "Strict proof" means anything which may serve directly or indirectly to convince a Court, and has been brought before the Court in legal form and in compliance with the law of evidence. It is the formality of the proof which is prescribed and not the sufficiency in the result. Hence, the fact that the evidence adduced is not *sufficient* to prove the allegation does not make the order granting an application for review one in contravention of the provisions of this rule within the meaning of R. 7, *infra.*[3] It is within the jurisdiction of the appellate Court to say whether the strict proof is according to law or not[4] though the question of the *sufficiency* or importance of evidence is for the Court admitting the review.[5]

7. **Second application for review.**—*See* O. 47, R. 7, below.

8. **Death of party pending review.**—The order granting review only holds the judgment in suspense. The death of party does not, therefore, cause the suit or appeal to abate.[1]

9. **Appeal.**—*See* O. 47, R. 7.

10. **Revision.**—*See* Note 27 to S. 115, *ante.*

O. 47, R. 5.

Application for review in Court consisting of two or more Judges.

R. **5.** [S. 627.] *Where* the Judge or Judges, or any one of the Judges, who passed the decree or *made the* order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the

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Suth W R 236 (237); *Bhyrub Chunder* v. *Madhubram,* (1869) 20 Suth W R 84 (85): 11 Beng L R 423 F B; *Shumsher Ali* v. *Ram Chunder,* (1865) 2 Suth W R 174 (175, 176); *Dhunsook Doss* v. *Hurry Baboo,* Bourke O C 115; *Hari Singh* v. *Allah Baksh,* (1916) 38 Ind Cas 769 (770): 1916 Pun Re No 115; *Nga Tet Pyo* v. *Ma Ngwe Ka,* (1917) 38 Ind Cas 403 (404): (1916) 2 U B R 126; *Kyaw Zan Hla* v. *San Dun,* 1893-1900 L B R 527.

(2) *Velovolu Potharaju* v. *Matta Adiseshu,* 1925 Mad 378 (578): 21 Mad L W 276: 87 Ind Cas 391; *Chiranji Lal* v. *Tulsi Ram Janki Das,* (1920) 56 Ind Cas 734 (738): 31 Cal L Jour 134: 47 Cal 568; *Sri Vaithilinga Pandara Sannathi* v. *Muniandi Samban,* 1927 Mad 826 (826): 39 Mad L Tim 119: 104 Ind Cas 290.

(3) *Ahed Khondkar* v. *Mohendra Lal Dey,* (1915) 29 Ind Cas 282 (284): 19 Cal W N 804: 42 Cal 830; *Nandu Lal Malik* v. *Panchanan Mookerjee,* (1917) 42 Ind Cas 484 (495): 21 Cal W N 1076: 26 Cal L Jour 187: 45 Cal 60; *Bai Nemathu* v. *Bai Nematullabu,* (1918) 46 Ind Cas 14 (16): 20 Bom L R 434: 42 Bom 295; *Ambika Charan Hazra* v. *Bhani Ram Rathi,* (1921) 64 Ind Cas 219 (219) Cal; *Chiranjilal* v. *Tulsiram,* (1920) 56 Ind Cas 734 (738, 739): 31 Cal L Jour 134: 47 Cal 568 F B; *Chandra Kant* v. *Lakshan Chandra,* (1916) 35 Ind Cas 651 (651): 27 Cal L Jour 540; *Seeramma* v. *Seshamma,* 1933 Mad 217 (218). See also *Venkataratnam* v. *Varahalu,* 1928 Mad 56 (56): 104 Ind Cas 746.

(4) *Ahed Khondkar* v. *Mohendra Lal Dey,* (1915) 29 Ind Cas 282 (284): 19 Cal W N 804: 42 Cal 830; *Nandalal Mullick* v. *Punchanan Mukerjee,* (1917) 42 Ind Cas 484 (495): 21 Cal W N 1076: 26 Cal L Jour 187: 45 Cal 60; *Chiranji Lal* v. *Tulsi Ram,* (1920) 56 Ind Cas 734 (736): 31 Cal L Jour 134: 47 Cal 568; *Ahed Khundkar* v. *Mohendra Lal Dey,* (1911) 9 Ind Cas 320 (321) Cal. See also *Ambika Charan* v. *Bhaniram,* (1921) 64 Ind Cas 219 (219) Cal; *Madhori Saran* v. *Parbati,* 1925 All 552 (558): 23 All L J 534: 6 L R All (Civ) 454: 88 Ind Cas 658: 47 All 881.

(5) *Ahed Khondkar* v. *Mohendra Lal,* (1916) 29 Ind Cas 282 (284): 42 Cal 830: 19 Cal W N 804; *Nundo Lal* v. *Punchanon Mukherjee,* (1917) 42 Ind Cas 484 (495): 45 Cal 60: 21 Cal W N 1076: 26 Cal L Jour 187; *Saherjan* v. *Gopal Chandra,* 1930 Cal 424 (425): 34 Cal W N 265: 127 Ind Cas 71. See also *Maksud Mahi* v. *Secretary of State,* (1911) 9 Ind Cas 532 (533) Cal.

Note 8.

(1) *Achyut* v. *Tapibai,* 1924 Bom 310 (310): 48 Bom 210: 26 Bom L R 103: 79 Ind Cas 753.

O. 47, R. 5, Notes 1—2.

application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

Local Amendment.

BOMBAY.

In R. 5, for the word "six" the word "two" shall be substituted.

Synopsis.

1. **Application for review in Court consisting of two or more Judges.**
2. **"Attached to the Court."**

Review by two Judges, one of whom is new. See Note 1, Pt. (1).

1. **Application for review in Court consisting of two or more Judges.**—This rule applies to High Court also. It is not applicable to Small Cause Courts. *See* O. 50. A review heard and granted by two Judges of a Court one of whom only was the Judge who passed the decree, is illegal.[1] Similarly where one Judge of a Bench of two Judges who disposed of an appeal leaves the Court on *a month's* leave, the other Judge has no jurisdiction to hear an application for review since the former Judge cannot be said to have ceased to be a member of the Court or to be precluded by absence or other cause for a period of *six* months next after the application for review.[2] But where a Bench of two Judges of a Court has passed a decree or made an order and one of the Judges is absent on leave thus precluding him from considering the decree or order for a period of six months from the date of the application for review, the other Judge is competent to hear the application for review.[3] If a review is allowed by such single Judge, the matter should be reheard by a Bench of two Judges.[4] A District Judge cannot transfer an application for review to the Additional Judge.[5]

2. **"Attached to the Court".**—A Judge who is absent on leave and for whom another is officiating, is not "attached to the Court" and the review application may be disposed of by the remaining Judge who heard the appeal originally.[1]

Order 47, Rule 5—Note 1.

(1) *Chhajju Ram* v. *Neki*, 1922 P C 112 (114): 3 Lah 127: 16 Mad L W 37: 26 Cal W N 697: 3 Pat L Tim 435: 17 Pun W R 1922: 30 Mad L Tim 295: 43 Mad L Jour 332: 49 Ind App 144: 24 Bom L R 1238: 36 Cal L Jour 459: 41 Pun L R 1922: 72 Ind Cas 566 P C.

(2) *Jagat Chandra Acharya* v. *Shyama Charan Buttacharya*, (1918) 44 Ind Cas 999 (1000): 22 Cal W N 550.

(3) *Mukta Ram Rakhit* v. *Gomasta Mahato*, 1928 Cal 654 (656): 47 Cal L Jour 623: 112 Ind Cas 225 [Absence for more than six months must be assumed to have existed in this case]; *G N Surty* v. *T S Chettyar Firm*, 1927 Rang 20 (23): 4 Rang 265: 98 Ind Cas 417: 5 Bur L Jour 187, (Do.); *Ratanchand* v. *Damji*, 1927 Bom 232 (234): 29 Bom L R 371: 101 Ind Cas 766, (Do.); *Aubhoy Churn* v. *Shamont*, (1889) 16 Cal 788 (793), (Do.); *Fatimunnissa* v. *Deoki Pershad*, (1897) 24 Cal 350 (354): 1 Cal W N 21 F B, (Do.); *Jardine, Skinner & Co* v. *Dhun Kishen*, (1870) 13 Suth W R 82 (83), (Do.); *Maksud Mahi* v. *Secretary of State*, (1911) 9 Ind Cas 532 (533) Cal, (Do.).

(4) *Aubhoy* v. *Shamont*, (1889) 16 Cal 788 (793); *Maksud Mahi* v. *Secretary of State*, (1911) 9 Ind Cas 532 (553) Cal; *Arayalpurath* v. *Cheekiladen Ahmed*, (1909) 2 Ind Cas 204 (205), Mad.

(5) *Bansidhar* v. *Ratan Lal*, 1930 All 785 (786): 128 Ind Cas 771.

Note 2.

(1) *Aubhoychurn* v. *Shamont*, (1888) 16 Cal 788 (793).

O. 47, R. 6. Application where rejected.

R. 6. [S. 628.] (1) *Where* the application for a review *is* heard by more than one Judge and the Court *is* equally divided, the application shall be rejected.

(2) *Where* there *is* a majority, the decision shall be according to the opinion of the majority.

[1877—S. 627; 1859—S. 379.]

O. 47, R. 7. **Order of rejection** *not appealable.* **Objections to** *order granting application.*

R. 7. [S. 629.] (1) An order of the Court rejecting the application shall *not* be *appealable*; but *an order granting an* application may be objected to on the ground that *the application* was—

(*a*) in contravention of the provisions of *rule* 2,

(*b*) in contravention of the provisions of *rule* 4,[7] or

(*c*) after the expiration of the period of limitation[8] prescribed therefor and without sufficient cause.

Such objection may be *taken* at once by an appeal *from* the order granting the application or in any appeal *from* the final decree or order *passed or* made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear he may apply for an order to have the rejected application restored to the file, and, *where* it *is* proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under *sub-rule* (2) unless notice of the application has *been* served *on* the opposite party.

[1877—S. 629.]

Local Amendment.

MADRAS.

In sub-R. (1) *substitute* the word "order" *for* the word "application" occurring after the words "on the ground that the".

Synopsis.

1. Legislative changes.
2. Scope and applicability of the rule.
3. Order rejecting review not appealable.
4. Order granting review, if and when appealable.
5. Grounds of objection in appeal—See Note 4 above.
6. Application being in contravention of

R. 2.
7. "In contravention of the provisions of R. 4."
8. "After the expiry of the period of limitation."
9. Second appeal from order granting review.
10. Letters Patent appeal.
11. Objections to order granting review may be taken in appeal from the final decree.
12. Order granting review in insolvency proceedings if appealable.
13. Dismissal of application for review for default no appeal.
14. Appeal from decree passed on review.
15. Second application for review.
16. Review without jurisdiction—Revision.

Applicability to Small Cause Courts. See Note 2, Pt. (2).

1. Legislative changes:—

1. In sub-R. (1), the word "first" which occurred in the old section has been substituted by the words "shall not be appealable".
2. The word "shall" in sub-R. (2) has been inserted in the place of the word "may" which occurred in the old section.
3. The last para. of S. 629 has been detached from this rule and reproduced in a modified form as R. 9 of this Order. The other changes do not involve any change in the law.

Under S. 378 of the Code of 1859 the order of the Court granting or refusing the review was final.

2. Scope and applicability of the rule.—Under this rule an order *rejecting* an application for review is not appealable. An order *granting* an application for review is appealable only on three grounds of objections, namely, that the application was—

(*a*) in contravention of the provisions of R. 2,

(*b*) in contravention of the provisions of R. 4,

(*c*) presented after the expiration of the period of limitation prescribed therefore and without sufficient cause,

Such objection may be taken—

(*a*) at once by an appeal from the order granting the application [O. 43, R. 1 (*w*)], or

(*b*) in an appeal from the final decree or order passed or made in the suit (S. 105).[1]

Where an application is dismissed for default of appearance it may be restored on sufficient cause being shown for such non-appearance, upon such terms as to costs or otherwise as the Court thinks fit and shall appoint a day for hearing the same. But no order of restoration should be made without notice to the opposite party.

This rule being inconsistent with S. 176 of the Agra Tenancy Act is not applicable to an order passed by an Assistant Collector, Second class, relating to the trial of any suit or application.[1-a] This rule does not apply to

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Order 47, Rule 7—Note 2.

(1) *Abdul Rahim* v. *Racha Rai*, (1877) 1 All 363 (365).

(1-a) *Paras Ram* v. *Sheobran Singh*, (1915) 31 Ind Cas 912 (912) All.

O. 47, R. 7,
Notes
2—4.

the Provincial Small Cause Courts.[2] Where the Court actually granted a review though it purported to act under S. 152, it was held in the undermentioned case[3] that it must be treated as an order under this order and that an appeal lay against the order.

3. **Order rejecting review not appealable.**—An order rejecting an application for review is not appealable.[1] As to whether and when a revision will lie in such a case, *see* Note 27 to S. 115 and the undermentioned cases.[2] As to whether an order rejecting an application for review of judgment is an order made "on appeal" from which an appeal lies to the Privy Council, *see* Note 5 to S. 109 and the cases cited below.[3] As to the powers of revision under S. 25 of the Small Cause Courts Act, *see* the case cited below.[4]

4. **Order granting review if and when appealable.**—Under the Code of 1859 there was no appeal even against an order granting a review.[1] O. 43, R. 1 (*w*) gives a right of appeal against such an order.[1-a] This rule enacts that in such an appeal only the three grounds of objections specified in this rule can be raised. Both the rules must be read together[2] and so reading them it follows, that there is no appeal even from an order granting a review in cases other than those specified in this rule.[3] Thus where a Court grants

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(2) *Valliammal Nadathi* v. *Aseervada Nadar,* (1919) 53 Ind Cas 44 (45) Mad.

(3) *Ramji Lal* v. *Giani,* 1921 Lah 250 (251): 3 Lah L Jour 341: 66 Ind Cas 992.

Note 3.

(1) *Ram Lal* v. *Ratan Lal,* (1904) 26 All 572 (573): 1904 All W N 130; *Padmanund Singh* v. *Doorga Pershad,* (1899) 4 Cal W N 39 (40); *Govinda Ram Mandal* v. *Bholanath Bhatta,* (1888) 15 Cal 432 (435); *Bhyrub Chunder Surmah Chowdhery* v. *Madhubram Surmah,* (1873) 20 Suth W R 84 (85): 11 Beng L R 423; *Modhoomutty* v. *Dhunput Singh,* (1870) 13 Suth W R 167 (168); *Nobin Chunder* v. *Gridharee,* (1869) 11 Suth W R 264 (265); *Banee Ram* v. *Hossein Ali,* (1869) 11 Suth W R 184 (185); *Radha Khant Bhuttacharjee* v. *Kishen Pershad Chuckerbutty,* (1866) 5 Suth W R 89 (90); *Kali Das Sircar* v. *Janokeenath Roy,* (1864) 1 Suth W R Mis 7 (7): *Chowdhry Ruttun Persud* v. *Hunuman Jah,* 1864 Suth W R (Mis) 20 (21); *Bungeshedhur Mundul* v. *Puddolochun Roy,* 1862-64 Suth W R Sp 11 (12); *Nuseerooddeen* v. *Indurnarain,* 5 Suth W R 93 (96): 1866 Beng L R F B 367; *Achaya* v. *Rathnavelu,* (1886) 9 Mad 253 (254, 256): 10 Ind Jur 59; *Vadilal Hukamchand* v. *Fulchand Umedram,* (1906) 30 Bom 56 (61): 7 Bom L R 664; *Somayya* v. *Subbamma,* (1906) 26 Mad 599 (602).

(2) *Balbhadar Singh* v. *Chunnilal Sahu,* (1910) 6 Ind Cas 707 (707) All [No revision lies against an order refusing to grant review]. See also *Sewa Dat Prasad* v. *Karam Chand,* (1911) 10 Ind Cas 725 (725): 35 Pun W R 1911 [No revision]; *Khasomal* v. *Bacho,* 1929 Sind 38 (39): 115 Ind Cas 314 [Orders disallowing review application are revisable]; *Akbar Khan* v. *Muhammad Ali Khan,* (1909) 4 Ind Cas 23 (24): 6 All L J 884: 31 All 610 [Refusal to entertain an application—Revision lies]; *Peria* v. *Fernandez,* (1911) 12 Ind Cas 172 (173): 10 Mad L Tim 283: (1911) 2 Mad W N 252 [No revision lies]; In the matter of the petition of *Mathura Prasad,* (1875-78) 1 All 296 (297) [Case under the old Code].

(3) See *Fakiruddin Mohamed Asan Chowdhry* v. *Najumunissa Chowdharni,* (1869) 11 Suth W R 145 (145): 2 Beng L R A C 264; *Nazir Ali Khan* v. *Rajah Ojoodhyaram,* (1864) 1 Suth W R Mis 13 (14); *Ameerunnisa Begum* v. *Maharanee Inderjeet Koonwar,* (1866) 5 Suth W R Mis 17 (17).

(4) *Vekatratnam* v. *Varahalu,* 1928 Mad 56 (56): 104 Ind Cas 746.

Note 4.

(1) *Ranee Surat Sundaree Debi* v. *Rajendur Kishore Roy Chowdhery,* (1868) 9 Suth W R 125 (125). See *Anundomoyee* v. *Kallee Koomar,* (1866) 6 Suth W R 18 (19) [The order is *final*]; *Sahebjan Bibi* v. *Syud Sufdar Ali,* (1874) 22 Suth W R 288; *Jardine* v. *Dhan Kishen,* (1870) 13 Suth W R 82 (83).

(1-a) See also *Ramji Lal* v. *Giyani,* 1921 Lah 250 (250): 3 Lah L Jour 341: 66 Ind Cas 992.

(2) *Rukmoni Kuer* v. *Ram Piari,* 1930 All 126 (127): 122 Ind Cas 184; *Sunder* v. *Habib Chick,* (1921) 60 Ind Cas 81 (83): 18 All L J 838: 2 U P L R (All) 283: 42 All 626; *Surya Narain* v. *Kunj Behari,* 1921 Cal 66 (66): 25 Cal W N 884: 66 Ind Cas 909; *Nandulal* v. *Punchanan,* (1917) 42 Ind Cas 484 (495): 21 Cal W N 1076: 26 Cal L Jour 187: 45 Cal 60; *Ahed Khondkar* v. *Mohendra Lal,* (1915) 29 Ind Cas 282 (284): 19 Cal W N 804: 42 Cal 830; *Hari Charan* v. *Baren Khan,* (1914) 25 Ind Cas 903 (903): 41 Cal 746; *Jagar Nath Prasad Singh* v. *Ramavatar Singh,* (1912) 14 Ind Cas 39 (39) Cal; *Bakhtan* v. *Ghulam Hussain,* 1928 Lah 608 (609): 9 Lah 298: 29 Pun L R 403: 112 Ind Cas 518; *Fazal Ahamad* v. *Khan Bahadur,* (1911) 12 Ind Cas 624 (625): 10 Pun L R 1912: 221 Pun W R 1911; *Madhuru Brahmayya* v. *Vedula Vellamma,* (1916) 36 Ind Cas 437 (439): 31 Mad L Jour 509: (1916) 2 Mad W N 278: 4 Mad L W 408 [Right of appeal under O 43, R 1 is controlled by O 47, R 7].

(3) See the cases cited in foot-note (2) above and also *Shaukat Ali* v. *Mt Shakila Bano,* 1926 All 492 (492): 94 Ind Cas 78; *Madhori* v. *Parbati,* 1925 All 552 (553): 23 All L J 534: 6 L R All (Civ) 454: 88 Ind Cas 653: 47 All 881; *Gudri Singh* v. *Parsotam Das,* 1925 All 895 (896): 6 L R All (Civ) 157: 86 Ind Cas 917; *Khurshed Alam Khan* v. *Rahmat-ullah Khan,* (1918) 48 Ind Cas 490 (491): 15 All L J 899: 40 All 68;

O. 47, R. 7, Note 4.

a review for *sufficient reason* the order is not open to appeal.[4] In Bombay O. 43, R. 1 (*w*) has been deleted by a rule made by the High Court under S. 122 of the Code. In Bombay therefore an order granting a review is in any view appealable, only if it falls under this rule.[4-a]

Where a decree passed on review cannot be attacked on a ground recognised under this rule the case cannot be certified as a fit case under S. 109, Cl. (*c*) of the Code[5]; nor will the mere fact that an appeal is permitted under this rule make it a fit case for appeal to his Majesty in Council.[6]

Lachman Das v. *Mutsaddi Lal*, (1917) 41 Ind Cas 886 (887): 15 All L J 505; *Kedar Nath* v. *Mussammat Mamola*, (1909) 2 Ind Cas 834 (834): 12 Oudh Cas 151; *Daryai Bibi* v. *Badri Pershad*, (1896) 18 All 44 (45): 1895 All W N 151: *Bombay Steam Navigation Co* v. *"Zuari,"* (1888) 12 Bom 171 (173); *Saherjan Bibi* v. *Gopal Chandra*, 1930 Cal 424 (425): 34 Cal W N 265: 127 Ind Cas 71; *Harendra Nath Chowdhry* v. *Sona Gazi*, 1926 Cal 259 (260): 90 Ind Cas 504; *Hamid* v. *Akhina Khatun*, (1918) 47 Ind Cas 850 (850) Cal; *Surendra Nath* v. *Sitanath Das*, (1913) 21 Ind Cas 943 (944); *Tripura Chawran Kul* v. *Shoroshi Bala*, (1914) 22 Ind Cas 773 (774) Cal; *Manindra Chandra Roy Chowdhury* v. *Balaram Das*, (1910) 5 Ind Cas 725 (726): 11 Cal L Jour 161; *Lalit Mohan Roy* v. *Purna Chandra Rai*, (1899) 3 Cal W N cxxxv (cxxxvi) (Note); *Mahabir* v. *Nathin*, (1897) 1 Cal W N 338 (339); *Harnandan* v. *Behari*, (1895) 22 Cal 8 (8); *Abhoy Churn* v. *Shamont*, (1889) 16 Cal 788 (793); *Sikandar Khan* v. *Baland Khan*, 1927 Lah 435 (438, 439): 8 Lah 617: 29 Pun L R 81; *Jagiri Ram* v. *Daulat Khan*, 1928 Lah 755 (757): 112 Ind Cas 46; *Uttam Chand* v. *Ganesh Mal*, 1921 Lah 395 (395): 3 Lah L Jour 572; *Atra* v. *Chajju*, (1911) 12 Ind Cas 246 (247): 49 Pun W R 1911; *Govinda Chetty* v. *Rengammal*, 1929 Mad 261 (264): 1927 Mad W N 411: 106 Ind Cas 172; *Srinivasa Aiyangar* v. *Official Assignee, Madras*, 1927 Mad 641 (642): 52 Mad L Jour 682: 39 Mad L Tim 11: 103 Ind Cas 377: 26 Mad L W 277: 50 Mad 891: 1927 Mad W N 806; *Venkata Seetharamayya* v. *Veena Tolasi Babu*, 1924 Mad 602 (602): 46 Mad L Jour 463: 19 Mad L W 649: 34 Mad L Tim 224: 1924 Mad W N 355: 83 Ind Cas 548; *Chokkalingam* v. *Lakshumanan*, (1920) 55 Ind Cas 444 (445): 1920 Mad W N 228; 11 Mad L W 217: 38 Mad L Jour 224; *M Brahmayya* v. *Vedalu Yellamma*, (1916) 36 Ind Cas 437 (438): 31 Mad L Jour 509: (1916) 2 Mad W N 278: 4 Mad L W 408; *Mulambath Kunhammad* v. *Parakat Katairi Kutti*, (1917) 38 Ind Cas 373 (376): 31 Mad L Jour 827: 5 Mad L W 472; *Orayukindiyli Parkum Elayana Tholan* v. *Kunhikutty*, (1913) 18 Ind Cas 549 (550): 24 Mad L Jour 93: 1913 Mad W N 52: *Bankey Behari Lal* v. *Abdul Rahman*, 1932 Oudh 63 (65): 8 Oudh W N 1267: 135 Ind Cas 695; *Sm Garabani Kumari* v. *Surja Narain Singh*, 1924 Pat 250 (252, 253): 3 Pat 134: 5 Pat L Tim 52: 1923 Pat H C C 361: 75 Ind Cas 177: *Sundar Mall* v. *Upendra Nath*, (1916) 35 Ind Cas 15 (15): 1 Pat L Jour 193; *Lan Tin* v. *Ma Mya Kyin*, 1929 Rang 105 (106): 7 Rang 187: 118 Ind Cas 120; *A T K P L M Muthu Pillay* v. *Lakshminarayan*, 1928 Rang 177 (178): 6 Rang 254: 111 Ind Cas 80; *Ramdat* v. *Parasutan*, (1919) 49 Ind Cas 57 (57): (1918) 3 U B R 104: *Chunilal* v. *Sonibai Kom Hazarimal*, (1897) 21 Bom 328 (330): *Mt Rukhmabai* v. *Ganpatrao*, 1932 Nag 177 (179): 28 Nag L R 221: 140 Ind Cas 409; *Surya Narain Chowdhury* v. *Kunja Behari Mal*, 1921 Cal 66 (66): 25 Cal W N 884: 66 Ind Cas 909; *Kanshiram* v. *Diwan Chand*, 1933 Lah 169 (170): 141 Ind Cas 188: 34 Pun L R 88; *Nand Singh* v. *Sher Singh*, 1933 Lah 130 (131): 141 Ind Cas 392: 34 Pun L R 229. But see *Mukundsa* v. *Motiram*, 1929 Nag 73 (74): 12 Nag L J 13: 116 Ind Cas 645: 25 Nag L R 104; *Daso* v. *Karbasappa*, 1926 Bom 121 (121): 27 Bom L R 1446: 94 Ind Cas 591; *Nritya Gopal* v. *Jorit Monjari*, 1926 Cal 217 (218): 87 Ind Cas 770: 30 Cal W N 584.

(4) *Narain Das* v. *Chiranji Lal*, 1925 All 364 (365): 23 All L J 56: 6 L R All (Civ) 159: 86 Ind Cas 168: 47 All 361 [Where the Court on being satisfied that the plaintiff was prevented from complying exactly with the terms of a decree originally passed owing to causes beyond his control, granted a review]; *Tirbenee Kunwar* v. *Mohan Lal*, 1922 All 366 (367): 66 Ind Cas 558 [Inability to tender evidence]; *Mannu Lal* v. *Kunj Behari Lal*, 1922 All 206 (207): 20 All L J 517: 67 Ind Cas 317: 44 All 605; *Benarsi* v. *Altaf Husain*, (1921) 63 Ind Cas 171 (173) All; *Harnarain* v. *Umrat*, (1912) 17 Ind Cas 661 (661): 10 All L J 396; *Ali Akbar* v. *Khurshed Ali*, (1905) 27 All 695 (696): 1905 All W N 154: 2 All L J 465 [Review allowed on the ground that original payment of Court-fee sufficient]; *Abdul Sadiq* v. *Abdul Aziz*, (1899) 21 All 152 (154): 1899 All W N 1 [Subsequent Full Bench ruling not brought to its notice]; *Mt Rukmani Kuar* v. *Ram Piari*, 1930 All 126 (127); 122 Ind Cas 184 [Review allowed on ground that judgment was unfair to one of the parties]; *Basant Kumari Gupta* v. *Abhoy Shanker Sen*, 1923 Cal 450 (451): 37 Cal L Jour 99: 73 Ind Cas 306 [Dismissal for default restored on sufficient cause]; *Wahed Ali* v. *Chand Mia*, (1919) 52 Ind Cas 29 (30); 30 Cal L Jour 250; *Golamali* v. *Abdul Karim*, (1910) 5 Ind Cas 182 (183): 14 Cal W N 244: 11 Cal L Jour 26 [Review granted on basis of subsequent admission]; *Munni Ram* v. *Bishen Perkash*, (1897) 24 Cal 878 (880); *Akshoy Kumar* v. *Ashutosh*, 1928 Cal 73 (73): 105 Ind Cas 4; *Beli Ram* v. *Padam Sain*, 1929 Lah 26 (27): 116 Ind Cas 221 [Contravention of provisions of R 1—No appeal lies]; *Jagiri Ram* v. *Daulat Khan*, 1928 Lah 755 (757): 112 Ind Cas 46; *Hari Singh* v. *Allah Buksh*, (1917) 38 Ind Cas 769 (770): 115 Pun Re 1916; *Basheshar Nath* v. *Ramakrishna Dass*, (1916) 32 Ind Cas 860 (860); 48 Pun W R 1916; *Yusuf* v. *Naza*, (1912) 16 Ind Cas 995 (995): 17 Pun L R 1913; 278 Pun W R 1913; 11 Pun Re 1913; *Kathyumma* v. *Muhammad Kutty*, 1926 Mad 1083 (1084): 24 Mad L W 447: 97 Ind Cas 545 [Review granted on the ground—Accidental slip]; *Sreenivasa Iyer* v. *Nataraja Iyer*, (1915) 28 Ind Cas 707 (708): 2 Mad L W 366; *Gurumurthy Nayudu* v. *Pappa Nayudu*, (1862-63) 1 Mad H C R 164 (167); *Narsingdas* v. *Pandit Sheoratan Lal Brahmin*, (1903) 16 C P L R 151; *Musamat Basanti* v. *Badri*, (1904) 7 Oudh Cas 345; *Kunjan* v. *Chandrahas*, 1925 Oudh 266 (267): 11 Oudh L J 682: 84 Ind Cas 515: 28 Oudh Cas 4: 10 O & A L R 809; *Bankey Behari Lal* v. *Abdul Rahman*, 1932 Oudh 63 (65): 8 Oudh W N 1267: 135 Ind Cas 695.

(4-a) *Shidramappa* v. *Gurushantappa*, 1929 Bom 183 (184, 185): 31 Bom L R 137: 116 Ind Cas 227; *Kunversi* v. *Pitamberdas*, 1927 Bom 599 (600): 29 Bom L R 1355.

(5) *Jagmohan Singh* v. *Sheo Manaal Singh*, 1926 Oudh 17 (18): 90 Ind Cas 332

(6) *Ambika Prasad* v. *Deri Dayal*, 1932 All 318 (319): 1932 All L J 235: 54 All 401: 140 Ind Cas 110.

O. 47, R. 7, Notes 4—8.

It is open to the appellant to prefer an appeal against an order granting a review, without taking any steps regarding the decree itself.[7]

As to an appeal from an order granting a review in suits of a Small Cause nature, *see* Note 19 to S. 102 and the undermentioned cases.[8]

An appeal will lie also from an order granting a review of an order passed in execution proceedings.[9]

5. **Grounds of objection in appeal**.—*See* Note 4, above

6. **Application being in contravention of R. 2.**—An appeal will lie from an order granting a review on the ground that there is a contravention of R. 2.[1] *A*, a District Judge passed an order dismissing an appeal. While *A* was absent, an application for review of the order was presented to the Sub-Judge who ordered notice to issue. Subsequently *A*, died and his successor granted a review of the order of dismissal. It was held that the Sub-Judge had no jurisdiction to order notice to issue on the application for review, and that an order by the successor of *A*, granting a review of *A's* order, was, under such circumstances, in contravention of the provisions of R. 2, and an appeal therefore lay under this rule.[2]

7. **"In contravention of the provisions of R. 4."**—It has been seen in Note 6 to R. 4, *ante* that where a Court grants a review without notice to the opposite party or, in cases coming under Cl. (*b*) of sub-R. (2) of that rule, without calling for strict proof of the allegations referred to therein, it acts in contravention of that rule. An appeal will therefore lie from such order under the provisions of this rule.[1] As to the meaning of the words "strict proof" and to the powers of the appellate Court to go into the question of the *sufficiency* of the evidence, *see* Note 6 to R. 4, *ante*.

8. **"After the expiry of the period of limitation".**— An appellate Court cannot entertain an appeal from an order granting review simply on the ground that the application was time-barred. There must also be want of *sufficient cause* for the delay.[1] When an application made beyond the prescribed period is admitted without the Court satisfying itself that there is sufficient cause for delay, then the Court acts without jurisdiction.[2] The

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(7) *Radhakrishna Das* v. *Beni Madhab Das*, 1932 Cal 552 (554): 36 Cal W N 212: 55 Cal L Jour 98: 138 Ind Cas 713.

(8) *Shamsher Ali* v. *Jagannath*, (1912) 16 Ind Cas 203 (204): 17 Cal W N 403; *Indar Kuar* v. *Baldeo Bakhsh*, (1910) 7 Ind Cas 1015 (1016): 13 .Oudh Cas 248.

(9) *Adhar Mandal* v. *Keshab Chandra*, (1910) 5 Ind Cas 483 (484) Cal.

Note 6.

(1) *Manindra Chandra* v. *Balaram Das*, (1910) 5 Ind Cas 725 (726): 11 Cal L Jour 161.

(2) *Shamshar Ali* v. *Jagarnath Thirain*, (1912) 16 Ind Cas 203 (204): 17 Cal W N 403.

Note 7.

(1) *Chiranji Lal Ram Lal* v. *Tulsiram Jankidas*, (1920) 56 Ind Cas 734 (736): 47 Cal 568: 31 Cal L Jour 134; *Sm Garabini Kumari* v. *Surja Narain Singh*, 1924 Pat 250 (253): 5 Pat L Tim 52: 1923 Pat H C C 361: 75 Ind Cas 177. *See also* generally the cases cited in Note 6 to Rule 4 *ante*.

Note 8.

(1) *Kurshed Alam Khan* v. *Rahmut-Ullah Khan*, (1918) 43 Ind Cas 490 (491): 15 All L J 899: 40 All 68.

(2) *Nathu Ram* v. *Gunga Bux*, 1930 All 815 (816): 1930 All L J 1057: 128 Ind Cas 753; *Bhukhan Saran* v. *Piare Lal*, 1931 All 218 (219): 1931 All L J 103: 130 Ind Cas 839; *Munro* v. *Cawnpore Municipal Board*, (1890) 12 All 57 (60): 1889 All W N 197; *Gyanaji Pomaji Marwadi* v. *Ningappa Marbasappa*, 1928 Bom 308 (310): 30 Bom L R 668: 52 Bom 434: 111 Ind Cas 633; *Luchmun Singh* v. *Tirabani Baksh*, (1875) 2 Ind App 58 (68, 69): 14 Beng L R 373: 3 Sar 487 P C; *Nolita Mohan* v. *Dinonath*, (1874) 11 Beng L R 427 (Note); *Assur Ali* v. *Woolfuttonissa*, (1870) 13 Suth W R 33 (33); *Mohamad Gazi* v. *Dullab Bibi*, (1870) 11 Suth W R 22 (22): 5 Beng L R 318 (Note); *Kristo Gobind* v. *Jugobundhoo*, (1869) 12 Suth W R 94 (95); *Luleet Mohun* v. *Sowtra Beebee*, (1868)

appellate Court can look into the sufficiency of the cause for the delay, alleged.[3]

9. **Second appeal from order granting review.**—No second appeal lies from the order of an appellate Court, whether it confirms or reverses the order of the Court of first instance granting an application for review.[1] *See* S. 104, sub-S. (2).

10. **Letters Patent appeal.**—An order refusing an application for review is not a judgment "within the meaning of S. 15 of the Letters Patent and is not appealable as such.[1] An order *granting* an application for review may amount to a "judgment" within that clause but an appeal will lie on the grounds specified in this rule.[2]

Where a single Judge disposed of an application for review, when the other Judge was on a month's leave it was held that the order was without jurisdiction and that an appeal lay under Cl. 15 of the Letters Patent.[3]

11. **Objection to order granting review may be taken in appeal from the final decree.**—The propriety of an order granting review can also be questioned in the appeal against the final decree but only on the grounds specified in this rule.[1]

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10 Suth W R 42 (43); *Ganganarain* v. *Gonomonee*, (1867) 8 Suth W R 184 (188); *Mussammat Fatto* v. *Lashkar Khan*, 1876 Pun Re No 101; *Hurree Singh* v. *Mukha*, 1871 Pun Re No 51. See however *Bhagat Singh* v. *Sadanand Brothers*, (1913) 18 Ind Cas 309 (311): 49 Pun W R 1913: 94 Pun L R 1913 [There was no objection by opposite party].

(3) *Lachman Singh* v. *Tirbani*, (1874-75) 2 Ind App 58 (69): 14 Beng L R 373: 3 Sar 437 P C: *Betts* v. *Bansi Mandal*, (1876) 25 Suth W R 343 (344); *Gour Pershad* v. *Anjub Ali*, (1875) 24 Suth W R 294 (295); *Sreenath Chowdhry* v. *Krittatto Moyee*, (1872) 18 Suth W R 286 (286); *Jhubhoo Sahoo* v. *Mussammat Jusoda Kooer*, (1872) 17 Suth W R 230 (231); *Gossie Dass* v. *Narain Doss*, 1864 Suth W R 287 (287) (Gap); *Hurree Singh* v. *Mukha*, 1871 Pun Re No 51; *Purna Chandra Sarkar* v. *Nil Madhub Nandi*, (1901) 5 Cal W N 485 (486); *Radakrishna Das* v. *Beni Madhab Das*, 1932 Cal 552 (555): 36 Cal W N 212: 55 Cal L Jour 98: 138 Ind Cas 713.

Note 9.

(1) *Gopal Das* v. *Alaf Khan*, (1889) 11 All 383 (385): 1889 All W N 151; *Khurshed Alam Khan* v. *Rahmat-ullah Khan*, (1918) 43 Ind Cas 490 (490): 15 All L J 899: 40 All 68; *Balanath* v. *Bhivanath*, (1889) 13 Bom 496 (499); *Jainal Bibi* v. *Abdul Jalil*, (1907) 6 Cal L Jour 225 (225); *Kanti Chunder Mukerjee* v. *Saligram*, (1897) 24 Cal 319 (319); *Than Singh* v. *Chundun Singh*, (1885) 11 Cal 296 (298); *Hirdhamun* v. *Jinghoor*, (1880) 5 Cal 711 (712, 713); *Papayya* v. *Chellamayya*, (1889) 12 Mad 125 (126); *Kali Shettathi* v. *Shamu Ram*, (1917) 37 Ind Cas 229 (229): 5 Mad L W 124: 21 Mad L Tim 297 [Question left open]; *Mangat Rai* v. *Khan Chand*, 1882 Pun Re No 133 [Under the Punjab Courts Act, a second appeal lies].

Note 10.

(1) *Trimal* v. *Kanhaiya*, 1923 All 356 (357): 21 All L J 341: 45 All 535: 4 L R A Civ 218: 84 Ind Cas 585; *Achaya* v. *Rathnavelu*, (1886) 9 Mad 253 (256): 10 Ind Jur 59; *Kailash Chandra Sommaddar* v. *Rerati Mohan Roy Chowdury*, (1917) 41 Ind Cas 183 (184): 25 Cal L Jour 360: 21 Cal W N 652; *Mulji Virji* v. *Bangabashi Saha*, (1905) 9 Cal W N 502 (503); *Mussammat Rughoo Bibi* v. *Noorjehan Begum*, (1869) 12 Suth W R 459 (460): 4 Beng L R A C 10.

(2) *Govinda Chetty* v. *Rengammal*, 1929 Mad 261 (263): 1927 Mad W N 411: 106 Ind Cas 172; *Abhoy Charan* v. *Shamant Lochun*, (1889) 16 Cal 788 (793); *Ashrafannissa* v. *Inact Hossein*, (1870) 13 Suth W R 439 (440): 5 Beng L R 316.

(3) *Jagat Chandra Acharji* v. *Shyma Charan Bottacharjee*, (1918) 44 Ind Cas 999 (1000): 22 Cal W N 350.

Note 11.

(1) *Sheik Sadaruddin* v. *Sheikh Ekramuddin*, (1913) 20 Ind Cas 670 (670): 18 Cal W N 22: 19 Cal L Jour 225. *See also* the following cases.—*Mt Bitana* v. *Shankar Lal*, 1931 All 329 (330): 131 Ind Cas 518; *O S Meah* v. *Durga Charan Datta*, 1926 Cal 243 (245): 29 Cal W N 1027: 90 Ind Cas 456; *Kumar Sarat* v. *Sripati*, (1919) 50 Ind Cas 119 (122): 23 Cal W N 242; *Baroda Charan* v. *Gobind Prasad*, (1895) 22 Cal 984 (989); *Gyanund Asram* v. *Bepin Mohun*, (1895) 22 Cal 734 (737, 738); *Ananda Krishna* v. *Jogendra Nath*, (1908) 8 Cal L Jour 294 (297); *Prannath* v. *Sreekant*, (1878) 2 Cal L Rep 257 (258); *Nubokishore Biswas* v. *Jadub Chunder Sircar*, (1873) 20 Suth W R 426 (426); *Chunder Surmah* v. *Madhub Ram*, (1873) 20 Suth W R 84 (85, 86): 11 Beng L R 423 F B; *Fateh Chand* v. *Menghi Bai*, (1913) 19 Ind Cas 481 (485): 108 Pun W R 1913: 181 Pun L R 1913: 109 Pun Re 1913; *Dharam Singh* v. *Dewa Singh*, 1895 Pun Re No 62; *Govinda Chetty* v. *Rengammal*, 1929 Mad 261 (264): 1927 Mad W N 411: 106 Ind Cas 172; *Gopala Iyer* v. *Ramaswamy Sastrial*, (1908) 31 Mad 49 (50): 17 Mad L Jour 603: 2 Mad L Tim 519; *Manicka* v. *Gurusami*, (1900) 23 Mad 496 (497); *Moheshur Singh* v. *Bengal Govt.*, (1858) 7 Moo Ind App 283 (307): 3 Suth W R (P C) 45: 1 Suth 325: 1 Sar 645 P C; *Beasut* v. *Abdoollah*, (1875) 2 Cal 131 (141): 3 Ind App 221: 26 Suth W R 50: 3 Sar 221 P C; *Amrit Lal* v. *Madho*, (1884) 6 All 292 (294): 1884 All W N 89: 8 Ind Jur 589; *Madho Das* v. *Rukman*, (1876-80) 2 All 287 (289);

12. **Order granting review in insolvency proceedings if appealable.**—A Court exercising powers under the insolvency jurisdiction has the same powers as any other Court under the Code. If a review is granted, the order can be objected to in appeal only on the grounds mentioned in this rule.[1]

13. **Dismissal of application for review for default—No appeal.**—An order under O. 47, R. 7 refusing to re-admit an application for review, dismissed for default is not an appealable order. However, the High Court could in such a case interfere in revision.[1]

14. **Appeal from decree passed on review.**—An appeal lies against the decree passed on review.[1] (*See also* Note 3 to R. 8.)

In such appeal the Court has full power to go into the merits of the case and see whether the decree was properly passed.[2] It could be urged in such an appeal that the Court which admitted the application for review had no jurisdiction to do so.[3]

15. **Second application for review.**—There is nothing in the Code of Civil Procedure preventing a second application for review, where a previous application for review was made and rejected, provided such second application is based on grounds different from those taken in the first application.[1]

16. **Review without jurisdiction—Revision.**—The High Court will not interfere with the order of an appellate Court dismissing an appeal against the grant of review unless there is a want of jurisdiction or there is an illegality or material irregularity in passing such an order[1] nor will it

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Abdul Rahim v. *Racha Rai*, (1875-78) 1 All 363 (364): 1 Ind Jur 818; *Chunder Churn* v. *Loodhunram*, (1876) 25 Suth W R 324 (325); *Mirza Akbar Ali* v. *Mullick Mukdoon Buksh*, (1876) 25 Suth W R 63 (64); *Koleemooddeen* v. *Heerun*, (1875) 24 Suth W R 186 (188); *Ram Joy Goopta* v. *Sreemuty Jaigodesuree*, (1874) 22 Suth W R 399 (399); *Joy Kishen Mookerjee* v. *Purbuty Churn Ghoosal*, (1874) 22 Suth W R 183 (183).

Note 12.

(1) *Mannu Lal* v. *Kunj Bihari*, 1922 All 206 (207): 20 All L J 517: 67 Ind Cas 317: 44 All 605: 4 U P L R (A) 66.

Note 13.

(1) *Basarat Ali* v. *Maung Aung Ban*, 1927 Rang 204 (205): 5 Rang 121: 102 Ind Cas 706; *Hem Sankar Roy Chowdhry* v. *Nishi Kanta Das Gupta*, 1925 Cal 430 (431): 81 Ind Cas 1017; *Girdhari Lal* v. *Zorawar Singh*, 1925 All 57 (58): 5 L R A (Civ) 608: 80 Ind Cas 649: 47 All 1.

Note 14.

(1) *Birjbasi Lal* v. *Salig Ram*, (1912) 14 Ind Cas 472 (473): 9 All L J 183: 34 All 282; *Amanut Ali* v. *Mussamut Bindhoo*, (1870) 13 Suth W R 138 (139); *Balanath* v. *Bhivanath*, (1889) 13 Bom 496 (499); *Nanhe* v. *Mangat*, (1914) 20 Ind Cas 647 (648) All.

(2) *Nundalal Mullick* v. *Panchanan*, (1918) 42 Ind Cas 484 (495): 21 Cal W N 1076: 26 Cal L Jour 187: 45 Cal 60; *Kolachina Venkata Seetharamayya* v. *Veena Tolasi Babu*, 1924 Mad 602 (602): 46 Mad L Jour 463: 19 Mad L W 649: 34 Mad L Tim 224: 1924 Mad W N 355: 83 Ind Cas 548; *Govinda Chetty* v. *Rungammal*, 1929 Mad 261 (264): 1927 Mad W N 411: 106 Ind Cas 172.

(3) *Ramanadhan Chetty* v. *Narayanan Chetty*, (1904) 27 Mad 602 (607): 14 Mad L Jour 321; *Ujagar* v. *Ram Sahai*, (1911) 11 Ind Cas 843 (843): 14 Oudh Cas 108. See also *Sakho Narayan Khandalkar* v. *Narayan Bhikaji Khandalkar*, (1869) 6 Bom H C R A C 238.

Note 15.

(1) *Hari Singh* v. *Muhammad Said*, 1927 Lah 200 (211): 8 Lah 54: 102 Ind Cas 523; *Palia* v. *Mathura Prasad*, (1916) 32 Ind Cas 622 (623): 14 All L J 204: 38 All 280; *Vaman* v. *Malhari*, (1902) 26 Bom 485 (491): 4 Bom L R 121; *Gobinda Ram* v. *Bholanath*, (1888) 15 Cal 432 (435); *Forbes* v. *Dyanutoollah*, (1868) 10 Suth W R 415 (415); *Nasiruddin* v. *Indro Narain*, 5 Suth W R 93 (95): Beng L R Sup Vol 367; *Kasheenath* v. *Lukhee Narain*, 1864 Suth W R 91 (92) (Gap); *Nee Doo Monee* v. *Saroda Monee*, (1865) 2 Suth W R 61 (62); *Fakheeroodeen* v. *Kalachand*, (1864) 1 Suth W R 287 (287); *Bansari Das* v. *Sayad Sultan Mirza*, 1892 Pun Re No 57; *Jai Gopal* v. *Jowhir*, 1883 Pun Re No 107. See also *Bissessar* v. *Smidt*, (1906) 4 Cal L Jour 46 (49). See however *Muhammad Yusuf* v. *Abdul*, (1888) 16 Cal 749 (752).

Note 16.

(1) *Ram Lal* v. *Ram Dhani*, 1925 Oudh 223 (224): 11 Oudh L J 700: 87 Ind Cas 204: 1 Oudh W N 349. See *Gopal Das* v. *Altaf Khan*, (1889) 11 All 383 (385): 1889 All W N 151 [No interference in revision as there is a remedy by way of appeal from the final decree at the rehearing].

interfere with an interlocutory order granting review for a sufficient reason.[2] But where the first appellate Court allows an appeal against an order granting review on a ground other than those mentioned in this rule, it acts without jurisdiction and the order is liable to be set aside in revision.[3] Where a Court subordinate to the High Court rejects an application for review of judgment refusing to consider the grounds of the same and thus fails to perform its duty, it is competent to the High Court under its general powers of superintendence to direct such Court to proceed according to law.[3-a] (*See also* Note 27 to S. 115, *ante* and the undermentioned cases.[4])

Registry of application granted, and order for re hearing.

R. **8.** [S. 630.] When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

[1877—S. 630; 1859—S. 380.]

Synopsis.

1. **Procedure on review.**
2. **What question may be gone into after the grant of review.**
3. **Effect of review on the original decree.**

1. **Procedure on review.**—The rule applies to High Courts and Small Cause Courts. There are three stages in the proceedings for review[1]:—

(1) An *ex parte* application and notice thereon.

(2) The hearing of the application after such notice.

(3) Rehearing of the case after granting the application for review.

This rule refers to the procedure to be followed when an order granting a review is passed. The Court ought to make a record of the fact

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(2) *Yusaz* v. *Naza*, (1912) 16 Ind Cas 995 (995): 17 Pun L R 1913: 278 Pun W R 1913: 11 Pun Re 1913; *Ashruffoonissa* v. *Enayat Hossein*, (1870) 13 Suth W R 439 (440): 5 Beng L R 316.

(3) *Lan Tin Nagan* v. *Ma Mya Kyin*, 1929 Rang 105 (107): 7 Rang 187: 118 Ind Cas 120; *Gudri Singh* v. *Parsotam Das*, 1925 All 395 (396): 6 L R A Civ 157: 86 Ind Cas 917; *Sreenivasa Iyer* v. *Nataraja Iyer*, (1915) 28 Ind Cas 707 (708): 2 Mad L W 366. See also *Kalap Nath Man Tiwari* v. *Bindye Chal Man Tiwari*, 1889 All W N 179 (181).

(3-a) In the matter of the petition of *Mathra Prasad*, (1875-78) 1 All 296 (297).

(4) *Kothathian* v. *Sethurayan*, (1909) 2 Ind Cas 488 (488): 19 Mad L Jour 56: 5 Mad L Tim 73 [Small Cause Court]; *Ram Naresh Singh* v. *Jagarnath Singh*, 1924 All 759 (760): 5 L R A Civ 392: 85 Ind Cas 180, (Do.); *Ramasamy* v. *Kurisu*, (1890) 13 Mad 178, (Do.); *Valliammai Nadathi* v. *Asseervatha Nadar*, (1919) 53 Ind Cas 44 (45) Mad [Although O 47, R 7 of the C P Code is not applicable to Small Cause Courts, its provisions will guide the discretion which the High Court possesses under S 25 of the Provincial Small Cause Courts Act]; *Gulzari Mal* v. *Sohan Lal*, 1904 Pun L R 38 [An application for a review wrongly granted by the Small Cause Court, is subjected to Revision by the High Court]; *Kang Lall* v. *Lilawati*, 1929 All 375 (376): 119 Ind Cas 561 [Order of the Lower Appellate Court postponing consideration of the application for review—Only remedy is revision]; *Hem Sankar Roy Chowdhry* v. *Nishi Kanta Das Gupta*, 1925 Cal 430 (431): 81 Ind Cas 1017 [Failure to exercise jurisdiction—Revision lies]; *Basarat Ali* v. *Maung Aung Ban*, 1927 Rang 204 (205): 5 Rang 121: 102 Ind Cas 706; *Somwar Gir* v. *Goswami Mayanand Gir*, 1928 All 392 (394): 26 All L J 477: 50 All 801: 113 Ind Cas 171 [Review granted on a ground not good in Law—No revision lies]; *Mt Rukhmabai* v. *Ganapat Rao*, 1932 Nag 177: 28 Nag L R 221: 140 Ind Cas 409 [Appeal from order granting—Review—Appellate Court confusing between reasons for review and order on review acts illegally—Revision lies].

Order 47, Rule 8—Note 1.

(1) *Gourkrishna Sarkar* v. *Nilmadhab Sha*, 1923 Cal 113 (114, 115): 36 Cal L Jour 484: 73 Ind Cas 34; *Abdurahiman* v. *Imbichunny*, 1932 Mad 669 (670): 63 Mad L Jour 357: 139 Ind Cas 436 (2): 1932 Mad W N 1124: 36 Mad L W 242: 55 Mad 871; *Nanhe* v. *Mangat Rai*, (1913) 20 Ind Cas 647 (648) All; *Vadilal* v. *Fulchand*, (1905) 30 Bom 56 (60): 7 Bom L R 664; *Lekhraj Roy* v. *Kanhya Singh*, (1872) 18 Suth W R 494 (495, 496); *Purander Coomar* v. *Ram Narain Singh*, (1911) 11 Ind Cas 720 (721): 14 Cal L Jour 103; *Rajendro Pratab* v. *Bhowabal*, (1871) 14 Suth W R 105 (106); *Indarkuar* v. *Baldeo Baksh*, (1910) 7 Ind Cas 1015 (1015, 1016): 13 Oudh Cas 248.

O. 47, R. 8. Notes 1—3.

that the review has been granted.[2] The Court can thereafter proceed to hear the case *at once*[3] or may make such order as to rehearing as it thinks fit. This is clear from the rule itself.

2. What question may be gone into after the grant of review.—A Court, in granting a review, can make a qualified order as to the *extent* to which the review should be carried out.[1] It is not bound to hear the whole case.[2] Nor, on the other hand, is it restricted to the particular ground on which the application was granted.[3] It depends upon the circumstances of each case whether the whole suit should be re-opened or whether it should be retried in part only.[4] When, on a review application, an order dismissing an appeal under O. 41, R. 11, is set aside, the whole appeal may be heard.[4-a] But grounds not mentioned in the memo. of appeal cannot be heard.[5] A party who not only had an opportunity of raising a question but who did raise it in appeal and in the argument abandoned it, cannot be allowed to agitate the question again on review.[6] The Court has a discretion to receive at the hearing after review, documents which had not been tendered at the original hearing.[7] But where a party obtained review on the ground that upon the record he was entitled to full relief he sought, the other side cannot be allowed to adduce evidence.[8] Whether certain documents which have been admitted as evidence were so admissible or not, is not a point which can be argued on review.[9]

3. Effect of review on the original decree.—Where an application for review is *rejected*, the original decree stands.[1] Where an application for re-

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(2) *Purander Kumar* v. *Ram Narain Singh*, (1911) 11 Ind Cas 720 (721): 14 Cal L Jour 103; *Nathu Ram* v. *Ganga Bux*, 1930 All 815 (816): 1930 All L J 1057: 128 Ind Cas 753; *Bhagwati Prasad* v. *Achhaibar Singh*, 1923 Oudh 93 (94, 95): 9 Oudh L J 531: 26 Oudh Cas 24: 74 Ind Cas 214. See also *Bhairon Din* v. *Ram Sahai*, (1881) 3 All 316 (320); *Anund Moyee* v. *Kalee Koomar*, (1866) 6 Suth W R 18 (19)

(3) *Subbaiyer* v. *Chinnappa Rowthen*, (1915) 26 Ind Cas 366 (366): 1915 Mad W N 22.

Note 2.

(1) *Bhugwandeen Doobey* v. *Myna Baee*, (1863-66) 11 Moo Ind App 487 (499): 9 Suth W R P C 23: 2 Suth 124: 2 Sar 327 P C; *Hurbuns Sahai* v. *Thakoor Prosad*, (1883) 13 Cal L Rep 285 (300): 10 Cal 108; *Phaniram Rathi* v. *Ambika Charan Hazra*, 1927 Cal 21 (24): 53 Cal 856: 97 Ind Cas 731: 31 Cal W N 1035; *Gour Sundar Bhowmick* v. *Rakhal Rai Bhowmick*, (1916) 34 Ind Cas 592 (595): 20 Cal W N 1165: 27 Cal L Jour 326; *Bhagwati Prasad* v. *Acchaibar Singh*, 1923 Oudh 93 (95): 9 Oudh L J 531: 26 Oudh Cas 24: 74 Ind Cas 214.

(2) *Hurbuns Sahye* v. *Thakoor Pershad*, (1883) 9 Cal 209 (211): 5 Shome L R 22: 7 Ind Jur 306.

(3) *Samilal* v. *Dullabh*, (1873) 10 Bom H C R 360; *Sadar-ud-din* v. *Ekram-ud-din*, (1913) 20 Ind Cas 670 (672): 18 Cal W N 22: 19 Cal L Jour 225; *Thacoor Prasad* v. *Baluck Ram*, (1882) 12 Cal L Rep 64 (79) [But see *Byjnath Sahoy* v. *Wuzeer Narain*, (1875) 24 Suth W R 427 (427); *Hurro Chunder* v. *Ram Kissore*, (1864) Suth W R 141 (142); *Dhuronidhur Sen* v. *The Agra Bank*, (1881) 5 Cal 86 (89): 4 Cal L R 434; *Khoresh Mahomed* v. *Mahomed Takee*, (1881) 10 Cal L Rep 106 (110)].

(4) *Bhubaneswari Koer* v. *Ajodhya Singh*, (1911) 11 Ind Cas 102 (104): 15 Cal L Jour 339.

(4-a) *Janki Nath* v. *Prabhasini*, (1915) 30 Ind Cas 898 (900): 22 Cal L Jour 99: 19 Cal W N 1077: 43 Cal 178.

(5) *Sasadhar* v. *Arun Kumar*, (1920) 54 Ind Cas 631 (631) Cal; *Janab Ali* v. *Chandicharan*, (1869) 11 Suth W R 202 (202): 5 Beng L R 334 Note; *Rajkunwar* v. *Inderjit*, (1870) 13 Suth W R 52 (55): 5 Beng L R 585; *Collector of Tippera* v. *Mufeezunnissa*, (1870) 14 Suth W R 84: 5 Beng L R 341 Note [But see *Chinta Monee Paul* v. *Peares Mohun Mookerjee*, (1871) 15 Suth W R 1 (5): 6 Beng L R 126 F B; *Kalu Bin* v. *Visram*, (1875-77) 1 Bom 543 (546)]

(6) *Sabapathy* v. *Subraya*, (1878-80) 2 Mad 58 (60): 3 Ind Jur 210.

(7) *Hefajuddin Talukdar* v. *Habi Nasya*, 1928 Cal 416 (416): 108 Ind Cas 246; *Bihari Lal* v. *Trailakhyo*, (1869) 12 Suth W R 228 (224): 3 Beng L R A C 346.

(8) *Banee Madhub* v. *Shahzada Pakaktar*, (1873) 20 Suth W R 225 (225).

(9) *Bishun Ram Doss* v. *Shaikh Sadoo*, (1875) 24 Suth W R 186 (187).

Note 3.

(1) *Nanhe* v. *Mangal Rai*, (1913) 20 Ind Cas 647 (648) All; *Vadilal* v. *Fulchand*, (1906) 30 Bom 56 (60): 7 Bom L R 664; *Lekraj* v. *Kanhaya Singh*, (1872) 18 Suth W R 494 (495); *Kailasa Iyer* v. *Arunachalla Chettiar*, (1914) 22 Ind Cas 953 (954): 15 Mad L Tim 224; *Soudaminee Dossee* v. *Mahtab Chand*, (1866) 6 Suth W R (Mis) 102 (103): 1866 Beng L R 585 F B; *Bhagwan Baksh Singh* v. *Manrak Kunwar*, 1922 Oudh 148 (148): 24 Oudh Cas 280: 8 Oudh L J 399: 66 Ind Cas 205; *Ramhurry Mondul* v. *Mothoor Mohun Mondul*, (1873) 20 Suth W R 450 (452) P C.

O. 47, R. 8, Note 3,

view is *granted*, the decree previously made is vacated.[2] No appeal will lie, therefore, against such decree, after the review is granted. If an appeal has been preferred, it cannot, after the review is granted, be prosecuted further.[3] Where, after hearing on review, a decree is passed modifying or confirming the original decree it is a *fresh decree* and can be appealed against within the period prescribed for an appeal.[4] An order for review is not a final order of the Court. So no leave to appeal to Privy Council can be granted in respect of such an order.[5]

O. 47, R. 9.

Bar of certain applications.

R. 9. [S. 629 Last para.] No application to review an order *made* on an application for a review or *a decree or* order passed *or made* on *a* review shall be entertained.

[1877—S. 629.]

Local Amendments.

ALLAHABAD.

Add the following as R. 10:—

"10. Rule 38 of O. 41 shall apply, so far as may be, to proceedings under this order."

BOMBAY.

The following shall be added as R. 10 in O. 47:—

Applicability of R. 38 of O. 41. "10. Rule 38 of O. 41 shall apply, so far as may be, to proceedings under this order."

OUDH.

Add the following as R. 10:—

"10. Rule 38 of O. 41 shall apply, so far as may be, to proceedings under this order."

SIND.

Add the following as R. 10 in O. 47:—

Applicability of R. 38 of O. 41. "10. Rule 38 of O. 41 shall apply, so far as may be, to proceedings under this order."

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[2] *Gourikrishna Sarkar* v. *Nilmadhab Saha*, 1923 Cal 113 (115): 36 Cal L Jour 484: 73 Ind Cas 34; *Nanhe* v. *Mangat Rai*, (1913) 20 Ind Cas 647 (648) All. See however *Achyut Vishnu Patnakar* v. *Tapibai Krishnaji*, 1924 Bom 310 (310): 48 Bom 210: 26 Bom L R 103: 79 Ind Cas 753 [The judgment sought to be reviewed is not set aside but only held in suspense until the case has been reheard]; *Shid Ramappa* v. *Guru Shanthappa*, 1929 Bom 183 (185): 116 Ind Cas 227: 31 Bom L R 137.

[3] *Gourikrishna Sarkar* v. *Nilmadhab Saha*, 1923 Cal 113 (115): 36 Cal L Jour 484: 73 Ind Cas 34; *Kanhaiya Lal* v. *Baldeo Prasad*, (1906) 28 All 240 (241): 1905 All W N 265; *Kuar Sen* v. *Gangaram*, 1890 All W N 144 (144); *Siddaramappa* v. *Gurushantappa*, 1929 Bom 183 (184, 185): 31 Bom L R 137: 116 Ind Cas 227; *Sailaja Nath Guha Roy* v. *Charu Bala Dassi*, 1926 Cal 943 (944): 30 Cal W N 738: 96 Ind Cas 384; *Pyari Mohun Kundu* v. *Kalu Khan*, (1917) 41 Ind Cas 497 (498): 44 Cal 1011; *Ghutar Singh* v. *Phulang Singh*, 1926 Oudh 55 (56): 90 Ind Cas 119; *Ramaswamy Iyengar* v. *Janaki Ammal*, (1910) 6 Ind Cas 723 (723): 7 Mad L Tim 387; *Malawa Ram* v. *Madan Gopal*, (1919) 55 Ind Cas 763 (763): 166 Pun Re 1919: 111 Pun W R 1919: 96 Pun L R 1919; *Basheshar Nath* v. *Ram Kishen Dass*, (1919) 54 Ind Cas 966 (967): 140 Pun Re No 1919: 80 Pun W R 1919: 1 Lah L Jour 191; *Bhavani Prasad* v. *Laxmi Bai*, (1919) 50 Ind Cas 329 (330): 15 Nag L R 65; *Aditya Kumar* v. *Abinish Chandra*, 1931 Cal 323 (326): 34 Cal W N 1002: 131 Ind Cas 258; *Birjbasi Lal* v. *Salig Ram*, (1912) 14 Ind Cas 472 (473): 9 All L J 183: 34 All 282.

[4] *Nibaran Chandra Sikdar* v. *Abdul Hakim*, 1928 Cal 418 (419): 107 Ind Cas 751; *Joy Kishen* v. *Ataoor Rohoman*, (1880) 6 Cal 22 (25): 6 Cal L Rep 575: 5 Ind Jur 522: 3 Shome L R 197.

[5] *Nibaran Chandra Sikdar* v. *Abdul Hakim*, 1928 Cal 418 (419): 107 Ind Cas 751; *Ambika Prasad* v. *Devi Dayal*, 1932 All 318 (318): 1932 All L J 235: 54 All 401: 140 Ind Cas 110.

O. 47, R. 9, Note 1.

Second review—Barred. See Note 1, Pt. (1).

1. **Bar of certain applications.**—No review lies from

(1) an order granting or rejecting an application for review, or

(2) the decree or order passed or made at the hearing on review.

A second review of the decree or order originally passed is barred under this rule as it is practically for the review of the order passed on review.[1]

ORDER XLVIII.

MISCELLANEOUS.

O. 48, R. 1.

Process to be served at expense of party issuing.

R. **1**. [S. 93.] (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

Costs of service.

(2) The Court-fee *chargeable* for such service shall be *paid* within a time to be fixed before the process is issued.

[1877—S. 93; 1861—S. 2.]

Local Amendments.

ALLAHABAD.

Before the words "Every process issued" prefix the words "Except as provided in O. 4, R. 1 (2)".

NAGPUR.

To sub-R. (2) of R. 1 of O. 48 prefix the words "Except as provided in O. 4, R. 1 (2)" and substitute the word "the" for "The".

OUDH.

In R. 1, before the words "Every process issued" prefix the words "Except as provided in O. 4, R. 1 (2)".

Remission of Court-fees. See N. 1, Pt. (2).

"Unless the Court otherwise directs." See N. 1, Pt. (2).

Order 47, Rule 9—Note 1.

[1] *Muhammad Yusuf Khan* v. *Abdul Rahman Khan*, (1889) 16 Cal 749 (752): 16 Ind App 104: 5 Sar 362: 13 Ind Jur 170: R & J 112 P C; *Durga Das* v. *Amir Chand*, (1911) 10 Ind Cas 679 (681): 25 Pun W R 1911; *Taranath* v. *Rajabullub*, (1867) 7 Suth W R 464 (465); *Kharak Sing* v. *Panjab Sing*, 1878 Pun Re No 6; *Vencama Shetty* v. *Pamoo Shetty*, (1869-70) 5 Mad H C R 323 (324, 325); *Maung San Win* v. *U Naw*, 1893-1900 L B R 580.

But see *Nazir-uddin Khan* v. *Indronarayan Chowdhry*, (1866) 5 Suth W R 93 (96): 1866 Beng L R 367 F B [Case under Code of 1859]; *Banarsi Das* v. *Sayad Sultan Mirza*, 1892 Pun Re No 57 [Case under Code of 1882].

O. 48, R. 1, Note 1.

1. **Process to be served at the expense of the party applying.**— Ordinarily a party applying for a process on his behalf should pay for the expenses thereof. But the Court has power, under special circumstances, to direct that any other party shall bear the expenses.[1] But the words "unless the Court otherwise directs" should not be construed as giving the Court any power to remit the fees leviable under the Court Fees Act.[2] The Court should under Cl. 2 of the rule *fix a time* for the payment of process fee; and it is only in default of payment within such time that it can dismiss the suit for default. Where no such time is fixed in the order, a dismissal for non-payment of process fees is not proper.[3] The time that a Court fixes for payment must be such as to give reasonable facilities to a litigant to obey such order and thus enable him to get the aid of the Court in the matter of summoning his witnesses; an order to pay process *at once* is against the spirit of the rule.[4]

This rule which applies to payment of process fees does not apply to filing of the process forms in the manner provided by the High Court Rules, and no time need be given for the same.[5] *See also* S. 143, *ante*.

O. 48, R. 2, Note 1.

Orders and notices how served.

R. **2**. [S. 94. *Cf.* S. 122.] All orders, notices and *other documents* required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons.

1. **"In the manner provided for the service of Summons"**.—*See* O. 5, *ante*.

This rule is not applicable to suits for recovery of rent under The Bengal Tenancy Act (Act VIII of 1885 as amended by Act IV of 1928), *vide* S. 148, sub-S. (*a*) thereof.

O. 48, R. 3.

Use of forms in appendices.

R. **3**. [S. 644.] The forms *given* in the *appendices*, with such variation as the circumstances of each case *may* require, shall be used for the purposes therein mentioned.

[1877—S. 644.]

Local Amendments.

RANGOON.

The following shall be added to O. 48, R. 3:—

The words "or such forms as may be prescribed by the High Court of Judicature at Rangoon", shall be inserted after the word "Appendices".

Order 48, Rule 1—Note 1.

[1] In re *Studd*, (1899) 26 Cal 124 (126, 127): 3 Cal W N 82.

[2] In re *Studd*, (1899) 26 Cal 124 (126): 3 Cal W N 82; *Kuer Dusadh* v. *Chulhan Singh*, 1927 Pat 318: 102 Ind Cas 791: 8 Pat L Tim 756.

[3] *Ajodhya Prasad* v. *Secretary of State*, 1924 Nag 298 (299): 79 Ind Cas 123; *Purshadee Lall* v. *Umbika Prasad Lall*, (1869) 11 Suth W R 290 (290): 3 Beng L R App. 25.

[4] *Pandu* v. *Rajeshwar*, 1924 Nag 271 (275): 20 Nag L R 145: 78 Ind Cas 996.

[5] *Ram Chandrika Prasad Singh* v. *Ram Niwaji*, 1921 Pat 428 (429): 2 Pat L Tim 45: 61 Ind Cas 666.

O. 48, R. 3, Note 1.

OUDH.

The following is added as R. 4:—

> "4. Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement."

1. **Use of forms in appendices.**—*See* the case noted below.[1]

ORDER XLIX.

CHARTERED HIGH COURTS.

O. 49, R. 1, Note 1.

Who may serve processes of High Courts.

R. **1**. [S. 636.] Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices *to respondents* may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs.

[*See* Ss. 116 to 120 and Ss. 121 to 131.]

1. **"Or by persons employed by them."**—Persons employed by attorney means persons in their *regular service* and not persons engaged for a special purpose. Thus a village headman specially employed for serving a notice is not a "person employed by the attorney" within the meaning of this rule.[1]

Orders 49 to 51 are not applicable to the Rangoon Small Cause Courts, *vide* S. 111, Cl. (*d*) of Act VII of 1920. (The Rangoon Small Cause Courts Act.)

O. 49, R. 2.

Saving in respect of Chartered High Courts.

R. **2**. [New.] *Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court.*

[*See* S. 157.]

Order 48, Rule 3—Note 1.

[1] *Achalabala Bose* v. *Surendra Nath*, (1897) 24 Cal 766 (772): 1 Cal W N 550.

Order 49, Rule 1—Note 1.

[1] *Kanappa Chetty* v. *Sugan Chand*, 1926 Cal 977 (978): 30 Cal W N 734: 96 Ind Cas 375.

D. N. DAR, B. A. LL. B.,
Vakil High Court
SRINAGAR (Kashmir)

O. 49, R. 2, Note 1.

1. **Scope of the rule.**—S. 633 of the old Code provided that the High Court "shall take evidence, and record judgments and orders in such manner as it by rule from time to time directs".[1] Where rules had been framed under that section and were in force at the time of the passing of this Code, the rules of the 1st Schedule as to the mode of taking evidence and of recording judgments would not affect those rules.[2]

O. 49, R. 3.

Application of rules.

R. **3**. [*Cf.* S. 638.] The following *rules* shall not apply to *any Chartered* High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely:—

(1) *rule* 10 *and rule* 11, *clauses* (b) *and* (c) *of Order VII*;

(2) *rule* 3 *of Order X*;

(3) *rule* 2 *of Order XVI*;

(4) *rules* 5, 6, 8, 9, 10, 11, 13, 14, 15 *and* 16 (so far as relates to the manner of taking evidence) *of Order XVIII*;

(5) *rules* 1 *to* 8 *of Order XX*; *and*

(6) *rule* 7 *of Order XXXIII* (so far as relates to the making of a memorandum);

and rule 35 *of Order XLI* shall not apply to any such High Court in the exercise of its appellate jurisdiction.

[*See* Ss. 116 to 120 and Ss. 121 to 131.]

Local Amendment.

BOMBAY.

In R. 3, the word "and" immediately preceding paragraph (6) shall be omitted and the following paragraph shall be inserted between paragraphs (5) and (6), namely:—

"(5-a) R. 72-A of Order 21; and"

For the word and figures "R. 35" occurring below item (6) of R. 3, the words and figures "Rr. 31 and 35" shall be substituted.

The following clause shall be inserted as clause (1), namely:—

"(1) R. 21-A of O. 5;"

For the existing clause (1), the following shall be substituted, namely:—

"(1-a) Rr. 10 and 11, clauses (*b*) and (*c*), and Rr. 19 to 26 of O. 7;"

Below clause (1-a), the following shall be inserted, namely:—

"(1-b) Rr. 11 and 12 of O. 8;"

Order 49, Rule 2—Note 1.

(1) See *Sundar Bibi* v. *Bisheshwar Nath*, (1887) 9 All 93 (96): 1886 All W N 303.

(2) *Banarsi Das* v. *Sagar Mal*, 1929 All 403 (403): 1929 All L J 713: 116 Ind Cas 23.

O. 49, R. 3, Note 1.

Below clause (6), the following shall be inserted, namely:—

"(7) Rule 38 of O. 41," and

The following shall be added as R. 4:—

> "4. Under S. 128, paragraph 2, clause (1) of the Civil Procedure Code of 1908, the following power is delegated to the Registrar of the High Court, Appellate Side, Bombay.
>
> 'Where on a memorandum of appeal presented within the time prescribed for the same the whole or any part of the fee prescribed by the law for the time being in force relating to Court-fees has not been paid, the Registrar may in his discretion allow the appellant to pay the whole or part as the case may be of such Court-fees and may admit the appeal to the register even though the subsequent payment of Court-fee may have been made after the time prescribed for presentation of the appeal.' "

1. **Application of O. 41, R. 10 to Chartered High Courts.**—*See* Note 3 to S. 117, *ante*.

ORDER L.

PROVINCIAL SMALL CAUSE COURTS.

O. 50, R. 1.

Provincial Small Cause Courts.

R. 1. [New.] *The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Causes Courts Act,* 1887, *or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say—*

(a) *so much of this schedule as relates to—*

(i) *suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits;*

(ii) *the execution of decrees against immoveable property or the interest of a partner in partnership property;*

(iii) *the settlement of issues; and*

(b) *the following rules and orders,—*

Order II, rule 1 *(frame of suit);*

Order X, rule 3 *(record of examination of parties);*

Order XV, except so much of rule 4 *as provides for the pronouncement at once of judgment;*

Order XVIII, rules 5 *to* 12 *(evidence);*

Orders XLI to XLV (appeals);

Order XLVII, rules 2, 3, 5, 6, 7 (*review*); O. 50, R. 1, Note 1.
Order LI.

[*See* S. 7 and O. 20, R. 4.]

1. **Provincial Small Cause Courts.**—*See* Notes to S. 7 and Note 8 to O. 20, R. 4, *ante*.

ORDER LI.

PRESIDENCY SMALL CAUSE COURTS.

Presidency Small Cause Courts.

R. 1. [New.] *Save as provided in rules* 22 *and* 23 *of Order V, rules* 4 *and* 7 *of Order XXI, and rule* 4 *of Order XXVI, and by the Presidency Small Cause Courts Act*, 1882, *this schedule shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.* O. 51, R. 1.

Local Amendments.

ALLAHABAD.

Add the following as O. 52, R. 1:—

"1. Rule 38 of O. 41 shall apply, so far as may be to proceedings under S. 115 of the Code."

BOMBAY.

The following shall be added as O. 52:—

Applicability of R. 38 of O. 41 to proceedings under S. 115.

"1. Rule 38 of O. 41 shall apply, so far as may be, to proceedings under S. 115 of the Code.

OUDH.

After O. 51 *add* the following as O. 52:—

"Rule 38 of O. 41 shall apply, so far as may be, to proceedings under S. 115 of the Code."

RANGOON.

"*Order* 52.—Rules of procedure to be followed in the Appellate Side of the High Court of Rangoon. [Omitted.]

Order 53.—Rules for the conduct of suits in the Small Cause Court at Rangoon. [Omitted.]

Order 54.—Rules for the classification and arrangement of Civil Records. [Omitted.]"

SIND.

Add the following as O. 52:—

Applicability of R. 38 of O. 41 to proceedings under S. 115.

"1. Rule 38 of O. 41 shall apply, so far as may be to proceedings under S. 115 of the Code."

Appendix A.

APPENDIX A.

PLEADINGS.

(1) TITLES OF SUITS.

IN THE COURT OF

A. B. (*add description and residence*) .. .. *Plaintiff.*

.. *against*

C. D. (*add description and residence*) .. .. *Defendant.*

(2) DESCRIPTION OF PARTIES IN PARTICULAR CASES.

The Secretary of State for India in Council.

The Advocate-General of

The Collector of

The State of

The A. B. Company, Limited, having its registered office at

A.B., a public officer of the C. D. Company

A. B. (*add description and residence*), on behalf of himself and all other creditors of C. D., late of (*add description and residence*).

A. B. (*add description and residence*), on behalf of himself and all other holders of debentures issued by the Company, Limited.

The Official Receiver.

A. B., a minor (*add description and residence*), by C. D. [*or* by the Court of Wards], his next friend.

A. B. (*add description and residence*), a person of unsound mind [*or* of weak mind], by C. D., his next friend.

A. B., a firm carrying on business in partnership at

A. B. (*add description and residence*), by his constituted attorney C. D. (*add description and residence*).

A. B. (*add description and residence*), Shebait of Thakur.

A. B. (*add description and residence*), executor of C. D., deceased.

A. B. (*add description and residence*), *heir of* C. D., deceased.

---

(3) PLAINTS.

No. 1.

MONEY LENT.

(*Title.*)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , he lent the defendant rupees repayable on the day of .

2. The defendant has not paid the same, except rupees paid on the day of 19 .

[*If the plaintiff claims exemption from any law of limitation, say:*—]

3. The plaintiff was a minor [*or* insane] from the day of till the day of .

4. [*Facts showing when the cause of action arose and that the Court has jurisdiction.*]

5. The value of the subject-matter of the suit for the purpose of jurisdiction is rupees and for the purpose of Court-fees is rupees.

6. The plaintiff claims rupees, with interest at per cent. from the day of 19 .

No. 2.

MONEY OVERPAID.

(*Title.*)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff agreed to buy and the defendant agreed to sell bars of silver at annas per tola of fine silver.

2. The plaintiff procured the said bars to be assayed by *E.F.*, who was paid by the defendant for such assay, and *E. F.*, declared each of the bars to contain 1,500 tolas of fine silver, and the plaintiff accordingly paid the defendant rupees.

3. Each of the said bars contained only 1,200 tolas of fine silver, of which fact the plaintiff was ignorant when he made the payment.

4. The defendant has not repaid the sum so overpaid.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 3.

GOODS SOLD AT A FIXED PRICE AND DELIVERED.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , *E. F.*, sold and delivered to the defendant [one hundred barrels of flour, *or* the goods mentioned in the schedule hereto annexed, *or* sundry goods].

2. The defendant promised to pay rupees for the said goods on delivery [*or* on the day of , *some day before the plaint was filed*].

3. He has not paid the same.

4. *E. F. died on the* *day of* 19 . By his last will he appointed his brother, the plaintiff, his executor.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

7. The plaintiff as executor of *E. F.* claims [*Relief claimed*].

No. 4.

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , plaintiff sold and delivered to the defendant [*sundry articles of house-furniture*], but no express agreement was made as to the price.

2. The goods were reasonably worth rupees.

3. The defendant has not paid the money.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 5.

GOODS MADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , *E. F.* agreed with the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*] and that *E. F.* should pay for the goods on delivery rupees.

2. The plaintiff made the goods, and on the day of 19 , offered to deliver them to *E. F.*, and has ever since been ready and willing so to do.

3. *E. F.* has not accepted the goods or paid for them.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 6.

DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION].

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff put up at auction sundry [*goods*], subject to the condition that all goods not paid for and removed by the purchaser within [*ten days*] after the sale should be re-sold by auction on his account, of which condition the defendant had notice.

2. The defendant purchased [*one crate of crockery*] at the auction at the price of rupees.

3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [*ten days*] after.

4. The defendant did not take away the goods purchased by him, nor pay for them within [*ten days*] after the sale, nor afterwards.

5. On the day of 19 , the plaintiff re-sold the [*crate of crockery*], on account of the defendant, by public auction, for rupees.

6. The expenses attendant upon such re-sale amounted to rupees.

7. The defendant has not paid the deficiency thus arising, amounting to rupees.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 7.

SERVICES AT A REASONABLE RATE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. Between the day of 19 , and the day of 19 , at , plaintiff [*executed sundry drawings, designs and diagrams*] for the defendant, at his request; but no express agreement was made as to the sum to be paid for such services.

2. The services were reasonably worth rupees.

3. The defendant has not paid the money.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 8.

SERVICES AND MATERIALS AT A REASONABLE COST.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , at , the plaintiff built a house [known as No. , in], and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.

2. The work done and materials supplied were reasonably worth rupees.

3. The defendant has not paid the money.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 9.

USE AND OCCUPATION.

(*Title.*)

A. B., the above-named plaintiff, executor of the will of *X. Y.*, deceased, states as follows:—

1. That the defendant occupied the [house No. , Street], by permission of the said *X. Y.*, from the day of 19 , until the day of 19 , and no agreement was made as to payment for the use of the said premises.

2. That the use of the said premises for the said period was reasonably worth rupees.

3. The defendant has not paid the money.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

6. The plaintiff as executor of *X. Y.* claims [*Relief claimed*].

No. 10.

ON AN AWARD.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil which the defendant refused to pay], agreed in writing to submit the difference to the arbitration of *E. F.* and *G. H.*, and the original document is annexed hereto.

2 On the day of 19 , the arbitrators awarded that the defendant should [pay the plaintiff rupees].

3. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No.* 1, *and Relief claimed.*]

No. 11.

ON A FOREIGN JUDGMENT.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , at , in the State [*or* Kingdom] of , the Court of that State [*or* Kingdom], in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff rupees, with interest from the said date.

2. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No.* 1, *and Relief claimed.*]

No. 12.

AGAINST SURETY FOR PAYMENT OF RENT.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , *E. F.* hired from the plaintiff for the term of years, the [house No. , Street], at the annual rent of rupees, payable [monthly].

2. The defendant agreed, in consideration of the letting of the premises to *E. F.*, to guarantee the punctual payment of the rent.

3. The rent for the month of 19 , amounting to rupees, has not been paid.

[*If, by the terms of the agreement, notice is required to be given to the surety, add:*—]

4. On the day of 19 , the plaintiff gave notice to the defendant of the non-payment of the rent, and demanded payment thereof.

5. The defendant has not paid the same.

[*As in paras. 4 and 5 of Form No.* 1, *and Relief claimed.*]

No. 13.

BREACH OF AGREEMENT TO PURCHASE LAND.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed.

[*Or*, on the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas of land in the village of for rupees.]

2. On the day of 19 , the plaintiff, being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant], tendered to the defendant a sufficient instrument of transfer of the same [*or*, was ready and willing, and is still ready and willing, and offered, to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

Local Amendment.

Bengal.

Cancel the word "bighas" and substitute therefor the words $\frac{\text{"acres"}}{\text{"bighas"}}$

No. 14.

NOT DELIVERING GOODS SOLD.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the day of 19 , and that the plaintiff should pay therefor rupees on delivery.

2. On the [said] day the plaintiff was ready and willing, and offered, to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 15.

WRONGFUL DISMISSAL.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, *or* in the capacity of foreman, *or as the case may be*], and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services rupees [monthly].

2. On the day of 19 , the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

3. On the day of 19 , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 16.

BREACH OF CONTRACT TO SERVE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year].

2 The plaintiff has always been ready and willing to perform his part of the agreement [and on the day of 19 , offered so to do].

3. The defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards on the day of 19 , he refused to serve the plaintiff as aforesaid.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 17.

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed. [*Or state the tenor of the contract.*]

[2. The paintiff duly performed all the conditions of the agreement on his part.]

3. The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner].

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 18.

ON A BOND FOR THE FIDELITY OF A CLERK.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff took *E. F.* into his employment as a clerk.

2. In consideration thereof, on the day of 19 , the defendant agreed with the plaintiff that if *E. F.* should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all monies, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees.

[*Or,* 2. In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of rupees, subject to the condition that if *E. F.* should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all monies, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void.]

[*Or,* 2. In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed.]

2. Between the day of 19 , and the day of 19 , *E. F.* received money and other property, amounting to the value of rupees, for the use of the plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 19.

BY TENANT AGAINST LANDLORD, WITH SPECIAL DAMAGE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant, by a registered instrument, let to the plaintiff [the house No. , Street] for the term of years, contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2 All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. On the day of 19 , during the said term, *E. F.*, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving, and lost the custom of *G. H.*, and *I. J.*, by such removal].

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 20.

ON AN AGREEMENT OF INDEMNITY.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant, being partners in trade under the style of *A. B.* and *C. D.*, dissolved the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm.

2. The plaintiff duly performed all the conditions of the agreement on his part.

3. On the day of 19 , [a judgment was recovered against the plaintiff and defendant by *E. F.*, in the High Court of Judicature at , upon a debt due from the firm to *E. F.*, and on the day of 19 ,] the plaintiff paid rupees [in satisfaction of the same].

4. The defendant has not paid the same to the plaintiff.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 21.

PROCURING PROPERTY BY FRAUD.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth rupees over all his liabilities].

2. The plaintiff was thereby induced to sell [and deliver] to the defendant, [dry goods] of the value of rupees.

3. The said representations were false [*or state the particular falsehoods*] and were then known by the defendant to be so.

4. The defendant has not paid for the goods. [*Or, if the goods were not delivered.*] The plaintiff, in preparing and shipping the goods and procuring their restoration, expended rupees.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 22.

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant represented to the plaintiff that *E. F.* was solvent and in good credit, and worth rupees over all his liabilities [*or* that *E. F.* then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit].

2. The plaintiff was thereby induced to sell to *E. F.* [rice] of the value of rupees [on months credit].

3. The said representations were false and were then known by the defendants to be so, and were made by him with intent to deceive and defraud the plaintiff [*or* to deceive and injure the plaintiff].

4 *E. F.* [did not pay for the said goods at the expiration of the credit aforesaid, *or*] has not paid for the said rice, and the plaintiff has wholly lost the same.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 23.

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called and situate in and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2. On the day of 19 , the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well.

3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 24.

CARRYING ON A NOXIOUS MANUFACTURE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called , situate in .

2. Ever since the day of 19 , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands and corrupted the air, and settled on the surface of the lands.

3. Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and live-stock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died.

4. The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep and farming-stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 25.

OBSTRUCTING A RIGHT OF WAY.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of

2. He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants [with vehicles, *or* on foot] at all times of the year.

3. On the day of 19 , defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles, *or* on foot, *or* in any manner] along the way [and has ever since wrongfully obstructed the same].

4. (*State special damage, if any.*)

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 26.

OBSTRUCTING A HIGHWAY.

(*Title.*)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from to so as to obstruct it.

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [*or* into the said trench] and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 27.

DIVERTING A WATER-COURSE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the , in the village of , district of .

2. By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill.

Appendix A.

3. On the day of 19 , the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than sacks per day, whereas, before the said diversion of water, he was able to grind sacks per day.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 28.

OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. Plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. On the day of 19 , the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 29.

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendants were common carriers of passengers by railway between and .

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at [*or* near the station of *or* between the stations of and], a collision occurred on the said railway caused by the negligence and unskilfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, etc., *and state the special damage, if any, as*], and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as [a salesman].

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

[*Or thus:*—2. On that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, etc., *as in para.* 3.]

No. 30.

INJURIES CAUSED BY NEGLIGENT DRIVING.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is a shoemaker, carrying on business at . The defendant is a merchant of .

2. On the day of 19 , the plaintiff was walking southward along Chowringhee, in the City of Calcutta, at about 3 o'clock in the afternoon.

He was obliged to cross Middleton Street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant's drawn by two horses under the charge and control of the defendant's servants, was negligently, suddenly and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months' ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 31.

FOR MALICIOUS PROSECUTION.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant obtained a warrant of arrest from
[a Magistrate of the said city, *or as the case may be*] on a charge of
, and the plaintiff was arrested thereon, and imprisoned for
[days, *or* hours, and gave bail in the sum of
rupees to obtain his release].

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the day of 19 , the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him; *or* in consequence of the said arrest, the plaintiff lost his situation as clerk to one *E. F.*; *or* in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 32.

MOVEABLES WRONGFULLY DETAINED.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , plaintiff owned [*or state facts showing a right to the possession*] the goods mentioned in the schedule hereto annexed [*or describe the goods*], the estimated value of which is rupees.

2. From that day until the commencement of this suit the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit, on the day of 19 , the plaintiff demanded the same from the defendant, but he refused to deliver them.

[*As in paras. 4 and 5 of Form No. 1.*]

6 The plaintiff claims—

(1) delivery of the said goods, or rupees, in case delivery cannot be had;

(2) rupees compensation for the detention thereof.

The Schedule.

No. 33.

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant *C. D.*, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth rupees over all his liabilities].

2. The plaintiff was hereby induced to sell and deliver to *C. D.* [one hundred boxes of tea], the estimated value of which is rupees.

3. The said representations were false, and were then known by *C. D.* to be so [*or* at the time of making the said representations, *C. D.* was insolvent, and knew himself to be so].

4. *C. D.* afterwards transferred the said goods to the defendant *E. F.* without consideration [*or* who had notice of the falsity of the representation].

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

7. The plaintiff claims—

(1) delivery of the said goods, or rupees, in case delivery cannot be had;

(2) rupees compensation for the detention thereof.

No. 34.

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at , contained [ten bighas].

2. The plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed. But the land has not been transferred to him.

3. On the day of 19 , the plaintiff paid the defendant rupees as part of the purchase-money.

4. That the said piece of ground contained in fact only [five bighas].

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

7. The plaintiff claims—

(1) rupees, with interest from the day of 19 ;

(2) that the said agreement be delivered up and cancelled.

No. 35.

AN INJUNCTION RESTRAINING WASTE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is the absolute owner of [*describe the property*].

2 The defendant is in possession of the same under a lease from the plaintiff.

3. The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

6. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

[*Pecuniary compensation may also be claimed.*]

No. 36.

INJUNCTION RESTRAINING NUISANCE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1 Plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No. , Street, Calcutta].

2. The defendant is, and at all the said times was, the absolute owner of [a plot of ground in the same street].

3. On the day of 19 , the defendant erected upon his said plot a slaughter-house, and still maintains the same; and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff].

[4. In consequence the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.]

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

7. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

No. 37.

PUBLIC NUISANCE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The defendant has wrongly heaped up earth and stones on a public road known as Street at so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

2. The plaintiff has obtained the consent in writing of the Advocate-General [*or* of the Collector or other officer appointed in this behalf] to the institution of this suit.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

5. The plaintiff claims—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road:

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

No. 38.

INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

(*Title.*)

A B., the above-named plaintiff, states as follows:—

Appendix A.

[*As in Form No.* 27.]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

No. 39.

RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION, AND FOR AN INJUNCTION.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. Plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grand-father which was executed by an eminent painter], and of which no duplicate exists [*or state any facts showing that the property is of a kind that cannot be replaced by money*]

2. On the day of 19 , he deposited the same for safe keeping with the defendant.

3. On the day of 19 , he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

8. The plaintiff claims—

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting];

(2) that he be compelled to deliver the same to the plaintiff.

No. 40.

INTERPLEADER.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. Before the date of the claims hereinafter mentioned *G. H.* deposited with the plaintiff [*describe the property*] for [safe-keeping].

2. The defendant *C. D.* claims the same [under an alleged assignment thereof to him from *G. H.*].

3. The defendant *E. F.* also claims the same [under an order of *G. H.* transferring the same to him].

4. The plaintiff is ignorant of the respective rights of the defendants.

5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct.

6. The suit is not brought by collusion with either of the defendants.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

9. The plaintiff claims—

(1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto;

(2) that they be required to interplead together concerning their claims to the said property;

[(3) that some person be authorized to receive the said property pending such litigation;]

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 41.

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. *E. F.*, late of , was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of [*here insert nature of debt and security, if any*].

2. *E. F.* died on or about the day of . By his last will, dated the day of he appointed *C. D.* his executor [*or* devised his estate in trust, etc., *or* died intestate, *as the case may be*].

3. The will was proved by *C. D.* [*or* letters of administration were granted, etc.].

4. The defendant has possessed himself of the moveable [and immoveable, *or* the proceeds of the immoveable] property of *E. F.*, and has not paid the plaintiff his debt.

[*As in paras. 4 and 5 of Form No. 1.*]

7. The plaintiff claims that an account may be taken of the moveable [and immoveable] property of *E. F.*, deceased, and that the same may be administered under the decree of the Court.

No. 42.

ADMINISTRATION BY SPECIFIC LEGATEE.

(*Title.*)

[*Alter Form No. 41 thus*]—

[*Omit paragraph 1 and commence paragraph 2*] *E. F., late of* , died on or about the day of . By his last will, dated the day of he appointed *C. D.* his executor, and bequeathed to the plaintiff [*here state the specific legacy*].

For paragraph 4 substitute—

The defendant is in possession of the moveable property of *E. F.*, and, amongst other things, of the said [*here name the subject of the specific bequest*].

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*], or that, etc.

No. 43.

ADMINISTRATION BY PECUNIARY LEGATEE.

(*Title.*)

[*Alter Form No. 41 thus*]—

[*Omit paragraph 1 and substitute for paragraph 2*] *E. F.*, late of , died on or about the day of . By his last will, dated the day of he appointed *C. D.* his executor, and bequeathed to the plaintiff a legacy of rupees.

In paragraph 4 substitute "legacy" *for* "debt".

Another form.

(*Title.*)

E. F., the above-named plaintiff, states as follows:—

1. *A. B.* of *K.* in the died on the day of . By his last will, dated the day of , he appointed the defendant

Appendix A.

and *M. N.* [who died in the testator's lifetime] his executors, and bequeathed his property, whether moveable or immoveable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at-law, and as to his moveable property for the persons who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The will was proved by the defendant on the day of . The plaintiff has not been married.

3. The testator was at his death entitled to moveable and immoveable property; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property; he has sold some part of the immoveable property.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

6. The plaintiff claims—

(1) to have the moveable and immoveable property of *A. B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken;

(2) such further or other relief as the nature of the case may require.

No. 44.

EXECUTION OF TRUSTS.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. He is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of *E. F.* and *G. H.*, the father and mother of the defendant [*or* an instrument of transfer of the estate and effects of *E. F.* for the benefit of *C. D.*, the defendant, and the other creditors of *E. F.*].

2. *A. B.* has taken upon himself the burden of the said trust, and is in possession of [*or* of the proceeds of] the moveable and immoveable property transferred by the said instrument.

3. *C. D.* claims to be entitled to a beneficial interest under the instrument.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

6. The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and the proceeds of the sale of the said, *or* of part of the said, immoveable property, *or* moveable, *or* the proceeds of the sale of, *or* of part of, the said moveable property, *or* the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of *C. D.*, the defendant, and all other persons who may be interested in such administration, in the presence of *C. D.* and such other persons so interested as the Court may direct, or that *C. D.* may show good cause to the contrary.

[*N.B.—Where the suit is by a beneficiary, the plaint may be modelled,* mutatis mutandis, *on the plaint by a legatee.*]

No. 45.

FORECLOSURE OR SALE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage:—

(*a*) (date);

(*b*) (names of mortgagor and mortgagee);

(*c*) (sum secured);

(*d*) (rate of interest);

(*e*) (property subject to mortgage);

(*f*) (amount now due);

(*g*) (*if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims*).

(*If the plaintiff is mortgagee in possession, add*)

3. The plaintiff took possession of the mortgaged property on the day of and is ready to account as mortgagee in possession from that time.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

6. The plaintiff claims—

(1) payment, or in default [sale *or*] foreclosure [and possession];

[*Where Order* 34, *rule* 6, *applies.*]

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

No. 46.

REDEMPTION.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.

2. The following are the particulars of the mortgage:—

(*a*) (date);

(*b*) (names of mortgagor and mortgagee);

(*c*) (sum secured);

(*d*) (rate of interest);

(*e*) (property subject to mortgage);

(*f*) (*if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims*).

(*If the defendant is mortgagee in possession, add*).

3. The defendant has taken possession [*or* has received the rents] of the mortgaged property.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

6. The plaintiff claims to redeem the said property and to have the same reconveyed to him [and to have possession thereof].

No. 47.

SPECIFIC PERFORMANCE (No. 1).

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. By an agreement dated the day of and signed by the defendant, he contracted to buy of [*or* sell to] the plaintiff certain immoveable property therein described and referred to, for the sum of rupees.

Appendix A.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [*or* to accept a transfer and possession of the said property] and to pay the costs of the suit.

No. 48.

SPECIFIC PERFORMANCE (No. 2).

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immoveable property described in the agreement.

2. On the day of 19 , the plaintiff tendered rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument.

3. On the day of 19 , the plaintiff again demanded such transfer. [*Or* the defendant refused to transfer the same to the plaintiff.]

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready, and willing to pay the purchase-money of the said property to the defendant.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

8. The plaintiff claims—

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [*following the terms of the agreement*];

(2) rupees compensation for withholding the same.

No. 49.

PARTNERSHIP.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. He and *C. D.*, the defendant, have been for years [*or* months] past carrying on business together under articles of partnership in writing [*or* under a deed, *or* under a verbal agreement].

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners. [*Or* the defendant has committed the following breaches of the partnership articles:—

(1)

(2)

(3)]

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

5. The plaintiff claims—

(1) dissolution of the partnership;

(2) that accounts be taken;

(3) that a receiver be appointed.

(N.B.—*In suits for the winding up of any partnership, omit the claim for dissolution; and instead insert a paragraph stating the facts of the partnership having been dissolved.*)

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(4) WRITTEN STATEMENTS.

General defences.

Denial. The defendant denies that (*set out facts*).

The defendant does not admit that (*set out facts*).

The defendant admits that but says that .

Protest. The defendant denies that he is a partner in the defendant firm of .

The defendant denies that he made the contract alleged or any contract with the plaintiff.

The defendant denies that he contracted with the plaintiff as alleged or at all.

The defendant admits assets but not the plaintiff's claim.

The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.

Limitation. The suit is barred by article or article of the second schedule to the [1]Indian Limitation Act, 1877.

Jurisdiction. The Court has no jurisdiction to hear the suit on the ground that (*set forth the grounds*).

On the day of a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.

Insolvency. The defendant has been adjudged an insolvent.

The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver.

Minority. The defendant was a minor at the time of making the alleged contract.

Payment into Court. The defendant, as to the whole claim (*or* as to Rs. part of the money claimed, *or as the case may be*) has paid into Court Rs. and says that this sum is enough to satisfy the plaintiff's claim (*or* the part aforesaid).

Performance remitted. The performance of the promise alleged was remitted on the (*date*).

Rescission. The contract was rescinded by agreement between the plaintiff and defendant.

Res judicata. The plaintiff's claim is barred by the decree in suit (*give the reference*).

Estoppel. The plaintiff is estopped from denying the truth of (*insert statements as to which estoppel is claimed*) because (*here state the facts relied on as creating the estoppel.*)

Ground of defence subsequent to institution of suit. Since the institution of the suit, that is to say, on the day of (*set out facts*).

---

[1] *See* now the Indian Limitation Act, 1908 (IX of 1908).

Appendix A.

No. 1.

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED.

1. The defendant did not order the goods.

2. The goods were not delivered to the defendant.

3. The price was not Rs.

[*or*]

4. } Except as to Rs. , same as { 1.
5. } Except as to Rs. , same as { 2.
6. } Except as to Rs. , same as { 3.

7. The defendant [*or* A. B., the defendant's agent] satisfied the claim by payment before suit to the plaintiff [*or* to C. D., the plaintiff's agent] on the day of 19 .

8. The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19 .

No. 2.

DEFENCE IN SUITS ON BONDS.

1. The bond is not the defendant's bond.

2. The defendant made payment to the plaintiff on the day according to the condition of the bond.

3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.

No. 3.

DEFENCE IN SUITS ON GUARANTEES.

1. The principal satisfied the claim by payment before suit.

2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

No. 4.

DEFENCE IN ANY SUIT FOR DEBT.

1. As to Rs. 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows:—

	Rs.
1907, January, 25th	150
„ February, 1st	50
Total ..	200

2. As to the whole [*or* as to Rs. , part of the money claimed] the defendant made tender before suit of Rs. and has paid the same into Court.

No. 5.

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to of Street, Calcutta, livery stable keepers employed by the defendant to supply him with carriages and horses; and

the person under whose charge and control the said carriage was, was the servant of the said

2. The defendant does not admit that the said carriage was turned out of Middleton Street either negligently, suddenly or without warning, or at a rapid or dangerous pace.

3. The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4. The defendant does not admit the statements contained in the third paragraph of the plaint.

No. 6.

DEFENCE IN ALL SUITS FOR WRONGS.

1. Denial of the several acts [*or* matters] complained of.

No. 7.

DEFENCE IN SUITS FOR DETENTION OF GOODS.

1. The goods were not the property of the plaintiff.

2. The goods were detained for a lien to which the defendant was entitled. Particulars are as follows:—

1907, May 3rd. To carriage of the goods claimed from Delhi to Calcutta:—

45 maunds at Rs. 2 per maund .. .. Rs. 90.

No. 8.

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT.

1. The plaintiff is not the author [*assignee, etc.*].
2. The book was not registered.
3. The defendant did not infringe.

No. 9.

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK.

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

No. 10.

DEFENCES IN SUITS RELATING TO NUISANCES.

1. The plaintiff's lights are not ancient [*or* deny his other alleged prescriptive rights].

2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.

3. The defendant denies that he or his servants pollute the water [*or* do what is complained of].

[*If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of the claim,* i.e., *whether by prescription, grant or what.*]

4. The plaintiff has been guilty of laches of which the following are particulars:—

1870. Plaintiff's mill began to work.
1871. Plaintiff came into possession.
1883. First complaint.

Appendix A.

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. *[If other grounds are relied on, they must be stated, e.g., limitation as to past damage.]*

No. 11.

DEFENCE TO SUIT FOR FORECLOSURE.

1. The defendant did not execute the mortgage.

2. The mortgage was not transferred to the plaintiff *(if more than one transfer is alleged, say, which is denied)*.

3. The suit is barred by article of the second schedule to the [1]Indian Limitation Act, 1877.

4. The following payments have been made, *viz.*:—

	Rs.
(Insert date.)————, ...	1,000
(Insert date.)————, ...	500

5. The plaintiff took possession on the of , and has received the rents ever since.

6. That plaintiff released the debt on the of .

7. The defendant transferred all his interest to *A.B.* by a document, dated .

No. 12.

DEFENCE TO SUIT FOR REDEMPTION.

1. The plaintiff's right to redeem is barred by article of the second schedule to the [1]Indian Limitation Act, 1877.

2. The plaintiff transferred all interest in the property to *A. B.*

3. The defendant, by a document dated the day of transferred all his interest in the mortgage-debt and property comprised in the mortgage to *A. B.*

4. The defendant never took possession of the mortgaged property, or received the rents thereof.

(If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits.)

No. 13.

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

1. The defendant did not enter into the agreement.

2. *A. B.* was not the agent of the defendant *(if alleged by plaintiff)*.

3. The plaintiff has not performed the following conditions—*(Conditions)*.

4. The defendant did not—*(alleged acts of part performance)*.

5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matter—*(state why)*.

6. The agreement is uncertain in the following respects—*(State them)*.

7. *(or)* The plaintiff has been guilty of delay.

8. *(or)* The plaintiff has been guilty of fraud *(or* misrepresentation).

9. *(or)* The agreement is unfair.

10. *(or)* The agreement was entered into by mistake.

11. The following are particulars of (7), (8), (9), (10) *(or as the case may be)*.

---

[1] *See* now the Indian Limitation Act, 1908 (IX of 1908).

12. The agreement was rescinded under Conditions of Sale, No. 11 (*or* by mutual agreement).

(*In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on,* e.g., *the Indian Limitation Act, accord and satisfaction, release, fraud, etc.*)

No. 14.

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE.

1. *A. B.'s* will contained a charge of debts; he died insolvent; he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs.   , and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs.   .

2. The defendant applied the whole of the said sums and the sum of Rs.   which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.

3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the   day of   19 , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.

4. The defendant submits that the plaintiff ought to pay the costs of this suit.

No. 15.

PROBATE OF WILL IN SOLEMN FORM.

1. The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 [*or* of the Hindu Wills Act, 1870].

2. The deceased at the time the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.

3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant].

4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud so far as is within the defendant's present knowledge, being [*state the nature of the fraud*].

5. The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [*or* of the contents of the residuary clause in the said will, *as the case may be*].

6. The deceased made his true last will, dated the 1st January, 1873, and thereby appointed the defendant sole executor thereof.

The defendant claims—

(1) that the Court will pronounce against the said will and codicil propounded by the plaintiff:

(2) that the Court will decree probate of the will of the deceased, dated the 1st January, 1873, in solemn form of law.

No. 16.

PARTICULARS. (O. 6, R. 5.)

(*Title of suit.*)

Particulars.

The following are the particulars of (*here state the matters in respect of which particulars have been ordered*) delivered pursuant to the order of the   of

(*Here set out the particulars ordered in paragraphs if necessary.*)

APPENDIX B.

PROCESS.

No. 1.

SUMMONS FOR DISPOSAL OF SUIT. (O. 5, Rr. 1, 5.)

(*Title.*)

To

[*Name, description and place of residence.*]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the day of 19 , at o'clock in the noon, to answer the claim; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

Local Amendments.

Bengal.

Insert the following form and number it as 1-A:—

"No. 1-A.

SUMMONS TO DEFENDANT FOR ASCERTAINMENT WHETHER THE SUIT WILL BE CONTESTED (O. 5, Rr. 1 and 5.)

(*Title.*)

To

[*Name, description and place of residence.*]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit on the day of 19 , at o'clock in the noon in order that on that day you may inform the Court whether you will or will not contest the claim either in whole or in part and in order that in the event of your deciding to contest the claim either in whole or in part directions may be given you as to the date upon which your written statement is to be filed and the witness or witnesses upon whose evidence you intend to rely in support of your defence are to be produced and also the document or documents upon which you intend to rely.

Take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence and take further notice that in the event of your admitting the claim either in whole or in part the Court will forthwith pass judgment in accordance with such admissions.

GIVEN under my hand and the seal of the Court, this day of 19 .

Seal. *Judge.*

NOTICE.—If you admit the claim either in whole or in part you should come prepared to pay into Court the money due by virtue of such admission together with the costs of the suit, to avoid execution of any decree which may be passed against your person or property, or both."

Bombay.

The following notes shall be *inserted* in red ink in Forms Nos. 1, 2, 3, 5 and 6.

"Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out."

Madras.

Insert the following "note":—

"*Note.*—Also take notice that in default of your filing an address for service before the day before mentioned you are liable to have your defence struck out."

After Form 1, *insert* the following as Form No. 1-A:—

"No. 1-A.

SUMMONS FOR ASCERTAINING WHETHER A SUIT IS CONTESTED OR NOT, AND IF NOT CONTESTED FOR ITS IMMEDIATE DISPOSAL. (O. 5, Rr. 1, 5.)

(*Title.*)

To

[*Name, description and place of residence.*]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit (or who shall be accompanied by some person able to answer all such questions) on the day of 19 , at o'clock in the noon and to state whether you contest or do not contest the claim and, if you contest, to receive directions of Court as to the date on which you have to file the written statement, the date of trial and other matters.

Take notice that in the event of the claim not being contested the suit shall be decided at once.

Take further notice that in default of your appearance on the day and hour before-mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Seal.

NOTICE.—If you admit the claim you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both."

Sind.

Insert the following note in red ink in Forms Nos. 1, 2, 3 and 6:—

"Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out."

No. 2.

SUMMONS FOR SETTLEMENT OF ISSUES. (O. 5, Rr. 1, 5.)

(*Title.*)

To

[*Name, description and place of residence.*]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person, or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the day of 19 , at o'clock in the noon, to answer the claim; and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Seal.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call on the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

Local Amendments.

Bombay.

See the Local Amendment of Bombay for Form No. 1, App. B.

Sind.

See the Local Amendment of Sind for Form No. 1, App. B.

No. 3.

SUMMONS TO APPEAR IN PERSON. (O. 5, R. 3.)

(*Title.*)

To

[*Name, description and place of residence.*]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person on the day of 19 , at o'clock in the noon, to answer the claim; and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Local Amendments.

Bombay.

See the Local Amendment of Bombay for Form No. 1, App. B.

Sind.

See the Local Amendment of Sind for Form No. 1, App. B.

No. 4.

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT.

(O. 37, R. 2.)

(*Title.*)

To

[*Name, description and place of residence.*]

WHEREAS has instituted a suit against you under Order XXXVII of the Code of Civil Procedure, 1908, for Rs. , balance of principal and interest due to him as the of a of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs. and the sum of Rs. for costs [1][together with such interest, if any, from the date of the institution of the suit as the Court may order].

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 5.

NOTICE TO PERSON WHO, THE COURT CONSIDERS, SHOULD BE ADDED AS CO-PLAINTIFF. (O. 1, R. 10.)

(*Title.*)

To

[*Name, description and place of residence.*]

WHEREAS has instituted the above suit against for and, whereas it appears necessary that you should be added as a plaintiff in the said suit in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved:

Take notice that you should on or before the day of 19 , signify to this Court whether you consent to be so added.

GIVEN under my hand and the seal of the Court, this day of 19 .

Local Amendments.

Bombay.

See the Local Amendment of Bombay for Form No. 1, App. B.

Sind.

See the Local Amendment of Sind for Form No. 1, App. B.

No. 6.

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT. (O. 22, R. 4.)

(*Title.*)

To

WHEREAS the plaintiff instituted a suit in this Court on the day of 19 against the defendant

---

[1] These words were inserted by S. 4 of the Negotiabe Instruments (Interest) Act, 1926 (XXX of 1926.

Appendix B.

who has since deceased, and whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said , deceased, and desiring that you be made the defendant in his stead:

You are hereby summoned to attend in this Court on the day of 19 at A.M. to defend the said suit and, in default of your appearance on the day specified, the said suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Local Amendments.

Bombay.

See the Local Amendment of Bombay for Form No. 1, App. B.

Sind.

See the Local Amendment of Sind for Form No. 1, App. B.

No. 7.

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION OF ANOTHER COURT. (O. 5, R. 21.)

(*Title.*)

WHEREAS it is stated that $\frac{\text{defendant}}{\text{witness}}$ in the above suit is at present residing in : It is ordered that a summons returnable on the day of 19 , be forwarded to the Court of for service on the said $\frac{\text{defendant}}{\text{witness}}$ with a duplicate of this proceeding.

The court-fee of chargeable in respect to the summons has been realized in this Court in stamps.

Dated 19 .

Judge.

Local Amendment.

Allahabad.

Form No. 7.—An order for transmission of summons for service in the jurisdiction of another Court (O. 5, R. 21) is hereby cancelled.

No. 8.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PRISONER. (O. 5, R. 24.)

(*Title.*)

To

The Superintendent of the Jail at .

UNDER the provisions of O. 5, R. 24, of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is a prisoner in jail. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 9.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC SERVANT OR SOLDIER. (O. 5, Rr. 27, 28.)

(*Title.*)

To

UNDER the provisions of O. 5, R. 27 (*or* 28, *as the case may be*), of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is stated to be serving under you. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 10.

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT. (O. 5, R. 23.)

(*Title.*)

Read proceeding from the forwarding for service on in Suit No. of 19 , of that Court.

Read Serving Officer's endorsement stating that the and proof of the above having been duly taken by me on the oath of and it is ordered that the be returned to the with a copy of this proceeding.

Judge.

NOTE.—This form will be applicable to process other than summons, the service of which may have to be effected in the same manner.

Local Amendments.

Allahabad.

Form No. 10.—A form to accompany return of summons of another Court (O. 5, R. 23) is *cancelled.*

Bengal.

Insert the words "(or proof of the above having been duly made by the declaration of)" after the words "proof of the above having been duly taken by me on the oath of ".

Bombay.

Form No. 10 shall be *amended* to read as follows:—

"No. 10.

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT. (O. 5, R. 23.)

(*Title.*)

Read proceeding from the forwarding for service on in suit No. of 19 , of that Court.

Read Serving Officer's endorsement stating that the and proof of the above having been duly taken by me on the oath of and it is ordered that the be returned to the with this proceeding.

I hereby declare that the said summons on has been duly served.

Judge.

NOTE.—This form will be applicable to process other than summons the service of which may have to be effected in the same manner."

Appendix B.

No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE. (O. 5, R. 18.)

(*Title.*)

The Affidavit of , son of .

I $\frac{\text{make oath}}{\text{affirm}}$ and say as follows:—

(1) I am a process-server of this Court.

(2) On the day of 19 , I received a $\frac{\text{summons}}{\text{notice}}$ issued by the Court of in Suit No. of 19 in the said Court, dated the day of 19 for service on .

(3) The said was at the time personally known to me, and I served the said $\frac{\text{summons}}{\text{notice}}$ on $\frac{\text{him}}{\text{her}}$ on the day of 19 at about o'clock in the noon at by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice}}$

(*a*)

(*b*)

(*a*) Here state whether the person served, signed or refused to sign the process, and in whose presence.

(*b*) Signature of process-server.

or,

(3) The said not being personally known to me accompanied me to and pointed out to me a person whom he stated to be the said , and I served the said $\frac{\text{summons}}{\text{notice}}$ on $\frac{\text{him}}{\text{her}}$ on the day of 19 , at about o'clock in the noon at by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice}}$.

(*a*)

(*b*)

(*a*) Here state whether the person served, signed or refused to sign the process, and in whose presence.

(*b*) Signature of process-server.

or,

(3) The said and the house in which he ordinarily resides being personally known to me, I went to the said house, in and there on the day of 19 , at about o'clock in the noon, I did not find the said .

(*a*)

(*b*)

(*a*) Enter fully and exactly the manner in which the process was served, with special reference to O. 5, Rr. 15 and 17.

(*b*) Signature of process-server.

or,

(3) One accompanied me to , and there pointed out to me which he said was the house in which ordinarily resides. I did not find the said there.

(*a*)

(*b*)

(*a*) Enter fully and exactly the manner in which the process was served, with special reference to O. 5, Rr. 15 and 17.

(*b*) Signature of process-server.

or,

If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

Sworn/Affirmed by the said before me this day of 19 .

Empowered under section 139 *of the Code of Civil Procedure,* 1908, *to administer the oath to deponents.*

Local Amendments.

Bengal.

Substitute the following for the existing form No. 11:—

"No. 11.

DECLARATION OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE.

(O. 5, R. 18).

(*Title.*)

I, , a process-server of this Court declare:—(1) On the day of 19 , I received a summons/notice issued by the Court of in suit No. of 19 , in the said Court, dated day of 19 , for service on .

(2) The said was at the time personally known to me and I served the said summons/notice on him/her on the day of 19 , at about o'clock in the noon at by tendering a copy thereof to him/her and requiring his/her signature to the original summons/notice.

Appendix B.

(a)

(b)

(a) Here state whether the person served, signed or refused to sign the process and in whose presence.

(b) Signature of process-server.

Or,

(2) The said not being personally known to me pointed out to me a person whom he stated to be the said , and I served the said $\dfrac{\text{summons}}{\text{notice}}$ on $\dfrac{\text{him}}{\text{her}}$ on the day of 19 , at about o'clock in the noon at by tendering a copy thereof to $\dfrac{\text{him}}{\text{her}}$ and requiring $\dfrac{\text{his}}{\text{her}}$ signature to the original $\dfrac{\text{summons}}{\text{notice}}$.

(a)

(b)

(a) Here state whether the person served, signed or refused to sign the process and in whose presence.

(b) Signature of process-server.

Or,

(2) The said and the house in which he ordinarily resides being personally known to me, I went to the said house, in and there on the day of 19 , at about o'clock in the noon, I did not find the said .

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to O. 5, Rr. 15 and 17.

(b) Signature of process-server.

Or,

(2) One at pointed out to me which he said was the house in which ordinarily resides. I did not find the said there.

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to O. 5, Rr. 15 and 17.

(b) Signature of process-server.

Or,

(3) If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service."

Lahore.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE. (O. 5, R. 18.)

(*Title.*)

The affidavit of , son of I $\dfrac{\text{make oath}}{\text{affirm}}$ and say as follows:—

(1) I am a process-server of this Court.

(2) On the day of 19 I received a $\frac{\text{summons}}{\text{notice}}$ issued by the Court of in suit No. of 19 in the said Court, dated the day of 19 for service on

(3) The said was at the time personally known to me, and I served the said $\frac{\text{summons}}{\text{notice}}$ on $\frac{\text{him}}{\text{her}}$ on the day of at about o'clock on the noon at by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice}}$.

(*a*)

(*b*)

(*a*) Here state whether the persons served, signed or refused to sign the process, and in whose presence.

(*b*) Signature of process-server.

Or,

(3) The said not being personally known to me accompanied to and pointed out to me a person whom he stated to be the said , and I served the said $\frac{\text{summons}}{\text{notice}}$ on $\frac{\text{him}}{\text{her}}$ on the day of 19 , at about o'clock in the noon at by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice.}}$.

(*a*)

(*b*)

(*a*) Here state whether the person served, signed or refused to sign the process, and in whose presence.

(*b*) Signature of process-server.

Or,

(3) The said and his house in which he ordinarily resides being $\frac{\text{personally known to me}}{\text{pointed out to me by}}$ I went to the said house in and there on the day of 19 , at o'clock in the $\frac{\text{fore}}{\text{after}}$ noon I did not find the said I enquired

{ (*a*)
{ (*b*) } neighbours.

I was told that had gone to and would not be back till .

Signature of process-server.

Or,

If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

$\frac{\text{Sworn}}{\text{Affirmed}}$ by the said before me this day of

Appendix B.

, 19 .

Empowered under the section 139 of the Code of Civil Procedure to administer the oath to deponents.

N.-W. F. P.

Substitute the following for the third and fourth parts of (3) in Form No. 11:—

"(3) The said and his house in which he ordinarily resides $\frac{\text{being personally known to me}}{\text{pointed out to me}}$ I went to the said house in and there on the day of 19 , at o'clock in the $\frac{\text{fore}}{\text{after}}$noon, I did not find the said I enquired from (*a*) neighbours.

I was told that had gone to and would not be back till .

Signature of process-server."

No. 12.

NOTICE TO DEFENDANT. (O. 9, R. 6.)

(*Title.*)

To

[*Name, description and place of residence.*]

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear, but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons;

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 is now fixed for the hearing of the same; in default of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Local Amendment.

Madras.

Insert the following as Form No. 12-A:—

"No. 12-A.

NOTICE TO THE PROPOSED GUARDIAN OF A MINOR $\frac{\text{DEFENDANT}}{\text{RESPONDENT}}$. (O. 32, Rr. 3 and 4.)

(*Title.*)

To

[*Name, description and place of residence of proposed guardian.*]

Take notice that X $\frac{\text{plaintiff}}{\text{appellant}}$ in has presented a petition to the Court praying that you be appointed guardian *ad litem* to the minor $\frac{\text{defendant(s)}}{\text{respondent(s)}}$, and that the same will be heard on the day of 19 .

2. The affidavit of X has been filed in support of this application.

3. If you are willing to act as guardian for the said $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ you are required to sign (or affix your mark to) the declaration on the back of this notice.

4. In the event of your failure to signify your express consent in manner indicated above, take further notice that the Court may proceed under O. 32, R. 4, Code of Civil Procedure, to appoint some other suitable person or one of its officers as guardian *ad litem* of the minor $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ aforesaid.

Dated the day of 19 .

(Signed)

(To be printed on the reverse.)

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian of the minor $\frac{\text{defendant(s)}}{\text{respondent(s)}}$ therein mentioned.

(Signed) Y. Z

Witnesses:

[illegible]
2. "

No. 13.

SUMMONS TO WITNESS. (O. 16, Rr. 1, 5.)

(Title.)

To

WHEREAS your attendance is required to on behalf of the in the above suit, you are hereby required [personally] to appear before this Court on the day of 19 , at o'clock in the forenoon, and to bring with you [*or* to send to this Court].

A sum of Rs. , being your travelling and other expenses and subsistence allowance for one day, is herewith sent. If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non-attendance laid down in R. 12 of O. 16 of the Code of Civil Procedure, 1908.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

NOTICE:—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2) If you are detained beyond the day aforesaid, a sum of Rs. will be tendered to you for each day's attendance beyond the day specified.

Local Amendment.

Madras.

Insert the following as Form No. 13-A:—

"No. 13-A.

CERTIFICATE OF ATTENDANCE TO AN OFFICER OF GOVERNMENT SUMMONED AS A WITNESS IN A SUIT TO WHICH THE GOVERNMENT IS A PARTY. (O. 16, R. 4-A.)

(Cause title.)

This is to certify that (name) (designation) being a Government servant was summoned to give evidence in his official capacity on behalf of the

$\frac{\text{plaintiff}}{\text{defendant}}$ in the above $\frac{\text{suit}}{\text{matter}}$ and was in attendance in this Court from the day of to the day of 19 (inclusive) and that a sum of Rupees has been paid into Court by the $\frac{\text{plaintiff}}{\text{defendant}}$ towards his travelling and subsistence allowance for days according to article 1133 of the Civil Service Regulations and that the said amount $\frac{\text{has been}}{\text{will be}}$ remitted to the Government treasury at to be credited to Government under the head 'XVI-A—Miscellaneous Fees and Fines.'

Dated the day of 19 .

Presiding Judge or Chief Ministerial Officer."

No. 14.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, R. 10.)

(*Title.*)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law: and whereas it appears that the evidence of the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons: This proclamation is therefore, under R. 10 of O. 16 of the Code of Civil Procedure, 1908, issued, requiring the attendance of the witness in this Court on the day of 19 at o'clock in the forenoon and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 15.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, R. 10.)

(*Title.*)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness, and whereas it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons: This proclamation is therefore, under R. 10 of O. 16 of the Code of Civil Procedure, 1908, issued, requiring the attendance of the witness in this Court on the day of 19 at o'clock in the forenoon, and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 16.

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS. (O. 16, R. 10.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS the witness cited by has not, after the expiration of the period limited in the proclamation issued for his attendance, appeared in Court; You are hereby directed to hold under attachment property belonging to the said witness to the value of and to submit a return, accompanied with an inventory thereof, within days.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 17.

WARRANT OF ARREST OF WITNESS. (O. 16, R. 10.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS has been duly served with a summons but has failed to attend [absconds and keeps out of the way for the purpose of avoiding service of a summons]; You are hereby ordered to arrest and bring the said before the Court.

You are further ordered to return this warrant on or before the day of 19 with an endorsement certifying the day on and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 18.

WARRANT OF COMMITTAL. (O. 16, R. 18.)

(*Title.*)

To

The Officer-in-charge of the Jail at

WHEREAS the plaintiff (or defendant) in the above-named suit has made application to this Court that security be taken for the appearance of to give evidence (*or* to produce a document), on the day of 19 ; and whereas the Court has called upon the said to furnish such security, which he has failed to do; This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at on the said day and on such other day or days as may be hereafter ordered.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 19.

WARRANT OF COMMITTAL. (O. 16, R. 18.)

(*Title.*)

To

The Officer-in-charge of the Jail at

WHEREAS , whose attendance is required before this Court in the above-named case to give evidence (*or* to produce a document), has been arrested and brought before the Court in custody; and whereas owing to the absence of the plaintiff (*or* defendant), the said cannot give such evidence (*or* produce such document); and whereas the Court has called upon the said to give security for his appearance on the day of 19 ,

Appendix B.

at which he has failed to do; This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at on the day of 19 .

Given under my hand and the seal of the Court, this day of 19 .

Judge.

Local Amendment.

No. 20.

Allahabad.

Application for Issue of Summons to a Party or witness.

No. of Suit.

Names of Parties.
In the Court of the
Date fixed for hearing.

	2	3	4		5		6
Number of witnesses to be summoned.	Name and full address of each person to be summoned.	Rank or occupation.	Distance of residence from court.		Cash paid for.		Name and address of person to whom unexpended travelling expenses and diet money should be returned.
			Rail.	Road.	Travelling expenses.	Diet expenses.	

APPENDIX C.

DISCOVERY, INSPECTION AND ADMISSION.

No. 1.

Order for Delivery of Interrogatories. (O. 11, R. 1.)

In the Court of .

Civil Suit No. of 19 .

A B. .. .. *Plaintiff,*

against

C.D., E.F. and G.H. .. .. *Defendants.*

Upon hearing and upon reading the affidavit of filed the day of 19 ; It is ordered that the be at liberty to deliver to the interrogatories in writing, and that the said do answer the interrogatories as prescribed by O. 11, R. 8, and that the costs of this application be .

No. 2.

Interrogatories. (O. 11, R. 4.)

(*Title as in No. 1, supra.*)

Interrogatories on behalf of the above-named [*plaintiff or defendant C. D.*] for the examination of the above-named [*defendants E. F. and G. H. or plaintiff*].

1. Did not, etc.
2. Has not, etc.

etc., etc., etc.

[*The defendant E F,* is *required to answer the interrogatories numbered* .]

[*The defendant G H,* is *required to answer the interrogatories numbered* .]

No. 3.

Answer to Interrogatories. (O. 11, R. 9.)

(*Title as in No. 1, supra.*)

The answer of the above-named defendant *E. F.* to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named *E. F.*, make oath and say as follows:—

1.
2. } Enter answers to interrogatories in paragraphs numbered consecutively.
3. I object to answer the interrogatories numbered on the ground that [*state grounds of objection*].

No. 4.

Order for affidavit as to Documents. (O. 11, R. 12.)

(*Title as in No. 1, supra.*)

Upon hearing It is ordered that the do within days from the date of this order, answer on affidavit stating which documents are or have been in his possession or power relating to the matter in question in this suit, and that the costs of this application be

---

No. 5.

AFFIDAVIT AS TO DOCUMENTS. (O. 11, R. 13.)

(*Title as in No. 1, supra.*)

I, the above-named defendant *C. D.*, make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the first schedule hereto [*state grounds of objection*].

3. I have had but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

4. The last-mentioned documents were last in my possession or power on [*state when and what has become of them and in whose possession they now are*].

5. According to the best of my knowledge, information and belief I have not now, and never had, in my possession, custody or power, or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

No. 6.

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION. (O. 11, R. 14.)

(*Title as in No. 1, supra.*)

Upon hearing and upon reading the affidavit of filed the day of 19 : It is ordered that the do, at all reasonable times, on reasonable notice, produce at situate at , the following documents, namely, , and that the be at liberty to inspect and peruse the documents so produced, and to make notes of their contents. In the meantime it is ordered that all further proceedings be stayed and that the costs of this application be

---

No. 7.

NOTICE TO PRODUCE DOCUMENTS. (O. 11, R. 16.)

(*Title as in No. 1, supra.*)

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [plaint *or* written statement *or* affidavit dated the day of 19].

[*Describe documents required.*]

X. Y., Pleader for the

To Z., Pleader for the

No. 8.

NOTICE TO INSPECT DOCUMENTS. (O. 11, R. 17.)

(*Title as in No. 1, supra.*)

Take notice that you can inspect the documents mentioned in your notice of the day of 19 [*except the documents numbered in that notice*] at [*insert place of inspection*] on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of documents mentioned in your notice of the day of 19 , on the ground that [*state the ground*]:—

No. 9.

NOTICE TO ADMIT DOCUMENTS. (O. 12, R. 3.)

(*Title as in No. 1, supra.*)

Take notice that the plaintiff [*or* defendant] in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or* plaintiff], his pleader or agent, at on between the hours of ; and the defendant [*or* plaintiff], is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit.

G. H., *pleader* [or *agent*] *for plaintiff* [or *defendant*].

To E. F., *pleader* [or *agent*] *for defendant* [or *plaintiff*].

[*Here describe the documents and specially as to each document whether it is original or a copy.*]

No. 10.

NOTICE TO ADMIT FACTS. (O. 12, R. 5.)

(*Title as in No. 1, supra.*)

Take notice that the plaintiff [*or* defendant] in this suit requires the defendant [*or* plaintiff] to admit, for the purposes of this suit only, the several facts respectively hereunder specified; and the defendant [*or* plaintiff] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit.

G. H., *pleader* [or *agent*] *for plaintiff* [or *defendant*].

To E. F., *pleader* [or *agent*] *for defendant* [or *plaintiff*].

The facts, the admission of which is required, are—

1. That M. died on the 1st January, 1890.
2. That he died intestate.
3. That N. was his only lawful son.
4. That O. died on the 1st April, 1896.
5. That O. was never married.

No. 11.

ADMISSION OF FACTS PURSUANT TO NOTICE. (O. 12, R. 5.)

(*Title as in No. 1, supra.*)

The defendant [*or* plaintiff] in this suit, for the purposes of this suit only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit:

Provided that this admission is made for the purposes of this suit only, and is not an admission to be used against the defendant [*or* plaintiff] on any other occasion or by any one other than the plaintiff [*or* defendant, *or* party requiring the admission].

E. F., *pleader* [or *agent*] *for defendant* [or *plaintiff*].

To G. H., *pleader* [or *agent*] *for plaintiff* [or *defendant*].

Appendix C.

Facts admitted.	Qualifications or limitations, if any, subject to which they are admitted.
1. That M. died on the 1st January, 1890 ..	1.
2. That he died intestate	2.
3. That N. was his lawful son	3. But not that he was his only lawful son.
4. That O. died	4. But not that he died on the 1st April, 1896.
5. That O. was never married	5.

No. 12.

NOTICE TO PRODUCE (GENERAL FORM). (O. 12, R. 8.)

(*Title as in No.* 1, *supra.*)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly.

G. H., *pleader* [or *agent*] *for plaintiff* [or *defendant*].

To E. F., *pleader* [or *agent*] *for defendant* [or *plaintiff*].

APPENDIX D.

DECREES.

No. 1.

Decree in Original Suit. (O. 20, Rr. 6, 7.)

(*Title.*)

Claim for

This suit coming on this day for final disposal before
in the presence of for the plaintiff and of
for the defendant, it is ordered and decreed that
and that the sum of Rs.
be paid by the to the on
account of the costs of this suit, with interest thereon at the rate of
per cent. per annum from this date to date of realization.

Given under my hand and the seal of the Court, this day of
19 .

Judge.

Costs of Suit.

Plaintiff.				Defendant.			
	RS.	A.	P.		RS.	A.	P.
1. Stamp for plaint				Stamp for power			
2. Do. for power				Do. for petition			
3. Do. for exhibits				Pleader's fee			
4. Pleader's fee on Rs.				Subsistence for witnesses			
5. Subsistence for witnesses				Service of process			
6. Commissioner's fee				Commissioner's fee			
7. Service of process							
Total				Total			

Local Amendments.

Bengal.

Cancel the table under the head "Costs of suit" in Form No. 1, and substitute therefor the following:—

Plaintiff.				Defendant.			
	RS.	A.	P.		RS.	A.	P.
1. Stamp for plaint				1. Stamp for power			
2. Stamp for power				2. Stamp for petitions and affidavits			
3. Stamp for petitions and affidavits				3. Cost of exhibits including copies made under the Banker's Book's Evidence Act, 1891			
4. Cost of exhibits including copies made under the Banker's Book's Evidence Act, 1891				4. Pleader's fee			
5. Pleader's fee on Rs.				5. Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge)			
6. Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge)				6. Process fees			
7. Process fees				7. Commissioner's fees			
8. Commissioner's fees				8. Demi-paper			
9. Demi-paper				9. Cost of transmission of records.			
10. Cost of transmission of records.				10. Other costs allowed under the Code and General Rules and Orders			
11. Other costs allowed under the Code and General Rules and Orders				11. Adjournment costs not paid in cash (to be deducted or added as the case may be").			
12. Adjournment costs not paid in cash (to be added or deducted as the case may be)							
Total				Total			

Appendix D.

Patna.

Substitute the following for the schedule of costs of suits in the form:—

PLAINTIFF.	Amount. RS.	A.	P.	DEFENDANT.	Amount. RS.	A.	P.
1. Stamp for plaint ..				1. Stamp for power ..			
2. Stamp for power ..				2. Stamp for petition or affidavit.			
3. Stamp for petition or affidavit.				3. Costs for exhibits ..			
4. Costs for exhibits ..				4. Pleader's fee ..			
5. Pleader's fee on Rs. ..				5. Subsistence:			
6. Subsistence ..				(a) for defendant or his agent.			
(a) for plaintiff or his agent.				(b) for witnesses ..			
(b) for witnesses ..				6. Commissioner's fee ..			
7. Commissioner's fee ..				7. Service of Process ..			
8. Service of process ..				8. Copying or typing charge ..			
9. Copying or typing charge ..							
Total ..				Total ..			

No. 2.

SIMPLE MONEY DECREE. (Section 34.)

(Title.)

Claim for

THIS suit coming on this day for final disposal before in the presence of for the plaintiff and of for the defendant, it is ordered that the do pay to the the sum of Rs. with interest thereon at the rate of per cent. per annum from to the date of realization of the said sum and do also pay Rs. , the costs of this suit, with interest thereon at the rate of per cent. per annum from this date to the date of realization.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Costs of Suit.

PLAINTIFF.	RS.	A.	P.	DEFENDANT.	RS.	A.	P.
1. Stamp for plaint ..				Stamp for power ..			
2. Do. for power ..				Do. for petition ..			
3. Do. for exhibits ..				Pleader's fee ..			
4. Pleader's fee on Rs. ..				Subsistence for witnesses ..			
5. Subsistence for witnesses ..				Service of process ..			
6. Commissioner's fee ..				Commissioner's fee ..			
7. Service of process ..							
Total ..				Total ..			

Local Amendment.

Bengal.

Cancel the table under the head "Costs of suit" in Form No. 2, and substitute therefor the following:—

PLAINTIFF.	RS.	A.	P.	DEFENDANT.	RS.	A.	P.
1. Stamp for plaint ..				1. Stamp for power ..			
2. Stamp for power ..				2. Stamp for petitions and affidavits ..			
3. Stamp for petitions and affidavits ..				3. Costs of exhibits including copies made under the Banker's Book's Evidence Act, 1891 ..			
4. Cost of exhibits including copies made under the Banker's Book's Evidence Act, 1891 ..				4. Pleader's fee ..			
5. Pleader's fee on Rs. ..				5. Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge) ..			
6. Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge) ..				6. Process fees ..			

2. "This rule will come into force from the 1st January, 1928."

PLAINTIFF.	RS.	A.	P.	DEFENDANT.	RS.	A.	P.
7. Process fees ..				7. Commissioner's fees ..			
8. Commissioner's fees ..				8. Demi-paper ..			
9. Demi-paper ..				9. Cost of transmission of records.			
10. Cost of transmission of records.				10. Other costs allowed under the Code and General Rules and Orders ..			
11. Other costs allowed under the Code and General Rules and Orders ..				11. Adjournment costs not paid in cash (to be deducted or added as the case may be).			
12. Adjournment costs not paid in cash (to be added or deducted as the case may be) ..							
Total ..				Total ..			

[1] No. 3.

PRELIMINARY DECREE FOR FORECLOSURE.

(O. 34, R. 2.—Where accounts are directed to be taken.)

(*Title.*)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(*i*) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(*ii*) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;

(*iii*) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(*iv*) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (*ii*) or adjudged due under clause (*iv*) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (*iii*) together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(*i*) that the defendant do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due, and the sum of Rs. for the costs of the suit awarded to the plaintiff;

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[1] Forms 8 to 11 were substituted by s. 8 and Sch. of the Transfer of Property (Amendment) Supplementary Act, 1929 (XXI of 1929).

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 3-A.

PRELIMINARY DECREE FOR FORECLOSURE.

(O. 34, R. 2.—Where the Court declares the amount due.)

(*Title.*)

This suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on his mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with interest thereon, and the sum of Rs. for the costs of this suit awarded to the plaintiff, making in all the sum of Rs. .

2. And it is hereby ordered and decreed as follows:—

(*i*) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court of the said sum of Rs. ;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 4.

FINAL DECREE FOR FORECLOSURE.

(O. 34, R. 3.)

(*Title.*)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of and the application of the plaintiff dated the day of for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the said mortgage:

It is hereby ordered and decreed that the defendant and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned;* [and (*if the defendant be in possession of the said mortgaged property*) that the defendant shall deliver to the plaintiff quiet and peaceable possession of the said mortgaged property].

2. And it is hereby further declared that the whole of the liability whatsoever of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

No. 5.

PRELIMINARY DECREE FOR SALE.

(O. 34, R. 4.—Where accounts are directed to be taken.)

(*Title.*)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(*i*) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(*ii*) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;

(*iii*) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest

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* Words not required to be deleted.

Appendix D.

thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(*iv*) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (*ii*) or adjudged due under clause (*iv*) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (*iii*), together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the   day of   , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(*i*) that the defendant do pay into Court on or before the   day of   or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs.   for the costs of the suit awarded to the plaintiff;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit, and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff

as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 5-A.

PRELIMINARY DECREE FOR SALE.

(O. 34, R. 4.—When the Court declares the amount due.)

(*Title.*)

This suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the paint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage-security, together with interest thereon, and the sum of Rs. for the costs of the suit awarded to the plaintiff, making in all the sum of Rs. .

2. And it is hereby ordered and decreed as follows:—

(*i*) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, the said sum of Rs. ;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plain-

tiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 6.

FINAL DECREE FOR SALE.

(O. 34, R. 5.)

(*Title.*)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of and the application of the plaintiff dated the day of for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold, and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

No. 7.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR FORECLOSURE IS PASSED.

(O. 34, R. 7.—Where accounts are directed to be taken.)

(*Title.*)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(*i*) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(*ii*) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;

(*iii*) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(*iv*) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. It is hereby further ordered and decreed that any amount received under clause (*ii*) or adjudged due under clause (*iv*) above, together with interest thereon, shall be adjusted against any sums paid by the defendant under clause (*iii*) together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(*i*) that the plaintiff do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the defendant;

(*ii*) that, on such payment, and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant shall be at liberty to apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7-A.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR SALE IS PASSED.

(O. 34, R. 7.—Where accounts are directed to be taken.)

(*Title.*)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(*i*) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(*ii*) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by the order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;

(*iii*) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(*iv*) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (*ii*) or adjudged due under clause (*iv*) above, together with interest thereon, shall first be adjusted against any sums paid by the defendant under clause (*iii*) together with interest thereon, and the balance, if any, shall be added to the mortgage-money, or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that, upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(*i*) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the defendant;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7-B.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR FORECLOSURE IS PASSED.

(O. 34, R. 7.—Where the Court declares the amount due.)

(Title.)

This suit coming on this day, etc.; It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. for the costs of the suit awarded to the defendant, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows:—

(*i*) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court the said sum of Rs. ;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable

Appendix D.

under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims, and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7-C.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR SALE IS PASSED.

(O. 34, R. 7.—Where the Court declares the amount due.)

(*Title.*)

This suit coming on this day, etc.; It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. for the cost of this suit awarded to the defendant, making in all the sum of Rs. .

2. And it is hereby ordered and decreed as follows:—

(*i*) that the plaintiff do pay into Court on or before the day of or any later date up to which time the payment may be extended by the Court the said sum of Rs. ;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property to the plaintiff free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for the payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7-D.

FINAL DECREE FOR FORECLOSURE IN A REDEMPTION SUIT ON DEFAULT OF PAYMENT BY MORTGAGOR.

(O. 34, R. 8.)

(*Title.*)

Upon reading the preliminary decree in this suit on the day of and further orders (if any) dated the day of , and the application of the defendant dated the day of for a final decree and after hearing the parties, and it appearing that the payment as directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the plaintiff and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned* [and (*if the plaintiff be in possession of the said mortgaged property*) that the plaintiff shall deliver to the defendant quiet and peaceable possession of the said mortgaged property].

2. And it is hereby further declared that the whole of the liability whatsoever of the plaintiff up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

No. 7-E.

FINAL DECREE FOR SALE IN A REDEMPTION SUIT ON DEFAULT OF PAYMENT BY MORTGAGOR.

(O. 34, R. 8.)

(*Title.*)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the

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* Words not required to be deleted.

Appendix D.

day of , and the application of the defendant dated the day of for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the defendant shall produce before the Court, or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the defendant for such costs of this suit including the costs of this application and such costs, charges and expenses as may be payable under R. 10, together with the subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

No. 7-F.

FINAL DECREE IN A SUIT FOR FORECLOSURE, SALE OR REDEMPTION WHERE THE MORTGAGOR PAYS THE AMOUNT OF THE DECREE.

(O. 34, Rr. 3, 5 and 8.)

(*Title.*)

This suit coming on this day for further consideration and it appearing that on the day of the mortgagor or , the same being a person entitled to redeem, has paid into Court all amounts due to the mortgagee under the preliminary decree dated the day of ; It is hereby ordered and decreed that:—

(*i*) the mortgagee do execute a deed of re-conveyance of the property in the aforesaid preliminary decree mentioned in favour of the mortgagor *[or, as the case may be, who has redeemed the property] or an acknowledgment of the payment of the amount due in his favour;

(*ii*) the mortgagee do bring into Court all documents in his possession and power relating to the mortgaged property in the suit.

And it is hereby further ordered and decreed that, upon the mortgagee executing the deed of re-conveyance or acknowledgment in the manner aforesaid,—

(*i*) the said sum of Rs. be paid out of Court to the mortgagee;

(*ii*) the said deeds and documents brought into the Court be delivered out of Court to the mortgagor *[or the person making the payment] and the mortgagee do, when so required, concur in registering, at the cost of the mortgagor *[or other person making the payment], the said deed of re-conveyance or the acknowledgment in the office of the Sub-Registrar of ; and

(*iii*) *[if the mortgagee, plaintiff or defendant, as the case may be, is in possession of the mortgaged property] that the mortgagee do forthwith deliver possession of the mortgaged property in the aforesaid preliminary decree mentioned to the mortgagor *[or such person as aforesaid who has made the payment].

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* Words not required to be deleted.

No. 8.

DECREE AGAINST MORTGAGOR PERSONALLY FOR BALANCE AFTER THE SALE OF THE MORTGAGED PROPERTY.

(O. 34, Rr. 6 and 8-A.)

(*Title.*)

Upon reading the application of the mortgagee (the plaintiff or defendant, as the case may be) and reading the final decree passed in the suit on the day of and the Court being satisfied that the net proceeds of the sale held under the aforesaid final decree amounted to Rs. and have been paid to the applicant out of the Court on the day of and that the balance now due to him under the aforesaid decree is Rs. ;

And whereas it appears to the Court that the said sum is legally recoverable from the mortgagor (plaintiff or defendant, as the case may be) personally;

It is hereby ordered and decreed as follows:—

That the mortgagor (plaintiff or defendant, as the case may be) do pay to the mortgagee (defendant or plaintiff, as the case may be) the said sum of Rs. with further interest at the rate of six per cent. per annum from the day of (the date of payment out of Court referred to above) up to the date of realization of the said sum, and the costs of this application.

No. 9.

PRELIMINARY DECREE FOR FORECLOSURE OR SALE.

[Plaintiff .. .. 1st Mortgagee,

vs.

Defendant No. 1 .. .. Mortgagor.

Defendant No. 2 .. .. 2nd Mortgagee.]

(O. 34, Rr. 2 and 4.)

(*Title.*)

The suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) incurred by the plaintiff in respect of the mortgage-security with interest thereon and the sum of Rs. for the costs of this suit awarded to the plaintiff, making in all the sum of Rs. .

(*Similar declarations to be introduced with regard to the amount due to defendant No.* 2 *in respect of his mortgage if the mortgage-money due thereunder has become payable at the date of the suit.*)

2. It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No. 2* [or (if there are several subsequent mortgages) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively:—]

3 And it is hereby ordered and decreed as follows:—

(*i*) (*a*) that defendants or one of them do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to the plaintiff; and

(*b*) that defendant No. 1 do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs.   due to defendant No. 2; and

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* Words not required to be deleted.

(*ii*) that, on payment of the sum declared to be due to the plaintiff by defendants or either of them in the manner prescribed in clause (*i*) (*a*) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant No.   (who has made the payment), or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant No.   (who has made the payment) quiet and peaceable possession of the said property.

(*Similar declarations to be introduced, if defendant No.* 1 *pays the amount found or declared to be due to defendant No.* 2 *with such variations as may be necessary having regard to the nature of his mortgage.*)

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid of the amount due to the plaintiff, the plaintiff shall be at liberty to apply to the Court for a final decree—

(*i*) *[*in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale*] that the defendants jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the plaintiff quiet and peaceable possession of the said property; or

(*ii*) *[*in the case of any other mortgage*] that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and

(*iii*) *[*in the case where a sale is ordered under clause* 4 (ii) *above*] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may have been passed in this suit and in payment of the amount which the Court may adjudge due to the plaintiff in respect of such costs of this suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2; and that if any balance be left, it shall be paid to the defendant No. 1 or other persons entitled to receive the same; and

(*iv*) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

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* Words not required to be deleted.

5. And it is hereby further ordered and decreed—

(*a*) that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in the payment of the said amount, defendant No. 2 shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree (*in the same manner as the plaintiff might have done under clause 4 above*)*—

*[(*i*) that defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to defendant No. 2 quiet and peaceable possession of the said property;] or

*[(*ii*) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property;]

and (*b*) (if on the application of defendant No. 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed *in the case where a sale is ordered under clause 5 above*]—

(*i*) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by defendant No. 2 in respect of the plaintiff's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount; and that the balance, if any, shall then be applied in payment of the amount adjudged due to defendant No. 2 in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of this suit and such costs, charges and expenses as may be payable to defendant No. 2 under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(*ii*) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of the plaintiff's mortgage or defendant No. 2's mortgage, defendant No. 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance.

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

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* Words not required to be deleted.

Appendix D.

No. 10.

PRELIMINARY DECREE FOR REDEMPTION OF PRIOR MORTGAGE AND FORECLOSURE OR SALE ON SUBSEQUENT MORTGAGE.

[Plaintiff .. .. 2nd Mortgagee,

vs.

Defendant No. 1 .. .. Mortgagor,

Defendant No. 2 .. .. 1st Mortgagee.]

(O. 34, Rr. 2, 4 and 7.)

(*Title.*)

The suit coming on this day, etc.; It is hereby declared that the amount due to defendant No. 2 on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by defendant No. 2 in respect of the mortgage-security with interest thereon and the sum of Rs. for the costs of this suit awarded to defendant No. 2, making in all the sum of Rs.

(*Similar declarations to be introduced with regard to the amount due from defendant No. 1 to the plaintiff in respect of his mortgage if the mortgage-money due thereunder has become payable at the date of the suit.*)

2. It is further declared that defendant No. 2 is entitled to payment of the amount due to him in priority to the plaintiff *[or if (there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively:—].

3. And it is hereby ordered and decreed as follows:—

(*i*) (*a*) that the plaintiff or defendant No. 1 or one of them do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to defendant No. 2; and

(*b*) that defendant No. 1 do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to the plaintiff; and

(*ii*) that, on payment of the sum declared due to defendant No. 2 by the plaintiff and defendant No. 1 or either of them in the manner prescribed in clause (*i*) (*a*) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, defendant No. 2 shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff or defendant No. 1 (whoever has made the payment), or to such person as he appoints, and defendant No. 2 shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by defendant No. 2 or any person claming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff or defendant No. 1 (whoever has made the payment) quiet and peaceable possession of the said property.

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* Words not required to be deleted.

(Similar declarations to be introduced, if defendant No. 1 pays the amount found or declared due to the plaintiff with such variations as may be necessary having regard to the nature of his mortgage.)

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid, of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court that the suit be dismissed or for a final decree—

(*i*) *[*in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale*] that the plaintiff and defendant No. 1 jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the defendant No. 2 quiet and peaceable possession of the said property; or

(*ii*) *[*in the case of any other mortgage*] that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and

(*iii*) *[*in the case where a sale is ordered under clause* 4 (ii) *above*] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to defendant No. 2 under the decree and any further orders that may be passed in this suit and in payment of the amount which the Court may adjudge due to defendant No. 2 in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to the plaintiff and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(*iv*) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to defendant No. 2 and the plaintiff, defendant No. 2 or the plaintiff or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed,—

(*a*) that, if the plaintiff pays into Court to the credit of this suit the amount adjudged due to defendant No. 2 but defendant No. 1 makes default in the payment of the said amount, the plaintiff shall be at liberty to apply to the Court to keep defendant No. 2's mortgage alive for his benefit and to apply for a final decree (*in the same manner as the defendant No. 2 might have done under clause 4 above*)—

*[(*i*) that defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property;] or

*[(*ii*) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property;]

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* Words not required to be deleted.

and (*b*) (if on the application of defendant No. 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed (*in the case where a sale is ordered under clause 5 above*)—

(*i*) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by the plaintiff in respect of defendant No. 2's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount; and that the balance, if any, shall then be applied in payment of the amount adjudged due to the plaintiff in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(*ii*) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of defendant No. 2's mortgage or the plaintiff's mortgage, defendant No. 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance.

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 11.

PRELIMINARY DECREE FOR SALE.

[Plaintiff—Sub or derivative mortgagee

vs.

Defendant No. 1.—Mortgagor.

Defendant No. 2.—Original mortgagee.]

(O. 34, R. 4.)

(*Title.*)

This suit coming on this day, etc.; It is hereby declared that the amount due to defendant No. 2 on his mortgage calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon and the sum of Rs. for the costs of the suit awarded to defendant No. 2, making in all the sum of Rs.

(*Similar declarations to be introduced with regard to the amount due from defendant No. 2 to the plaintiff in respect of his mortgage.*)

2. And it is hereby ordered and decreed as follows:—

(*i*) that defendant No. 1 do pay into Court on or before the said day of or any later date up to which time for payment may be extended by the Court the said sum of Rs. due to defendant No. 2.

(Similar declarations to be introduced with regard to the amount due to the plaintiff, defendant No. 2 being at liberty to pay such amount.)

(*ii*) that, on payment of the sum declared due to defendant No. 2 by defendant No. 1 in the manner prescribed in clause 2 (*i*) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff and defendant No. 2 shall bring into Court all documents in their possession or power relating to the mortgaged property in the plaint mentioned, and all such documents (except such as relate only to the sub-mortgage) shall be delivered over to defendant No. 1, or to such person as he appoints, and defendant No. 2 shall, if so required, re-convey or re-transfer the property to defendant No. 1 free from the said mortgage clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims, and free from all liability arising from the mortgage or this suit and shall, if so required, deliver up to defendant No. 1 quiet and peaceable possession of the said property; and

(*iii*) that, upon payment into the Court by defendant No. 1 of the amount due to defendant No. 2, the plaintiff shall be at liberty to apply for payment to him of the sum declared due to him together with any subsequent costs of the suit and other costs, charges and expenses, as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall then be paid to defendant No. 2; and that if the amount paid into the Court be not sufficient to pay in full the sum due to the plaintiff, the plaintiff shall be at liberty (if such remedy is open to him by the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 for the amount of the balance.

3. And it is further ordered and decreed that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, the plaintiff shall bring into the Court all documents, etc. [as in sub-clause (*ii*) of clause 2].

4. And it is hereby further ordered and decreed that, in default of payment by defendants Nos. 1 and 2 as aforesaid, the plaintiff may apply to the Court for a final decree for sale, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold; and that for the purposes of such sale the plaintiff and defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in their possession or power relating to the mortgaged property.

5. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount due to the plaintiff as specified in clause 1 above with such costs of the suit and other costs, charges and expenses, as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2; and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same.

6. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amounts payable to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (if such remedy is open under their respective mortgages and is not barred

Appendix D.

by any law for the time being in force) to apply for a personal decree against defendant No. 2 or defendant No. 1 (as the case may be) for the amount of the balance.

7. And it is hereby further ordered and decreed that, if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in payment of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court for a final decree for foreclosure or sale (as the case may be)—(*declarations in the ordinary form to be introduced according to the nature of defendant No. 2's mortgage and the remedies open to him thereunder*).

8. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 12.

DECREE FOR RECTIFICATION OF INSTRUMENT.

(*Title.*)

IT is hereby declared that the , dated the day of 19 , does not truly express the intention of the parties to such .

And it is decreed that the said be rectified by

No. 13.

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS.

(*Title.*)

IT is hereby declared that the , dated the day of 19 , and made between and , is void as against the plaintiff and all other the creditors, if any, of the defendant

No. 14.

INJUNCTION AGAINST PRIVATE NUISANCE.

(*Title.*)

LET the defendant , his agents, servants and workmen, be perpetually restrained from burning, or causing to be burnt, any bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling-house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff.

No. 15.

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

(*Title.*)

LET the defendant , his contractors, agents and workmen, be perpetually restrained from continuing to erect upon his premises in any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights.

No. 16.

INJUNCTION RESTRAINING USE OF PRIVATE ROAD.

(*Title.*)

LET the defendant , his agents, servants and workmen, be perpetually restrained from using or permitting to be used any part of the lane at ;

the soil of which belongs to the plaintiff, as a carriage-way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever.

No. 17.

PRELIMINARY DECREE IN AN ADMINISTRATION-SUIT.

(*Title.*)

IT is ordered that the following accounts and inquiries be taken and made; that is to say:—

In creditor's suit—

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

In suit by legatees—

2. That an account be taken of the legacies given by the testator's will.

In suits by next-of-kin—

3. That an inquiry be made and account taken of what or of what share, if any, the plaintiff is entitled to as next-of-kin [*or* one of the next-of-kin] of the intestate.

[After the first paragraph, the decree will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, heirs-at-law and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit.]

4. An account of the funeral and testamentary expenses.

5. An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

6. An inquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of.

7. And it is further ordered that the defendant do, on or before the day of next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use.

8. And that if the *shall find it necessary for carrying out the objects of the suit to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

9. And that Mr. E. F. be receiver in the suit (*or* proceeding) and receive and get in all outstanding debts and outstanding moveable property of the deceased, and pay the same into the hands of the *(and shall give security by bond for the due performance of his duties to the amount of rupees).

10. And it is further ordered that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say—

(*a*) an inquiry what immoveable property the deceased was seized of or entitled to at the time of his death;

(*b*) an inquiry what are the incumbrances (if any) affecting the immoveable property of the deceased or any part thereof;

(*c*) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

Vakil High Court,
SRINAGAR (Kashmir)

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* Here insert name of proper officer.

Appendix D.

11. And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent.

12. And it is ordered that G. H. shall have the conduct of the sale of the immoveable property, and shall prepare the conditions and contracts of sale subject to the approval of the * and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle.

13. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the *shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the *to give the most useful publicity to such inquiries.

14. And it is ordered that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before the day of , and that the *do certify the result of the inquiries, and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of .

15. And, lastly, it is ordered that this suit [*or* proceeding] stand adjourned for making final decree to the day of .

[Such part only of this decree is to be used as is applicable to the particular case.]

No. 18.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE.

(*Title.*)

1. IT is ordered that the defendant do, on or before the day of , pay into Court the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the estate of , the testator, and also the sum of Rs. for interest, at the rate of Rs. per cent. per annum, from the day of to the day of , amounting together to the sum of Rs. .

2. Let the *of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed, be paid out of the said sum of Rs. ordered to be paid into Court as aforesaid, as follows:—

(*a*) The costs of the plaintiff to Mr. , his attorney [*or* pleader] *or* and the costs of the defendant to Mr. , his attorney [*or* pleader].

(*b*) And (*if any debts are due*) with the residue of the said sum of Rs. after payment of the plaintiff's and defendant's costs as aforesaid, let the sums, found to be owing to the several creditors mentioned in the schedule to the certificate, of the *, together with subsequent interest on such of the debts as bear interest, be paid; and, after making such payments, let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as (aforesaid), be paid to them.

3. And if there should then be any residue, let the same be paid to the residuary legatee.

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* Here insert name of proper officer.

No. 19.

PRELIMINARY DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE, WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES.

(*Title.*)

1. It is declared that the defendant is personally liable to pay the legacy of Rs. bequeathed to the plaintiff;

2. And it is ordered that an account be taken of what is due for principal and interest on the said legacy;

3. And it is also ordered that the defendant do, within weeks after the date of the certificate of the *, pay to the plaintiff the amount of what the *shall certify to be due for principal and interest;

4. And it is ordered that the defendant do pay the plaintiff his costs of suit, the same to be taxed in case the parties differ.

No. 20.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY NEXT-OF-KIN.

(*Title.*)

1. Let the *of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff's costs, when so taxed, be paid by the defendant to the plaintiff out of the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the personal estate of *E. F.*, the intestate, within one week after the taxation of the said costs by the said *, and let the defendant retain for her own use out of such sum her costs, when taxed.

2. And it is ordered that the residue of the said sum of Rs. , after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows:—

(*a*) Let the defendant, within one week after the taxation of the said costs by the *as aforesaid, pay one-third share of the said residue to the plaintiffs *A. B.*, and *C. D.*, his wife, in her right as the sister and one of the next-of-kin of the said *E. F.*, the intestate.

(*b*) Let the defendant retain for her own use one other third share of the said residue, as the mother and one of the next-of-kin of the said *E. F.*, the intestate.

(*c*) And let the defendant, within one week after the taxation of the said costs by the *as aforesaid, pay the remaining one-third share of the said residue to *G. H.*, as the brother and the other next-of-kin of the said *E. F.*, the intestate.

No. 21.

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(*Title.*)

It is declared that the proportionate shares of the parties in the partnership are as follows:—

It is declared that this partnership shall stand dissolved [*or* shall be deemed to have been dissolved] as from the day of , and it is ordered that the dissolution thereof as from that day be advertised in the Gazette, etc.

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* Here insert name of proper officer.

Appendix D.

And it is ordered that be the receiver of the partnership-estate and effects in this suit and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken:—

1. An account of the credits, property and effects now belonging to the said partnership;

2. An account of the debts and liabilities of the said partnership;

3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the *may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of , and that the *do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of .

And, lastly, it is odered that this suit stand adjourned for making a final decree to the day of .

No. 22.

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(*Title.*)

It is ordered that the fund now in Court, amounting to the sum of Rs. , be applied as follows:—

1. In payment of the debts due by the partnership set forth in the certificate of the *amounting in the whole to Rs. .

2. In payment of the costs of all parties in this suit, amounting to Rs. .

[*These costs must be ascertained before the decree is drawn up.*]

3. In payment of the sum of Rs. to the plaintiff as his share of the partnership-assets, of the sum of Rs. , being the residue of the said sum of Rs. now in Court, to the defendant as his share of the partnership-assets.

[*Or,* And that the remainder of the said sum of Rs. be paid to the said plaintiff (*or* defendant) in part payment of the sum of Rs. certified to be due to him in respect of the partnership-accounts.]

4. And that the defendant [*or* plaintiff] do on or before the day of pay to the plaintiff [*or* defendant] the sum of Rs. being the balance of the said sum of Rs. due to him, which will then remain due.

No. 23.

DECREE FOR RECOVERY OF LAND AND MESNE PROFITS.

(*Title.*)

It is hereby decreed as follows:—

1. That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed.

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* Here insert name of proper officer.

2. That the defendant do pay to the plaintiff the sum of Rs. with interest thereon at the rate of per cent. per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit.

Or

2. **That an inquiry** be made as to the amount of mesne profits which have accrued due prior to the institution of the suit.

3. **That an inquiry** be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree-holder] [the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court] [the expiration of three years from the date of the decree].

Schedule.

Local Amendment.

Madras.

Add the following form as Form No. 24, viz.:—

"No. 24.

DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR OR A LUNATIC.

(*Title.*)

This suit coming on this day for final disposal in the presence of etc., and C. D., the defendant, a minor by E. F., his guardian *ad litem*, applying that this suit may be compromised in the terms of an agreement in writing, dated the day of and made between A. B., the plaintiff, of the one part, and the said C. D. by the said guardian *ad litem* of the other part, (or. on the terms hereafter set forth) and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise on behalf of the said minor, and with the consent of all parties hereto: It is ordered as follows:—

(Set out the terms of the compromise.)"

Appendix E.

APPENDIX E.

EXECUTION.

No. 1.

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE RECORDED AS CERTIFIED.

(O. 21, R. 2.)

(*Title.*)

To

WHEREAS in execution of the decree in the above-named suit has applied to this Court that the sum of Rs. recoverable under the decree has been $\frac{\text{paid}}{\text{adjusted}}$ and should be recorded as certified, this is to give you notice that you are to appear before this Court on the day of 19 , to show cause why the $\frac{\text{payment}}{\text{adjustment}}$ aforesaid should not be recorded as certified.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 2.

PRECEPT. (Section 46.)

(*Title.*)

UPON hearing the decree-holder it is ordered that this precept be sent to the Court of at under section 46 of the Code of Civil Procedure, 1908, with directions to attach the property specified in the annexed schedule and to hold the same pending any application which may be made by the decree-holder for execution of the decree.

Schedule.

Dated the day of 19 .

Judge.

No. 3.

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT.

(O. 21, R. 6.)

(*Title.*)

WHEREAS the decree-holder in the above suit has applied to this Court for a certificate to be sent to the Court of at for execution of the decree in the above suit by the said Court, alleging that the judgment-debtor resides or has property within the local limits of the jurisdiction of the said Court, and it is deemed necessary and proper to send a certificate to the said Court under O. 21, R. 6 of the Code of Civil Procedure, 1908, it is

Appendix E.

Ordered:

That a copy of this order be sent to with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non-satisfaction.

Dated the day of 19 .

Judge.

No. 4.

CERTIFICATE OF NON-SATISFACTION OF DECREE.

(O. 21, R. 6.)

(*Title.*)

CERTIFIED that no[1] satisfaction of the decree of this Court in Suit No. of 19 , a copy which is hereunto attached, has been obtained by execution within the jurisdiction of this Court.

Dated the day of 19 .

Judge.

No. 5.

CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER COURT.

(O. 21, R. 6.)

(*Title.*)

Number of suit and the Court by which the decree was passed.	Names of parties.	Date of application for execution.	Number of the execution case.	Processes issued and dates of service thereof.	Costs of execution.	Amount realized.	How the case is disposed of.	Remarks.
1	2	3	4	5	6	7	8	9
					R. a. p.	*R. a. p.*		

Signature of Muharrir in charge. *Signature of Judge.*

Local Amendment.

Rangoon.

In the heading of Form No. 5 for the words and figures "O. 21, R. 6," the word and figures "section 41" shall be substituted.

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[1] *If partial, strike out "no" and state to what extent.*

Appendix E.

No. 6.

APPLICATION FOR EXECUTION OF DECREE.

(O. 21, R. 11.)

In the Court of

I , decree-holder, hereby apply for execution of the decree herein below set forth:—

No. of suit.	Names of parties.	Date of decree.	Whether any appeal preferred from decree.	Payment or adjustment made, if any.	Previous application, if any, with date and result.	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree.	Amount of costs, if any, awarded.	Against whom to be executed.	Mode in which the assistance of the Court is required.
1	2	3	4	5	6	7	8	9	10
789 of 1897.	A B.—Plaintiff . . C. D.—Defendant . .	October 11, 1897.	No.	None.	Rs. 72-4 recorded on application, dated the 4th March, 1899.	Rs. 314-8-2 principal [interest at 6 per cent. per annum, from date of decree till payment.]	Rs. A. P. As awarded in the decree . . . . . 47 10 4 Subsequently incurred . . . . . 8 2 0 Total . 55 12 4	Against the defendant C. D.	[*When attachment and sale of moveable property is sought.*] I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by attachment and sale of defendant's moveable property as per annexed list and paid to me. [*When attachment and sale of immoveable property is sought.*] I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by the attachment and sale of defendant's immoveable property specified at the foot of this application and paid to me.

I declare that what is stated herein is true to the best of my knowledge and belief.

Signed , *decree-holder.*

Dated the day of 19 .

Appendix E.

[When attachment and sale of immoveable property is sought.]
Description and Specification of Property.

The undivided one-third share of the judgment-debtor in a house situated in the village of , value Rs. 40, and bounded as follows:—

East by *G's* house; west by *H's* house; south by public road, north by private lane and *J's* house.

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified.

Signed , *decree-holder.*

No. 7.

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE.

[1][(O. 21, R. 16.)]

(Title.)

To

WHEREAS
has made application to this Court for execution of decree in Suit No. of 19 , on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court on the day of 19 , to show cause why execution should not be granted.

GIVEN under my hand and the seal of the Court, this day of 19 .

No. 8.

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN EXECUTION OF A DECREE FOR MONEY. (O. 21, R. 30.)

(Title.)

To

The Bailiff of the Court.

WHEREAS was ordered by decree of this Court passed on the day of 19 , in Suit No. of 19 , to pay to the plaintiff the sum of Rs. as noted in the margin; and whereas the said sum of Rs. has not been paid; These are to command you to attach the moveable property of the said as set forth in the schedule hereunto annexed, or which shall be pointed out to you by the said , and unless the said shall pay to you the said sum of Rs. together with Rs. , the costs of this attachment, to hold the same until further orders from this Court.

Decree.			
Principal ..			
Interest ..			
Costs			
Costs of execution.			
Further Interest			
Total ..			

You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the day on which and manner in which it has been executed, or why it has not been executed.

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[1] This reference was substituted for the reference "(O. 21, R. 22)" by s. 2 and Sch. I of the Repealing and Amending Act, 1914 (X of 1914).

Appendix E.

GIVEN under my hand and the seal of the Court, this day of 19 .

Schedule.

Judge.

No. 9.

WARRANT FOR SEIZURE OF SPECIFIC MOVEABLE PROPERTY ADJUDGED BY DECREE.

(O. 21, R. 31.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS was ordered by decree of this Court passed on the day of 19 , in Suit No. of 19 , to deliver to the plaintiff the moveable property (*or* a share in the moveable property) specified in the schedule hereunto annexed, and whereas the said property (*or* share) has not been delivered;

These are to command you to seize the said moveable property (*or* a share of the said moveable property) and to deliver it to the plaintiff or to such person as he may appoint in his behalf.

GIVEN under my hand and the seal of the Court, this day of 19 .

Schedule.

Judge.

No. 10.

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT.

(O. 21, R. 34.)

(*Title.*)

To

TAKE notice that on the day of 19 , the decree-holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of , whereof a draft is hereunto annexed, of the immoveable property specified hereunder, and that the day of 19 is appointed for the hearing of the said application, and that you are at liberty to appear on the said day and to state in writing any objections to the said draft.

Description of Property.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 11.

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, ETC.

(O. 21, R. 35.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS the undermentioned property in the occupancy of has been decreed to , the plaintiff in this suit; You are hereby directed to put the said in possession of the same, and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Schedule.

Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY WARRANT OF ARREST SHOULD NOT ISSUE.

(O. 21, R. 37.)

(*Title.*)

To

WHEREAS has made application to this Court for execution of decree in suit No. of 19 by arrest and imprisonment of your person, you are hereby required to appear before this Court on the day of 19 , to show cause why you should not be committed to the civil prison in execution of the said decree.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 13.

WARRANT OF ARREST IN EXECUTION. (O. 21, R. 38.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS was adjudged by a decree of the Court in Suit No. of 19 , dated the day of 19 , to pay to the decree-holder the sum of Rs. as noted in the margin, and whereas the said sum of Rs. has not been paid to the said decree-holder in satisfaction of the said decree; These are to command you to arrest the said judgment-debtor and unless the said judgment-debtor shall pay to you the said sum of Rs. together with Rs. for the costs of executing this process, to bring the said defendant before the Court with all convenient speed.

Decree.			
Principal ..			
Interest ..			
Costs ..			
Execution ..			
Total ..			

You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the day on which and manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 14.

WARRANT OF COMMITTAL OF JUDGMENT-DEBTOR TO JAIL.

(O. 21, R. 40.)

(*Title.*)

To

The Officer in charge of the Jail at .

WHEREAS who has been brought before this Court this day of 19 ,

Appendix E.

under a warrant in execution of a decree which was made and pronounced by the said Court on the day of 19 , and by which decree it was ordered that the said should pay ; And whereas the said has not obeyed the decree nor satisfied the Court that he is entitled to be discharged from custody; You are hereby, in the name of the King-Emperor of India, commanded and required to take and receive the said into the civil prison and keep him imprisoned therein for a period not exceeding or until the said decree shall be fully satisfied, or the said shall be otherwise entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure, 1908; and the Court does hereby fix annas per diem as the rate of the monthly allowance for the subsistence of the said during his confinement under this warrant of committal.

GIVEN under my signature and the seal of the Court, this day of 19 .

Judge.

No. 15.

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE.

(Sections 58, 59.)

(*Title.*)

To

The Officer in charge of the Jail at .

UNDER orders passed this day, you are hereby directed to set free judgment-debtor now in your custody.

Dated .

Judge.

Local Amendments.

Lahore.

Add the following:—

"Form No. 15-A.

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF PERSON INTERESTED AND SURETIES.

(O. 21, R. 43.)

In the Court of at Civil Suit No. of A.B. of .

against

C.D. of .

Know all men by these presents that we, I.J. of , etc., and K. L. of , etc., and M.N. of etc., are jointly and severally bound to the Judge of the Court of in Rs. to be paid to the said Judge, for which payment to be made, we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally by these presents.

Dated this day of 19 .

And whereas the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the day of 19 , in execution of a decree in favour of in suit No. of 19 on the file of and the said property has been left in the charge of the said I.J.

Now the condition of this obligation is that, if the above bounden I.J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void; otherwise it shall remain in full force.

I.J.

K.L.

M.N.

Signed and delivered by the above bounden in the presence of .

"Form No. 15-B.

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF ANY PERSON AND SURETIES.

[O. 21, R. 43 (1) (c)]

In the Court of at Civil Suit No. of A.B. of against

C.D. of

Know all men by these presents that we, I.J. of , etc., and K.L. of etc., and M.N. of etc., are jointly and severally bound to the Judge of the Court of in Rupees to be paid to the said Judge for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this day of 19 .

And whereas the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the day of 19 , in execution of a decree in favour of in suit No. of 19 on the file of and said property has been left in the charge of the said I.J.

Now the condition of this obligation is that, if the above bounden I.J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void: otherwise it shall remain in full force and be enforcible against the above bounden I.J. in accordance with the procedure laid down in section 145, Civil Procedure Code, as if the aforesaid I.J. were a surety for the restoration of property taken in execution of a decree.

I.J.

K.L.

M.N.

Signed and delivered by the above bounden in the presence of ."

Madras.

For the word "dated" substitute the words "Given under my hand and the seal of the Court, this day of ."

Add the following Form:—

"Form No. 15-A.

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF PERSON INTERESTED AND SURETIES.

(O. 21, R. 43.)

In the Court of at Civil Suit No. of A.B. of *against*

C.D. of

Know all men by these presents that we, I.J. of etc., and K.L. of etc., and M.N. of etc., are jointly and severally bound to the Judge of the Court of in Rupees to be paid to the said Judge, for which payment to be made we bind ourselves and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this day of 19 .

And whereas the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the day of 19 , in execution of a decree in favour of in suit No. of 19 , on the file of and the said property has been left in the charge of the said I.J.

Appendix E.

Now the condition of this obligation is that, if the above bounden I.J. shall duly account for and produce when required before the said Courts all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void; otherwise it shall remain in full force.

I.J.

K.L.

M.N.

Signed and delivered by the above bounden in the presence of ."

Rangoon.

The following shall be inserted as Form No. 15-A:—

"Form No. 15-A.

FORM OF RECEIPT FOR MONEY DEPOSITED IN CONNECTION WITH THE ATTACHMENT OF PROPERTY TOGETHER WITH NOTICE TO DECREE-HOLDER.

In the Court of .

Execution Case No. of 19 .

versus

Received the sum of Rs. on account of the following expenditure to be incurred in connection with attachment of property as per list appended:—

	Rs.	a.	p.
Process Fees Rules— *15 (i) (b) (ii). †17(1) (c) (ii) (2).			
1. Custody Fees			
2. Feeding charges			
3. Conveyance charges			
4. Other expenses (to be specified)			
Total ..			

N.B.—The decree-holder is hereby warned that the sum deposited by him for recurring charges will be exhausted on the day of 19 , and that unless a further deposit is made before that date the attachment will cease.

Dated this day of 19 .

Bailiff.

"List of property to be attached."

No. 16.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF. (O. 21, R. 46.)

(*Title.*)

To

WHEREAS has failed to satisfy a decree passed against on the day of 19 , in Suit No. of 19 , in favour of for Rs. ; It is ordered that the defendant be, and is hereby, prohibited and restrained until the further order of this Court, from receiving from the following property in the possession of the said , that is to say, , to which the defendant is entitled, subject to any claim of the said , and the said is hereby prohibited and restrained, until the further order of this Court, from delivering the said property to any person or persons whomsoever.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

---

* Strike out if used in Courts other than the High Court of Judicature at Rangoon, and the Small Cause Court, Rangoon.

†Strike out if used in the High Court of Judicature at Rangoon, and the Small Cause Court, Rangoon.

No. 17.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS NOT SECURED BY NEGOTIABLE INSTRUMENTS.

(O. 21, R. 46.)

(*Title.*)

To

WHEREAS has failed to satisfy a decree passed against on the day of 19 , in Suit No. of 19 , in favour of for Rs. ; It is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant, namely, and that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever or otherwise than into this Court.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 18.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN THE CAPITAL OF A CORPORATION.

(O. 21, R. 46.)

(*Title.*)

To

Defendant and to

, Secretary of Corporation.

WHEREAS has failed to satisfy a decree passed against on the day of 19 , in Suit No. of 19 , in favour of , for Rs. ; It is ordered that you, the defendant, be, and you are hereby, prohibited and restrained, until the further order of this Court, from making any transfer of shares in the aforesaid Corporation, namely, , or from receiving payment of any dividends thereon; and you, , the Secretary of the said Corporation, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 19.

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF RAILWAY COMPANY OR LOCAL AUTHORITY. (O. 21, R. 48.)

(*Title.*)

To

WHEREAS judgment-debtor in the above-named case, is a (*describe office of judgment-debtor*) receiving his salary (*or* allowances) at your hands; and whereas , decree-holder in the said case, has applied in this Court for the attachment of the salary (*or* allowances) of the said to the extent of due to him under

Appendix E.

the decree; You are hereby required to withhold the said sum of from the salary of the said in monthly instalments of and to remit the said sum (*or* monthly instalments) to this Court.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 20.

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT.

(O. 21, R. 51.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS an order has been passed by this Court on the day of 19 , for the attachment of ; You are hereby directed to seize the said and bring the same into Court.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 21.

ATTACHMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY SECURITY IN THE CUSTODY OF A COURT OF JUSTICE OR OFFICER OF GOVERNMENT. (O. 21, R. 52.)

(*Title.*)

To

SIR,

The plaintiff having applied, under R. 52 of O. 21 of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed, on what account, etc.*), I request that you will hold the said money subject to the further order of this Court.

I have the honour to be,
SIR,
Your most obedient Servant,

Judge.

Dated the day of 19 .

No. 22.

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT.

(O. 21, R. 53.)

(*Title.*)

To

The Judge of the Court of .

SIR,

I have the honour to inform you that the decree obtained in your Court on the day of 19 , by in Suit No. of 19 , in which he was and was has been attached by this Court on the application of , the in the suit specified above. You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment-debtor.

I have the honour, etc.,

Judge.

Dated the day of 19 .

No. 23.

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE.

(O. 21, R. 53.)

(*Title.*)

To

WHEREAS an application has been made in this Court by the decree-holder in the above suit for the attachment of a decree obtained by you on the day of 19 , in the Court of in Suit No. of 19 , in which was and was ; It is ordered that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the same in any way.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 24.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS OF IMMOVEABLE PROPERTY

(O. 21, R. 54.)

(*Title.*)

To

Defendant.

WHEREAS you have failed to satisfy a decree passed against you on the day of 19 , in Suit No. of 19 , in favour of for Rs. ; It is ordered that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift or otherwise.

GIVEN under my hand and the seal of the Court, this day of 19 .

Schedule.

Judge.

Appendix E.

No. 25.

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC., OF MONEY, ETC., IN THE HANDS OF A THIRD PARTY. (O. 21, R. 56.)

(*Title.*)

To

WHEREAS the following property has been attached in execution of a decree in Suit No. of 19 , passed on the day of 19 , in favour of for Rs. ; It is ordered that the property so attached, consisting of Rs. in money and Rs. in currency-notes, or a sufficient part thereof to satisfy the said decree, shall be paid over by you, the said to .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 26.

NOTICE TO ATTACHING CREDITOR. (O. 21, R. 58.)

(*Title.*)

To

WHEREAS has made application to this Court for the removal of attachment on placed at your instance in execution of the decree in Suit No. of 19 , this is to give you notice to appear before this Court on , the day of 19 , either in person or by a pleader of the Court duly instructed to support your claim, as attaching creditor.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 27.

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY. (O. 21, R. 66.)

(*Title.*)

To

The Bailiff of the Court.

THESE are to command you to sell by auction, after giving day's previous notice, by affixing the same in this Court-house, and after making due proclamation, the property attached under a warrant from this Court, dated the day of 19 , in execution of a decree in favour of in Suit No. of 19 , or so much of the said property as shall realize the sum of Rs. , being the of the said decree and costs still remaining unsatisfied.

You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 28.

NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION.

(O. 21, R. 66.)

(Title.)

To

Judgment-debtor.

WHEREAS in the above-named suit , the decree-holder, has applied for the sale of ; You are hereby informed that the day of 19 has been fixed for settling the terms of the proclamation of sale.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 29.

PROCLAMATION OF SALE. (O. 21, R. 66.)

(Title.)

(1) Suit No. of 19 decided by the of in which was plaintiff and was defendant.

Notice is hereby given that, under R. 64 of O. 21 of the Code of Civil Procedure, 1908, an order has been passed by this Court for the sale of the attached property mentioned in the annexed schedule, in satisfaction of the claim of the decree-holder in the suit (1) mentioned in the margin, amounting with costs and interest up to date of sale to the sum of .

The sale will be by public auction, and the property will be put up for sale in the lots specified in the schedule. The sale will be of the property of the judgment-debtors above-named as mentioned in the schedule below; and the liabilities and claims attaching to the said property, so far as they have been ascertained, are those specified in the schedule against each lot.

In the absence of any order of postponement, the sale will be held by at the monthly sale commencing at o'clock on the at . In the event, however, of the debt above specified and of the costs of the sale being tendered or paid before the knocking down of any lot, the sale will be stopped.

At the sale the public generally are invited to bid, either personally or by duly authorized agent. No bid by, or on behalf of, the judgment-creditors above-mentioned, however, will be accepted, nor will any sale to them be valid without the express permission of the Court previously given. The following are the further .

Conditions of Sale.

1. The particulars specified in the schedule below have been stated to the best of the information of the Court, but the Court will not be answerable for any error, misstatement or omission in this proclamation.

2. The amount by which the biddings are to be increased shall be determined by the officer conducting the sale. In the event of any dispute arising as to the amount bid, or as to the bidder, the lot shall at once be again put up to auction.

3. The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so.

Appendix E.

4. For reasons recorded, it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provisions of R. 69 of O. 21.

5. In the case of moveable property, the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale directs, and in default of payment the property shall forthwith be again put up and re-sold.

6. In the case of immoveable property, the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent. on the amount of his purchase-money to the officer conducting the sale, and in default of such deposit the property shall forthwith be put up again and re-sold.

7. The full amount of the purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property, exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day.

8. In default of payment of the balance of purchase-money within the period allowed, the property shall be re-sold after the issue of a fresh notification of sale. The deposit, after defraying the expenses of the sale, may, if the Court thinks fit, be forfeited to Government and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

Schedule of Property.

Number of lot.	Description of property to be sold, with the name of each owner where there are more judgment-debtors than one.	The revenue assessed upon the estate or part of the estate, if the property to be sold is an interest in an estate or a part of an estate paying revenue to Government.	Detail of any ncumbrances to which the property is able.	Claims, if any, which have been put forward to the property and any other known particulars bearing on its nature and value.

Local Amendments.

Allahabad.

In Form No. 29. (Proclamation of Sale) delete the sentence "No bid by * * * * previously given" in the paragraph above "conditions of sale."

Madras.

Add the following as a "Note" to Form No. 29 (proclamation of sale)—

"NOTE:—The title-deeds relating to the property have not been filed in Court, and the purchaser will take the property subject to the risk of there being mortgages by deposit of title-deeds, or mortgages not disclosed in the encumbrance certificate."

No. 30.

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION OF SALE.

(O. 21, R. 66.)

(*Title.*)

To

The Nazir of the Court.

WHEREAS an order has been made for the sale of the property of the judgment-debtor specified in the schedule hereunder annexed, and whereas the day of 19 , has been fixed for the sale of the said property, copies of the proclamation of sale are by this warrant made over to you, and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said schedule, to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the Court-house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published.

Dated the day of 19 .

Schedule.

Judge.

No. 31.

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE ON A RE-SALE OF PROPERTY BY REASON OF THE PURCHASER'S DEFAULT.

(O. 21, R. 71.)

(*Title.*)

Certified that at the re-sale of the property in execution of the decree in the above-named suit, in consequence of default on the part of , purchaser, there was a deficiency in the price of the said property amounting to Rs. , and that the expenses attending such re-sale amounted to Rs. , making a total of Rs. , which sum is recoverable from the defaulter.

Dated the day of 19 .

Officer holding the sale.

No. 32.

NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY SOLD IN EXECUTION

(O. 21, R. 79.)

(*Title.*)

To

WHEREAS has become the purchaser at a public sale in execution of the decree in the above suit of now in your possession, you are hereby prohibited from delivering possession of the said to any person except the said .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Appendix E.

No. 33.

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION TO ANY OTHER THAN THE PURCHASER. (O. 21, R. 79.)

(*Title.*)

To and to

WHEREAS has become the purchaser at a public sale in execution of the decree in the above suit of being debts due from you to you ; It is ordered that you be, and you are hereby, prohibited from receiving, and you from making payment of, the said debt to any person or persons except the said .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 34.

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXECUTION. (O. 21, R. 79.)

(*Title.*)

To

and , Secretary of Corporation.

WHEREAS has become the purchaser at a public sale in execution of the decree, in the above suit, of certain shares in the above Corporation , that is to say, of standing in the name of you ; It is ordered that you be, and you are hereby, prohibited from making any transfer of the said shares to any person except the said , the purchaser aforesaid, or from receiving any dividends thereon; and you , Secretary of the said Corporation, from permitting any such transfer or making any such payment to any person except the said , the purchaser aforesaid.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 35.

CERTIFICATE TO JUDGMENT-DEBTOR AUTHORIZING HIM TO MORTGAGE, LEASE OR SELL PROPERTY. (O. 21, R. 83.)

(*Title.*)

WHEREAS in execution of the decree passed in the above suit an order was made on the day of 19 , for the sale of the under-mentioned property of the judgment-debtor , and whereas the Court has, on the application of the said judgment-debtor, postponed the said sale to enable him to raise the amount of the decree by mortgage, lease or private sale of the said property or of some part thereof:

This is to certify that the Court doth hereby authorize the said judgment-debtor to make the proposed mortgage, lease or sale within a period of from the date of this certificate; provided that all monies payable under such mortgage, lease or sale shall be paid into this Court and not to the said judgment-debtor.

Description of property.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 36.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE.

(O. 21, Rr. 90, 92.)

(*Title.*)

To

WHEREAS the under-mentioned property was sold on the day of 19 , in execution of the decree passed in the above-named suit, and whereas , the decree-holder [*or* judgment-debtor], has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [*or* fraud] in publishing [*or* conducting] the sale, namely, that

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the day of 19 , when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Description of property.

Judge.

No. 37.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE.

(O. 21, Rr. 91, 92.)

(*Title.*)

To

WHEREAS , the purchaser of the under-mentioned property sold on the day of 19 , in execution of the decree passed in the above-named suit, has applied to this Court to set aside the sale of the said property on the ground that , the judgment-debtor, had no saleable interest therein:

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the day of 19 , when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Description of property.

Judge.

No. 38.

CERTIFICATE OF SALE OF LAND. (O. 21, R. 94.)

(*Title.*)

THIS is to certify that has been declared the purchaser at a sale by public auction on the day of

Appendix E.

19 , of in execution of decree in this suit, and that the said sale has been duly confirmed by this Court.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Local Amendments.

Nagpur.

In Form No. 38, *insert* the words "for Rs……………….." between the words "The purchaser" and "At a sale".

Patna

Substitute the following for form No. 38.

"Form No. 38.

Certificate of sale of land (O. 21, R. 94).

District

In the Court of at
Execution Case No. of 19 .

Decree-holder,

versus

Judgment-debtor.

This is to certify that son of by caste , by occupation , resident of , Thana , District , has been declared the purchaser at a sale by public auction on the day of 19 , of the property specified below in execution of the decree in suit No. of this Court[1] and that the said sale has been duly confirmed by this Court.

GIVEN under my hand and the seal of the Court, this day2 of 19 .

Judge.

Specification and price of properties[3].

No. 39.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN EXECUTION. (O. 21, R. 95.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS has become the certified purchaser of at a sale in execution of decree in suit No. of 19 ; You are hereby ordered to put the said , the certified purchaser, as aforesaid, in possession of the same.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

---

[1] If the decree has been received by transfer from other Court enter name of that Court.

[2] The date when the sale became absolute.

[3] Particulars sufficient to identify the property including the name of each registration sub-district in which any part of the property is situated should be fully stated.

Local Amendment.

Madras.

Substitute the following for the old one:—

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN EXECUTION (O. 21, R. 95).

(*Title.*)

To

The Bailiff of the Court.

WHEREAS has become the certified purchaser of at a sale in execution of decree in suit No. of 19 ; you are hereby ordered to put the said , the certified purchaser, as aforesaid, in possession of the same; and you are hereby further required to state in your return, whether there are crops, on the land and whether you have delivered them to , the certified purchaser.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 40.

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING EXECUTION OF DECREE. (O. 21, R. 97.)

(*Title.*)

To

WHEREAS , the decree-holder in the above suit, has complained to this Court that you have resisted (*or* obstructed) the officer charged with the execution of the warrant for possession:

You are hereby summoned to appear in this Court on the day of 19 at A.M., to answer the said complaint.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 41.

WARRANT OF COMMITTAL. (O. 21, R. 98.)

(*Title.*)

To

The Officer in Charge of the Jail at .

WHEREAS the under-mentioned property has been decreed to , the plaintiff in this suit, and whereas the Court is satisfied that without any just cause resisted [*or* obstructed] and is still resisting [*or* obstructing] the said in obtaining possession of the property, and whereas the said has made application to this Court that the said be committed to the civil prison;

You are hereby commanded and required to take and receive the said into the civil prison and to keep him imprisoned therein for the period of days.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Appendix E.

No. 42.

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND.

(Section 72.)

(*Title.*)

To

, Collector of

SIR,

In answer to your communication No. , dated , representing that the sale in execution of the decree in this suit of land situate within your district is objectionable, I have the honour to inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you.

I have the honour to be,
SIR,
Your obedient Servant,
Judge.

Local Amendments.

Allahabad.

Add the following as Form No. 43:—

Form No. 43.

The security to be furnished under Section 55(4) shall be, as nearly as may be, by a bond in the following form:—

In the Court of at
Suit No. of 19 .

A.B. of Plaintiff,
against
C.D. of Defendant.

WHEREAS in execution of the decree in the suit aforesaid, the said C.D. has been arrested under a warrant and brought before the Court of ; and whereas the said C.D. has applied for his discharge on the ground that he undertakes within one month to apply under section 5 of Act No. III of 1907, to be declared an insolvent, and the said Court has ordered that the said C.D. shall be released from custody if the said C.D. furnish good and sufficient security in the sum of Rs. that he will appear when called upon, and that he will within one month from this date apply under section 5 of Act No. III of 1907, to be declared an insolvent; Therefore I, E.F., inhabitant of , have voluntarily become security and do hereby bind myself, my heirs, and executors to as Judge of the said Court and his successors in office that the said C.D. will appear at any time when called upon by the said Court, and will apply in the manner and within the time hereinbefore set forth, and in default of such appearance or of such application, I bind myself, my heirs and executors, to pay to the said Court on its order, the sum of Rs. .

Witness my hand at this day of 19 .

(Signed) E.F.,
Surety.

Witnesses.

APPENDIX F.

SUPPLEMENTAL PROCEEDINGS.

Appendix F.

No. 1.

WARRANT OF ARREST BEFORE JUDGMENT. (O. 38, R. 1.)

(Title.)

To

The Bailiff of the Court.

WHEREAS the plaintiff in the above suit, claims the sum of Rs. as noted in the margin, and has proved to the satisfaction of the Court that there is probable cause for believing that the defendant is about to

Principal . . .		
Interest . . .		
Costs		
Total .		

These are to command you to demand and receive from the said the sum of Rs. as sufficient to satisfy the plaintiff's claim, and unless the said sum of Rs. is forthwith delivered to you by or on behalf of the said , to take the said into custody, and to bring him before this Court, in order that he may show cause why he should not furnish security to the amount of Rs. for his personal appearance before the Court, until such time as the said suit shall be fully and finally disposed of, and until satisfaction of any decree that may be passed against him in the suit.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 2.

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE JUDGMENT.

(O. 38, R. 2.)

(Title.)

WHEREAS at the instance of , the plaintiff in the above suit, the defendant, has been arrested and brought before the Court;

And whereas on the failure of the said defendant to show cause why he should not furnish security for his appearance, the Court has ordered him to furnish such security:

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall appear at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the said suit; and in default of such appearance I bind myself, my heirs and executors, to pay to the said Court, at its order, any sum of money that may be adjudged against the said defendant in the said suit.

Appendix F.

Witness my hand at this day of 19 .

(*Signed*)

Witnesses.

1.

2.

No. 3.

SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION FOR DISCHARGE.

(O. 38, R. 3.)

(*Title.*)

To

WHEREAS , who became surety on the day of 19 for your appearance in the above suit, has applied to this Court to be discharged from his obligation:

You are hereby summoned to appear in this Court in person on the day of 19 , at A.M., when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 4.

ORDER FOR COMMITTAL. (O. 38, R. 4.)

(*Title.*)

To

WHEREAS , plaintiff in this suit, has made application to the Court that security be taken for the appearance of , the defendant, to answer any judgment that may be passed against him in the suit; and whereas the Court has called upon the defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which he has failed to do; it is ordered that the said defendant be committed to the civil prison until the decision of the suit; or, if judgment be pronounced against him, until satisfaction of the decree.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 5.

ATTACHMENT BEFORE JUDGMENT, WITH ORDER TO CALL FOR SECURITY FOR FULFILMENT OF DECREE. (O. 38, R. 5.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS has proved to the satisfaction of the Court that the defendant in the above suit ;

These are to command you to call upon the said defendant on or before the day of 19 either to furnish security for the sum of rupees to produce and place at the disposal of this Court when required or the value thereof, or such portion of the value as may be sufficient to satisfy any decree that may be passed against him; or to appear and show cause why he should not furnish security; and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 6.

SECURITY FOR THE PRODUCTION OF PROPERTY. (O. 38, R. 5.)

(*Title.*)

WHEREAS at the instance of , the plaintiff in the above suit, the defendant has been directed by the Court to furnish security in the sum of Rs. to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed;

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree; and in default of his so doing, I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs. or such sum not exceeding the said sum as the said Court may adjudge.

Schedule.

Witness my hand at this day of
19 .

(*Signed*)

Witnesses.

1.

2.

No. 7.

ATTACHMENT BEFORE JUDGMENT, ON PROOF OF FAILURE TO FURNISH SECURITY. (O. 38, R. 6.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS , the plaintiff in this suit, has applied to the Court to call upon , the defendant, to furnish security to fulfil any decree that may be passed against him in the suit, and whereas the Court has called upon the said to furnish such security, which he has failed to do; These are to command you to attach , the property of the said , and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

Appendix F.

No. 8.

TEMPORARY INJUNCTIONS. (O. 39, R. 1.)

(*Title.*)

Upon motion made unto this Court by , Pleader of [or Counsel for] the plaintiff A.B., and upon reading the petition of the said plaintiff in this matter filed [this day] [*or* the plaint filed in this suit on the day of , *or* the written statement of the said plaintiff filed on the day of] and upon hearing the evidence of and in support thereof [*if after notice and defendant not appearing*: *add*, and also the evidence of as to service of notice of this motion upon the defendant C. D.]: This Court doth order that an injunction be awarded to restrain the defendant C. D., his servants, agents and workmen, from pulling down, or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned [*or* in the written statement, *or* petition, of the plaintiff and evidence at the hearing of this motion mentioned], being No. 9, Oilmongers Street, Hindupur, in the Taluk of and from selling the materials whereof the said house is composed, until the hearing of this suit or until the further order of this Court.

Dated this day of 19 .

Judge.

[*Where the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus:—*]

to restrain the defendants and from parting with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note [*or* bill of exchange] in question, dated on or about the , etc., mentioned in the plaintiff's plaint [*or* petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court.

[*In Copyright cases*] to restrain the defendant C. D., his servants, agents or workmen, from printing, publishing or vending a book, called , or any part thereof, until the, etc.

[*Where part only of a book is to be restrained*]

to restrain the defendant C. D., his servants, agents or workmen, from printing, publishing, selling or otherwise disposing of such parts of the book in the plaint [*or* petition and evidence, etc.] mentioned to have been published by the defendant as hereinafter specified, namely, that part of the said book which is entitled and also that part which is entitled [*or* which is contained in page to page both inclusive] until , etc.

[*In Patent cases*] to restrain the defendant C. D., his agents, servants and workmen, from making or vending any perforated bricks [*or as the case may be*] upon the principle of the inventions in the plaintiff's plaint [*or* petition, etc., *or* written statement, etc.,] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint [*or as the case may be*] mentioned, and from counterfeiting, imitating or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, etc.

[*In cases of Trade marks*] to restrain the defendant C. D., his servants, agents or workmen, from selling, or exposing for sale, or procuring to be sold, any composition or blacking [*or as the case may be*] described as or purporting to be blacking manufactured by the plaintiff A. B., in bottles having affixed thereto such labels as in the plaintiff's plaint [*or* petition, etc.] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff A. B., and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff A. B., until the, etc.

[To restrain a partner from in any way interfering in the business]

to restrain the defendant C. D., his agents and servants, from entering into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note or written security in the name of the partnership-firm of B. and D., and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing, or causing to be done, any act, in the name or on the credit of the said partnership-firm of B. and D., or whereby the said partnership-firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking until the, etc.

No. [1][9].

APPOINTMENT OF A RECEIVER. (O. 40, R. 1.)

(Title.)

To

WHEREAS has been attached in execution of a decree passed in the above suit on the day of 19 , in favour of ; You are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Order 40 of the Code of Civil Procedure, 1908, with full powers under the provisions of that Order.

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on . You will be entitled to remuneration at the rate of per cent. upon your receipts under the authority of this appointment.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Local Amendment.

Madras.

Substitute the following for Form No. 9:—

"No. 9.

APPOINTMENT OF A RECEIVER.

(O. 40, R. 1.)

(Title.)

WHEREAS it appears to the Court that in the above suit it is just and convenient to appoint a receiver of the properties specified below (or whereas the properties specified below have been attached in execution of a decree passed in the above suit on the day of 19 , in favour of).

It is hereby ordered that A.B. be appointed (subject to his giving security to the satisfaction of the Court) the receiver of the said property and of the rents, issues and profits thereof under Order 40 of the Code of Civil Procedure, 1908, with all powers under the provisions of that order, except that he shall not without leave of the Court, (1) grant leases for a term exceeding three years, or (2) institute suits in any Court (except suits for rent), or (3) institute appeals in any Court (except from a decree in a rent suit) where the value of the appeal is over Rs. 1,000, or (4) expend on the repairs of any property in any period of two years more than half of the net annual rental of the property to be repaired, such rental being calculated at the amount at which the property to be repaired would be let when in a fair state of repair, provided that such amount shall not exceed Rs. 1,000.

---

[1] Forms 6 and 7 were renumbered 9 and 10, respectively, by s. 2 and Sch. I of the Repealing and Amending Act, 1914 (X of 1914).

And it is further ordered that the parties / defendants to the above suit and all persons claiming under them do deliver up quiet possession of the properties, moveable and immoveable, specified below together will all leases, agreements for lease, kabuleats, account books, papers, memoranda and writings relating thereto to the said receiver. And it is further ordered that the said receiver do take possession of the said property, moveable and immoveable, and collect the rents, issues and profits of the said immoveable property, and that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said receiver. And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants where necessary. And it is further ordered that the receipt or receipts of the said receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver.

And it is further ordered that the said receiver do out of the first monies to be received by him pay the debts due from the said and shall be entitled to retain in his hands the sum of Rs. for current expenses, but subject thereto shall pay his net receipts, as soon as the same come to his hands, into Court to the credit of this suit. He shall once in every months file his accounts and vouchers in Court, the first account to be filed on the day of and to be passed on the day of .

He shall be entitled to the commission at the rate of Rs. per cent. on the net amounts collected by him or to the sum of Rs. per month (or as the case may be) as his remuneration (or he shall act without any remuneration).

And it is further ordered (where an additional office establishment is required) that the said receiver shall be allowed to charge to the estate in addition to his own office establishment the following further establishment:—

(Here enter specification of Property.)

GIVEN under my hand and the seal of the Court, this day of 19 ."

No. [1][10].

BOND TO BE GIVEN BY RECEIVER. (O. 40, R. 3.)

(*Title.*)

KNOW all men by these presents, that we, and and , are jointly and severally bound to of the Court of in Rs. to be paid to the said or his successor in office for the time being. For which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this day of 19 .

Whereas a plaint has been filed in this Court by against for the purpose of [*here insert the object of suit*]:

And whereas the said has been appointed, by order of the above-mentioned Court to receive the rents and profits of the immoveable property and to get in the outstanding moveable property of in the said plaint named:

Now the condition of this obligation is such, that if the above-bounden shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immoveable property, and in respect of the moveable property, of the said at such periods as the said Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

---

[1] Forms 6 and 7 were renumbered 9 and 10, respectively, by S. 2 and Sch. I of the Repealing and Amending Act, 1914 (X of 1914).

Signed and delivered by the above-bounden in the presence of

Note.—If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond.

Local Amendments.

Allahabad.

No. 11.

Add the following as Forms Nos. 11 and 12:—

The Security to be furnished under O. 38, R. 9, shall be, as nearly as may be by a bond in the following form:—

In the Court of at Suit No. of 19 .

Plaintiff.

Defendant.

Amount of suit, Rupees.

Whereas in the suit above specified the plaintiff aforesaid, has applied to the said Court that the said defendant, , may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit, or that on his failure so to do, certain property of the said defendant, , may be attached;

And whereas, on the failure of the said defendant to furnish such security, or, show cause why it should not be furnished, the property aforesaid of the said defendant, , has been attached by order of the said Court:

Therefore I, , inhabitant of , have voluntarily become security and hereby bind myself, my heirs and executors, to as Judge of the said Court, and his successors in office, that the said defendant , shall produce and place at the disposal of the said Court, when required, the property herein below specified, namely (here give description of property or refer to an annexed schedule), or the value of the same, or such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the attachment, and in default of his so doing I bind myself, my heirs and executors, to pay to as Judge of the said Court and his successors in office on its order, such sum to the extent of rupees (here enter a sufficient sum to cover the amount of suit with costs and the costs of attachment) as the said Court may adjudge against the said defendant.

Witness my hand at this day of 19 .

(Signed)

Surety.

Witnesses:

No. 12.

The security to be furnished under O. 39, R. 2 (2) shall be, as far as may be, by a bond in the following form:—

In the Court of at Suit No. of 19 .

Plaintiff,

Defendant.

Whereas, in the suit above specified, instituted by the said plaintiff, , to restrain the said defendant , from (*here state the breach of contract or other injury*), the said Court has, on the application of the said plaintiff, , granted an injunction to restrain the said defendant from the repetition (*or the continuance*) of the said breach of contract (*or wrongful act complained of*), and required security from the said defendant against such repetition (*or continuance*):

Therefore I, , inhabitant of , have voluntarily become security and do hereby bind myself, my heirs and executors, to as Judge of the said Court and his successors in office that the said defendant, shall abstain from the repetition (*or continuance*) of the breach of contract aforesaid (*or*

Appendix F.

wrongful act, or from the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right), and in default of his so abstaining, I bind myself my heirs and executors to pay into Court, on the order of the Court, such sum to the extent of rupees , as the Court shall adjudge against the said defendant.

Witness my hand at this day of 19 .

(Signed)
Surety.

Witnesses:

APPENDIX G.

APPEAL, REFERENCE AND REVIEW.

No. 1.

MEMORANDUM OF APPEAL. (O. 41, R. 1.)

(*Title.*)

The above-named appeals to the Court at from the decree of in Suit No. of 19 , dated the day of 19 , and sets forth the following grounds of objection to the decree appealed from, namely:—

No. 2.

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY EXECUTION OF DECREE.

(O. 41, R. 5.)

(*Title.*)

To

THIS security bond on stay of execution of decree executed by witnesseth:—

That , the plaintiff in Suit No. of 19 , having sued , the defendant, in this Court and a decree having been passed on the day of 19 in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the Court, the said appeal is still pending.

Now the plaintiff decree-holder having applied to execute the decree, the defendant has made an application praying for stay of execution and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs. , mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be confirmed or varied by the Appellate Court the said defendant shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of 19 .

Schedule.

(*Signed*)

Witnessed by

1.
2.

Appendix G.

No. 3.

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL. (O. 41, R. 6.)

(Title.)

To

THIS security bond on stay of execution of decree executed by witnesseth:—

That , the plaintiff in Suit No. of 19 , having sued , the defendant, in this Court and a decree having been passed on the day of 19 in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the Court, the said appeal is still pending.

Now the plaintiff decree-holder has applied for execution of the said decree and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs. , mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be reversed or varied by the Appellate Court, the plaintiff shall restore any property which may be or has been taken in execution of the said decree and shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of 19 .

Schedule.

(Signed)

Witnessed by

1.

2.

No. 4.

SECURITY FOR COSTS OF APPEAL. (O. 41, R. 10.)

(Title.)

To

THIS security bond for costs of appeal executed by witnesseth:—

This appellant has preferred an appeal from the decree in Suit No. of 19 , against the respondent, and has been called upon to furnish security. Accordingly I, of my own free will, stand security for the costs of the appeal, mortgaging the properties specified in the schedule hereunto annexed. I shall not transfer the said properties or any part thereof, and in the event of any default on the part of the appellant, I shall duly carry out any order that may be made against me with regard to payment of the costs of appeal. Any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of 19 .

Schedule.

(Signed)

Witnessed by

1.

2.

No. 5.

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL. (O. 41, R. 13.)

(*Title.*)

To

YOU are hereby directed to take notice that , the in the above suit, has preferred an appeal to this Court from the decree passed by you therein on the day of 19 .

You are requested to send with all practicable despatch all material papers in the suit.

Dated the day of 19 .

Judge.

No. 6.

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL.

(O. 41, R. 14.)

(*Title.*)

APPEAL from the of the Court of dated the day of 19 .

To *Respondent.*

TAKE notice that an appeal from the decree of in this case has been presented by and registered in this Court, and that the day of 19 has been fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal, it will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

[NOTE.—If a stay of execution has been ordered, intimation should be given of the fact on this notice.]

Local Amendment.

Madras.

Insert the following "Note" namely:—

"NOTE.—Also take notice that if an address for service is not filed before the aforesaid date, this appeal is liable to be heard and decided as if you had not made an appearance."

Insert the following as Forms Nos. 6-A and 6-B:—

"No. 6-A.

NOTICE TO RESPONDENT.

(O. 41-A, R. 2.)

(*Cause Title.*)

Appeal from the of the Court of dated the day of

To *Respondent.*

Take notice that an appeal from the above decree (order) has been presented by the above-named appellants and registered in this Court, and that if you intend to defend the same you must enter an appearance in this Court and give notice thereof to the appellant or his pleader within 30 days after the service of this notice on you.

Appendix G.

If no appearance is entered on your behalf by yourself, your pleader or some one by law authorised to act for you in this appeal, it will be heard and decided in your absence.

The address for service of the appellant is that of his pleader Mr. A.B. of (insert address) Madras.

(If the appellant appears in person, insert his address for service.)

GIVEN under my hand and the seal of the Court, this day of 19 .

Registrar.

Interlocutory application No. of 19 has been made by appellant, and execution has been stayed (or other order made) by order dated the day of 19 ."

"No. 6-B.

MEMORANDUM OF APPEARANCE.

(O. 41-A, R. 3.)

(Cause Title.)

Take notice that the respondent intends to appear and defend the above appeal, and that his address for services of all notices and process is (insert address).

The said respondent requires a list of the papers which the appellant proposes to translate and print.

Dated the day of 19 .

Signed O.D.,
Vakil for Respondent.

To

The Registrar, High Court of Judicature, Madras."

No. 7.

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL BUT JOINED BY THE COURT AS A RESPONDENT.

(O. 41, R. 20.)

(Title.)

To

WHEREAS you were a party in suit No. of 19 , in the Court of , and whereas the has preferred an appeal to this Court from the decree passed against him in the said suit and it appears to this Court that you are interested in the result of the said appeals:

This is to give you notice that this Court has directed you to be made a respondent in the said appeal and has adjourned the hearing thereof till the day of 19 , at A.M. If no appearance is made on your behalf on the said day and at the said hour the appeal will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 8.

MEMORANDUM OF CROSS OBJECTION. (O. 41, R. 22.)

(Title.)

WHEREAS the has preferred an appeal to the Court at from the decree of in Suit No. of 19 , dated the day of 19 , and whereas notice of the day fixed for hearing the appeal was served on the day of 19 , the files this memorandum of cross objection under R. 22 of O. 41 of the Code of Civil Procedure, 1908, and sets forth the following grounds of objection to the decree appealed from, namely:—

No. 9.

DECREE IN APPEAL. (O. 41, R. 35.)

(*Title.*)

Appeal No. of 19 from the decree of the Court of dated the day of 19 .

Memorandum of Appeal.

Plaintiff.
Defendant.

The above-named appeals to the Court at from the decree of in the above suit, dated the day of 19 , for the following reasons, namely:—

This appeal coming on for hearing on the day of 19 , before in the presence of for the appellant and of for the respondent, it is ordered—

The costs of this appeal, as detailed below, amounting to Rs. , are to be paid by . The costs of the original suit are to be paid by .

GIVEN under my hand this day of 19 .

Judge.

Costs of Appeal.

Appellant.	Amount.			Respondent.	Amount.		
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for memorandum of appeal.				Stamp for power			
2. Do. for power				Do. for petition			
3. Service of processes				Service of processes			
4. Pleader's fee on Rs,				Pleader's fee on Rs.			
TOTAL				TOTAL			

Local Amendments.

Bengal.

Cancel the words from "Memorandum of Appeal" to "the following reasons, namely":—

Madras.

"Form No. 9.

Omit the entire portion beginning with the words "Memorandum of Appeal" and ending with the words "the following reasons, namely:—"

Appendix G.

Patna.

"Form No. 9.

In the schedule of costs in the form of Decree in Appeal, add "Copying or typing charges" below the item "pleader's fee on Rs. " in the columns for Appellant and Respondent, and number the new entry in the first column as "5".

No. 10.

APPLICATION TO APPEAL *in forma pauperis*. (O. 44, R. 1.)

(*Title.*)

I the above-named, present the accompanying memorandum of appeal from the decree in the above suit and apply to be allowed to appeal as a pauper.

Annexed is a full and true schedule of all the moveable and immoveable property belonging to me with the estimated value thereof.

Dated the day of 19 .

(*Signed*)

NOTE.—Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as a pauper

---

No. 11.

NOTICE OF APPEAL *in forma pauperis*. (O. 44, R. 1.)

(*Title.*)

WHEREAS the above-named has applied to be allowed to appeal as a pauper from the decree in the above suit dated the day of 19 and whereas the day of 19 has been fixed for hearing the application, notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the afore-mentioned date.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN COUNCIL SHOULD NOT BE GRANTED.

(O. 45, R. 3.)

(*Title.*)

To

TAKE notice that has applied to this Court for a certificate that as regards amount or value and nature the above case fulfils the requirements of section 110 of the Code of Civil Procedure, 1908, or that it is otherwise a fit one for appeal to His Majesty in Council.

The day of 19 is fixed for you to show cause why the Court should not grant the certificate asked for.

GIVEN under my hand and the seal of the Court, this day of 19 .

Registrar.

Local Amendment.

Madras.

Forms 12-A, 12-B, and 12-C.

Insert the following as new forms after the Form No. 12:—

"No. 12-A.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL.

(O. 45, R. 7.)

(In cases where the subject-matter of the appeal is of sufficient value and the findings of the Courts are not concurrent.)

Read petition presented under O. 45, R. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the $\frac{\text{decree}}{\text{final order}}$ of this Court in suit No. of 19 .

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and the other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he appears) this Court doth certify that the $\frac{\text{amount}}{\text{value}}$ of the subject-matter of the suit in the Court of first instance is $\frac{\text{Rs. 10,000}}{\text{upwards of Rs. 10,000}}$ and the $\frac{\text{amount}}{\text{value}}$ of the subject-matter in dispute on appeal to His Majesty in Council is also of the value of $\frac{\text{Rs. 10,000}}{\text{upwards of Rs. 10,000}}$ or that the $\frac{\text{decree}}{\text{final order}}$ appealed from involves $\frac{\text{directly}}{\text{indirectly}}$ some claim or question $\frac{\text{to}}{\text{respecting}}$ property of the value of $\frac{\text{Rs. 10,000}}{\text{upwards of Rs. 10,000}}$ and that the $\frac{\text{decree}}{\text{final order}}$ appealed from does not affirm the decision of the lower Court.

"No. 12-B.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL.

(O. 45, R. 7.)

(In cases where the subject-matter is of sufficient value and the findings of the Court are concurrent.)

Read the petition presented under O. 45, R. 3 of the Code of Civil Procedure, praying for a grant of a certificate to enable the petitioner to appeal to His Majesty in council against the $\frac{\text{decree}}{\text{final order}}$ of this Court in suit No. of 19 .

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he appears) this Court doth certify that the $\frac{\text{amount}}{\text{value}}$ of the subject-matter of the suit in the Court of first instance is $\frac{\text{Rs. 10,000}}{\text{upwards of Rs. 10,000}}$ and the $\frac{\text{amount}}{\text{value}}$ of the subject-matter in dispute on appeal to His Majesty in Council is also of the value of $\frac{\text{Rs. 10,000}}{\text{upwards of Rs. 10,000}}$ or that the $\frac{\text{decree}}{\text{final order}}$ appealed against involves $\frac{\text{directly}}{\text{indirectly}}$ some claim or question $\frac{\text{to}}{\text{respecting}}$ property of the value of $\frac{\text{Rs. 10,000}}{\text{upwards of Rs. 10,000}}$ and that the affirming $\frac{\text{decree}}{\text{final order}}$ appealed from involves the following substantial question(s) of law, *viz.*:—

1.
2.

Appendix G.

"Form 12-C.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL.

(O. 45, R. 7.)

(In cases where the subject-matter in dispute is either not of sufficient value or is incapable of money valuation.)

Read petition presented under O. 45, R. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the $\frac{\text{decree}}{\text{final order}}$ of this Court in suit No. of 19 .

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he appears) this Court doth certify that the $\frac{\text{amount}}{\text{value}}$ of the subject-matter of the suit both in the Court of the first instance and in this Court is $\frac{\text{below Rs. 10,000 in value}}{\text{incapable of money valuation}}$ this Court in the exercise of the discretion vested in it is satisfied that the case is a fit one for appeal to His Majesty in Council for the reasons set forth below, *viz.*:—

(1)

(2) ."

No. 13.

NOTICE TO RESPONDENT OF ADMISSION OF APPEAL TO THE KING IN COUNCIL. (O. 45, R. 8.)

(*Title.*)

To

WHEREAS , the in the above case, has furnished the security and made the deposit required by O. 45, R. 7 of the Code of Civil Procedure, 1908:

Take notice that the appeal of the said to His Majesty in Council has been admitted on the day of 19 .

GIVEN under my hand and the seal of the Court, this day of 19 .

Registrar.

No. 14.

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED.

(O. 47, R. 4.)

(*Title.*)

To

TAKE notice that has applied to this Court for a review of its decree passed on the day of 19 in the above case. The day of 19 , is fixed for you to show cause why the Court should not grant a review of its decree in this case.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

APPENDIX H.

MISCELLANEOUS.

No. 1.

Agreement of Parties as to issues to be tried.

(O. 14, R. 6.)

(*Title.*)

Whereas we, the parties in the above suit, are agreed as to the question of fact [*or* of law] to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the day of 19 and filed as Exhibit in the said suit, is or is not beyond the statute of limitation (*or state the point at issue whatever it may be*):

We therefore severally bind ourselves that, upon the finding of the Court in the negative [*or* affirmative] of such issue, will pay to the said the sum of Rupees (*or* such sum as the Court shall hold to be due thereon), and I, the said , will accept the said sum of Rupees (*or* such sum as the Court shall hold to be due) in full satisfaction of my claim on the bond aforesaid [*or* that upon such finding I, the said will do or abstain from doing, etc., etc.]

Plaintiff.
Defendant.

Witnesses:—
1.
2.

Dated the day of 19 .

No. 2.

Notice of application for the transfer of a suit to another Court for trial. (Section 24.)

In the Court of the District Judge of
No. of 19 .

Whereas an application, dated the day of 19 has been made to this Court by the in Suit No. of 19 now pending in the Court of the at , in which is plaintiff and is defendant, for the transfer of the suit for trial to the Court of the at :—

You are hereby informed that the day of 19 has been fixed for the hearing of the application, when you will be heard if you desire to offer any objection to it.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

No. 3.

Notice of Payment into Court. (O. 24, R. 2.)

(*Title.*)

Take notice that the defendant has paid into Court Rs. and says that that sum is sufficient to satisfy the plaintiff's claim in full.

X. Y., *Pleader for the defendant.*

To Z., *Pleader for the plaintiff.*

Appendix H.

No. 4.

NOTICE TO SHOW CAUSE. (GENERAL FORM.)

(*Title.*)

To

WHEREAS the above-named has made application to this Court that ;

You are hereby warned to appear in this Court in person or by a pleader duly instructed on the day of 19 , at o'clock in the forenoon, to show cause against the application, failing wherein, the said application will be heard and determined *ex parte*.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Local Amendment.

Allahabad.

Form No. 4.

Notice to show cause. (General form.)

In the Court of at district.

Civil Suit No. of 19 .
Miscellaneous No. of 19 .

resident of

versus.

resident of

To

WHEREAS the above-named has made application to this Court that ; you are hereby warned to appear in this Court in person or by a pleader duly instructed on the day of 19 , at o'clock in the forenoon, to show cause against the application failing wherein, the said application will be heard and determined *ex parte*, and it will be presumed that you consent to be the appointed Guardian for the suit.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 5.

LIST OF DOCUMENTS PRODUCED BY $\frac{\text{plaintiff}}{\text{defendant}}$. (O. 13, R. 1.)

(*Title.*)

No.	Description of document.	Date, if any, which the document bears.	Signature of party or pleader.
1	2	3	4

Local Amendment.

Allahabad.

Appendix H.

Form No. 5.

LIST OF DOCUMENTS PRODUCED BY $\frac{\text{plaintiff}}{\text{defendant}}$, (O. 13, R. 1).

In the Court of at District.

Suit No. of 19.

Plaintiff,

versus.

Defendant.

List of documents produced with the plaint (or at first hearing) on behalf of plaintiff (or defendant).

This list was filed by this day of 19 .

1	2	3			4
Serial number.	Description and date, if any, of the document.	What became of the document.			Remarks.
		If brought on the record the exhibit mark put on the document.	If rejected, date of return to party, and signature of party or pleader to whom the document was returned.	If it remains on the record after decision of the case and is enclosed in an envelope, under rule 24, Chapter III, the date of enclosure in the envelope.	

Signature of party or pleader producing the list.

No. 6.

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS ABOUT TO LEAVE THE JURISDICTION. (O. 18, R. 16.)

(*Title.*)

To

WHEREAS in the above suit application has been made to the Court by *plaintiff (or defendant)*, that the examination of , a witness required by the said , in the said suit may be taken immediately; and it has been shown to the Court's satisfaction that the said witness is about to leave the Court's jurisdiction (*or any other good and sufficient cause to be stated*):

TAKE notice that the examination of the said witness will be taken by the Court on the day of 19 .

Dated the day of 19 .

Judge.

No. 7.

COMMISSION TO EXAMINE ABSENT WITNESS. (O. 26, Rr. 4, 18.)

(*Title.*)

To

WHEREAS the evidence of is required by the in the above suit; and whereas ; you are requested to take the evidence

Appendix H.

on interrogatories [*or viva voce*] of such witness , and you are hereby appointed Commissioner for that purpose. The evidence will be taken in the presence of the parties or their agents if in attendance, who will be at liberty to question the witness on the points specified, and you are further requested to make return of such evidence as soon as it may be taken.

Process to compel the attendance of the witness will be issued by any Court having jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Local Amendment.

Patna.

Add the following "Note" at the foot:—

"NOTE.—The commissioner has power under Chapter X of the Indian Evidence Act to control the examination of witnesses."

No. 8.

LETTER OF REQUEST. (O. 26, R. 5.)

(Title.)

(Heading:—To the President and Judges of, etc., etc., *or as the case may be.*)

WHEREAS a suit is now pending in the in which *A. B.* is plaintiff and *C. D.* is defendant; And in the said suit the plaintiff claims

(Abstract of claim.)

And whereas it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say:

E. F., of

G. H., of and

I. J., of

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court.

Now I , as the of the said Court, have the honour to request, and do hereby request, that for the reasons aforesaid and for the assistance of the said Court, you, as the President and Judges of the said , or some one or more of you, will be pleased to summon the said witness (and such other witnesses as the agents of the said plaintiff and defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you or such other person as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (*or viva voce*) touching the said matters in question in the presence of the agents of the plaintiff and defendant, or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same, together with such request in writing, if any, for the examination of other witnesses to the said Court.

(NOTE.—If the request is directed to a Foreign Court, the words "through His Majesty's Secretary of State for Foreign Affairs for transmission" should be inserted after the words "other witnesses" in the last line of this form.)

No. 9

COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMIN ACCOUNTS.

(O. 26, Rr. 9, 11.)

(*Title.*)

To

WHEREAS it is deemed requisite, for the purposes of this suit, that a commission for should be issued; You are hereby appointed Commissioner for the purpose of .

Process to compel the attendance before you of any witnesses, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 10

COMMISSION TO MAKE A PARTITION. (O. 26, R. 13.)

(*Title.*)

To

WHEREAS it is deemed requisite for the purposes of this suit that a commission should be issued to make the partition or separation of the property specified in, and according to the rights as declared in, the decree of this Court, dated the
day of 19 ; You are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as may be necessary, to divide the said property according to the best of your skill and judgment in the shares set out in the said decree, and to allot such shares to the several parties. You are hereby authorized to award sums to be paid to any party by any other party for the purpose of equalizing the value of the shares.

Process to compel the attendance before you of any witness, or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN. (O. 32, R. 3.)

(*Title.*)

To

Minor Defendant.
Natural Guardian.

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said

Appendix H.

minor, and you* , are hereby required to take notice that unless within days from the service upon you of this notice, an application is made to this Court for the appointment of you* or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Local Amendment.

Allahabad.

In Appendix H for form No. 11, under the heading "Notice to Minor defendant and guardian" substitute:—

"No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN.

In the Court of at District.

Suit No. of 19 .

resident of *Plaintiff*,

versus

resident of *defendant*.

To

(1) Minor defendant; and ;

(2) or † natural / certificated guardian,

the person in whose care the minor is alleged to be. Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you said minor, and you (2) the † natural / certificated guardian or the person in whose care the minor is alleged to be are hereby required to take notice that unless within days from the service upon you of this notice, an application is made to this Court to show cause why the person named below should not be appointed or for the appointment of any other person willing to act as guardian for the suit. The Court will proceed to appoint the person named below or some other person to act as the guardian of the minor for the purposes of the said suit. *Proposed guardian* son of resident of .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge."

Madras.

Substitute the following for Form No. 11:—

"No. 11.

NOTICE TO GUARDIAN APPOINTED OR DECLARED, OR TO FATHER OR OTHER NATURAL GUARDIAN, OR TO THE PERSON IN CHARGE OF THE MINOR.

[O. 32, R. 3 (5).]

(*Title*.)

To

Guardian appointed or declared, or father or other natural guardian, or person in charge of the minor.

WHEREAS an application has been presented on the part of the in the above suit for the appointment of a guardian for the suit for the said minor, you are hereby required to take notice that, unless within days from the service upon you of this notice an application is made to this Court for the appointment of you or of some friend of the said

---

* Here insert the name of the guardian.

† NOTE.—Cut out the word "Natural" if the Certificated Guardian is named; cut out the word "certificated" if the Natural guardian be intended cut out both "natural" and "certificated" and the word "Or" if the guardian be of neither class but one with whom the minor lives.

his
Minor to act as —— guardian for the purposes of the said suit, the Court will proceed to appoint
her
some other person to act as guardian of the said minor for the purposes of the said .

GIVEN under my hand and the seal of the Court, this day of 19 ."

"No. 11-A.

NOTICE TO PROPOSED GUARDIAN.

[O. 32, R. 4 (3).]

(*Title.*)

To

residing at

Take notice that the above-named petitioner has made an application to this Court to appoint you as guardian for the suit of minor defendant in No. of 19 , and that the said application will be heard on the day of next.

GIVEN under my hand and the seal of the Court, this day of 19 ."

Nagpur.

For Form No. 11 *substitute* the following:—

"No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN.

(O. 32, R. 4-A.)

(*Title.*)

To

Minor Defendant.
Legally appointed
————————Guardian.
Actual
Proposed Guardian.

on the part of the plaintiff
Whereas an application has been presented————————for the
on behalf of the minor defendant
appointment of you as the guardian of the suit of the minor
defendant (you the said minor*) you
his legally appointed
————————guardian and you the proposed guardian for the
actual
suit are hereby required to take notice that unless you, the proposed guardian, appear before this Court on or before the day appointed for the hearing of the case and stated in the appended summons, and express your consent to your appointment, or unless an application is made to this Court for the appointment of some other person to act as guardian of the minor for the suit, the Court will proceed to appoint an officer of the Court or a pleader or some other person to act as a guardian to the minor for the purposes of the said suit of which summons in the ordinary form is herewith appended.

GIVEN under my hand and the seal of the Court this day of 19 .

Judge."

Patna.

For Form No. 11, *substitute* the following:—

"Form No. 11.

NOTICE TO THE MINOR DEFENDANT AND GUARDIAN OF APPLICATION FOR APPOINTMENT OF THE GUARDIAN TO BE GUARDIAN FOR THE SUIT.

(O. 32, R. 3.)

(*Title.*)

To

Minor defendant.

Guardian (appointed by authority, or natural, or the person in whose care the minor is, as the case may be).

---

* The portion in brackets should be scored out if no notice is to issue to the minor-defendant.

Appendix H.

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of you* as guardian for the suit to the minor defendant, you the said minor and you* are hereby required to take notice that unless within 21 days from the service upon you of this notice you* give your consent to be appointed to act as guardian, the Court will proceed, subject to the decision of any objection that may be raised, to appoint an officer of the Court to act as guardian to you the minor for the said suit.

GIVEN under my hand and the seal of this Court, this day of 19 .

Judge.

Add the following as Form Nos. 11-A and 11-B:—

Form No. 11-A.

NOTICE TO THE MINOR DEFENDANT AND GUARDIAN OF APPLICATION FOR APPOINTMENT OF ANOTHER PERSON TO BE GUARDIAN FOR THE SUIT.

(O. 32, R. 3.)

To

Minor defendant.

Guardian (appointed by authority or natural, or the person in whose care the minor is).

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of[1] as guardian for the suit to the minor defendant, you the said minor and you[2] are hereby required to take notice that unless within 21 days from the service upon you of this notice you[2] make an application for the appointment of yourself or of some friend of you the minor to act as guardian, the Court will proceed, subject to the decision of any objection that may be raised, to appoint[1] or an officer of the Court to act as guardian to you the minor for the said suit.

GIVEN under my hand and the seal of this Court, this day of 19 .

Judge.

Form No. 11-B.

NOTICE TO THE PROPOSED GUARDIAN FOR THE MINOR DEFENDANT, WHEN THE PERSON PROPOSED IS NOT THE GUARDIAN APPOINTED BY AUTHORITY OR THE NATURAL GUARDIAN OR THE PERSON IN WHOSE CARE THE MINOR IS.

(O. 32, R. 4.)

(*Title.*)

District
In the Court of at
Suit No. of 19 .
Plaintiff,
versus
Defendant.

To
, Proposed Guardian.

"Whereas an application has been presented by the plaintiff in the above case for the appointment of you † as guardian for the suit to the minor defendant you are hereby required to take notice that unless within days from the service upon you of this notice you make an application to the Court intimating your consent to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

GIVEN under my hand and the seal of this Court, this day of 19 .

Judge.

---

*Here insert name of guardian.

[1] Here insert name and description of proposed guardian.

[2] Here insert name of guardian upon whom the notice is to be served.

† Here insert the name of the proposed guardian.

Appendix H.

No. 12.

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE OF PAUPERISM.

(O. 33, R. 6.)

(*Title.*)

To

WHEREAS has applied to this Court for permission to institute a suit against *in forma pauperis* under O. 33 of the Code of Civil Procedure, 1908; and whereas the Court sees no reason to reject the application; and whereas the day of 19 has been fixed for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof:

Notice is hereby given to you under R. 6 of O. 33 that in case you may wish to offer any evidence to disprove the pauperism of the applicant, you may do so on appearing in this Court on the said day of 19 .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 13.

NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE.

(Section 145.)

(*Title.*)

To

WHEREAS you did on become liable as surety for the performance of any decree which might be passed against the said defendant in the above suit; and whereas a decree was passed on the day of 19 against the said defendant for the payment of , and whereas application has been made for execution of the said decree against you:

Take notice that you are hereby required on or before the day of 19 to show cause why the said decree should not be executed against you, and if no sufficient cause shall be, within the time specified, shown to the satisfaction of the Court, an order for its execution will be forthwith issued in the terms of the said application.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Appendix H.

No. 14.

REGISTER OF CIVIL SUITS. (O. 4, r. 2.)

Court of the of at

REGISTER OF CIVIL SUITS IN THE YEAR 19 .

Date of presentation of plaint.	Number of suit.	Plaintiff.			Defendant.			Claim.			Appearance.			Judgment.			Appeal		Execution					Return of Execution.		
		Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Particulars.	Amount or value	When the cause of action accrued.	Day for parties to appear.	Plaintiff.	Defendant.	Date.	For whom.	For what, or amount.	Date of decision of appeal.	Judgment in appeal.	Date of application.	Date of order.	Against whom.	For what and amount if money.	Amount of costs.	Amount paid into Court.	Arrested.	Minute of other Return than payment or Arrest, and date of every return.

NOTE.—Where there are numerous plaintiffs or numerous defendants, the name of the first plaintiff only, or the first defendant only as the case may be, need be entered in the register.

Madras.

Local Amendments.

(FORMS NOS. 14 TO 25 OMITTED.)

Patna.

Substitute the following form for Form No. 14.

"No. 14.

REGISTER OF CIVIL SUITS. (O. 4, r. 2.)

Court of the of at

REGISTER OF CIVIL SUITS IN THE YEAR 19 .

Date of presentation of Plaint.	Number of suit.		Plaintiff.			Defendant.			Claim.			Judgment.			Appeal.		Adjustment or satisfaction of decrees otherwise than by execution.		Execution.					Result of Execution.			Orders in appeals, revisions or under S. 144, C. P. Code with date and name of court.	Relief or amount still due.	Remarks.
	Serial number of suit.	Serial number of suit dealt with under the S.C.C. powers.	Name.	Description.	Place of residence.	Name.	Description.	Place of residence	Particulars.	Amount or value.	When the cause of action accrued.	Date.	For whom.	For what or amount.	Number & year of appeal.	Order on appeal with date and name of appellate Court.	Particulars.	Date.	Number and date of application.	Date of final order.	Against whom.	For what, and amount, if money.	Amount of costs.	Amount paid into court.	Name of person, if any, detained in civil prison.	Minute of other result with date.			
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30

Appendix H.

NOTE 1.—Where there are numerous plaintiffs or numerous defendants, the name of the first plaintiff only, or the first defendant only, as the case may be, need be entered in the register.

NOTE 2.—Cases remanded by appellate Courts to lower Courts under O. 41, R. 23, Civil Procedure Code, will be readmitted and entered in the general register of suits under their original numbers. In each case the letter *R* will be affixed to the number to be entered in column 2.

NOTE 3.—In column 14 should be indicated whether the decision was *ex parte*, on compromise or on contest against all or any of the defendants.

NOTE 4.—When the Court of execution is other than the Court which passed the decree the name of the executing Court should be given in column 26."

Appendix H.

No. 15.

REGISTER OF APPEALS. (O. 41, r. 9.)

COURT (*OR* HIGH COURT) AT

REGISTER OF APPEALS FROM DECREES in the year 19

Date of memorandum.	Number of appeal.	Appellant.			Respondent.			Decree appealed from.				Appearance.		Judgment.			
		Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Of what Court.	Number of Original Suit.	Particulars.	Amount or value.	Day for parties to appear.	Appellant.	Respondent	Date.	Confirmed, reversed or varied.	For what or amount.

Appendix H.

Local Amendment.

"Form No. 16.

Allahabad.

Add the following Nos. 16 to 18:—

The security to be furnished under O. 25, R. 1, shall be, as nearly as may be, by bond in the following form:—

In the Court of at .

Suit No. of 19 .

Plaintiff,

versus *Defendant.*

WHEREAS a suit has been instituted in the said Court by the said paintiff to recover from the said defendant the sum of rupees and the said plaintiff is residing out of British India (or is a woman) and does not possess any sufficient immoveable property within British India independent of the property in the suit:

Therefore, I, inhabitant of , have voluntarily become security, and do hereby bind myself, my heirs and executors, to as Judge of the said Court and to his successors in office that the said plaintiff , his heirs and executors, shall, whenever called on by the said Court, pay all costs that may have been or may be incurred by the said defendant, , in the said suit, and in default of such payment I bind myself, my heirs and executors, to pay all such costs to the said Court on its order.

Witness my hand at this day of 19 .

(signed)

Witnesses:

Surety.

Form No. 17.

Address for service.

Under O. 7, Rr. 19-26: O. 8, Rr. 11 and 12; O. 41, R. 38; O. 46, R. 8; O. 47, R. 10; O. 52, R. 1.

In the Court of the of .

Original $\frac{\text{suit}}{\text{or case}}$ No. of 19 .

Plaintiff,

versus

Defendant.

This address shall be within the local limits of the district Court within which the suit is filed, or of the district Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh, but not within the limits of any other province:—

Name, parentage and caste.	Residence.	Pargana or Tashil.	Post Office.	District.

Dated .

Any summons, notice, or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is changed I shall forthwith file a notice of change containing all the new particulars.

Signature of party { *Plaintiff.* *Defendant.* *Appellant.* *Respondent.*

Or

I file the above address according to the instructions given by my client, (name) (and capacity).

Signature of Pleader.

N.B.—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

Form No. 18.

Notice of change of address for service.

Under O. 7, Rr. 19-26; O. 8, Rr. 11 and 12; O. 41, R. 38; O. 46, R. 8; O. 47, R. 10; O. 52, R. 1.

In the Court of the at

Original suit/or case No. of 19 .

Plaintiff,

versus

Defendant.

This address shall be within the local limits of the district Court within which the suit is filed, or of the district Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh, but not within the limits of any other province:—

Name, parentage and caste.	Residence.	Pargana or Tashil.	Post office.	District.

Dated

Any summons, notice, or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is again changed I shall forthwith file a notice of change containing all the new particulars.

Signature of party { *Plaintiff.* *Defendant.* *Appellant.* *Respondent.*

Or

I file the above address according to the instructions given by my client, (name) (and capacity).

Signature of Pleader.

N.B.—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

Title [redacted]

Author [redacted] [redacted]

Accession No. [redacted]

Call No. [redacted] [redacted] [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date
[redacted]	[redacted]		

THE SECOND SCHEDULE.

ARBITRATION.

ARBITRATION IN SUITS.

Parties to suit may apply for order of reference.

P. 1. [S. 506.] (1) Where in any suit all the parties interested[7] agree that any matter in difference[10] between them shall be referred to arbitration, they may, at any time before judgment is pronounced,[13] apply to the Court[16] for an order of reference.

(2) Every such application shall be in writing[12] and shall state the matter sought to be referred.

[1877—S. 506; 1859—Ss. 312, 313.]

Synopsis.

1. Legislative changes.
2. Scope of the schedule.
3. Applicability of the schedule to insolvency proceedings.
4. Applicability of the schedule to execution proceedings.
5. Applicability of the schedule to probate proceedings.
6. Applicability of the schedule to suits for restitution of conjugal rights.

6-a. Arbitration in proceedings under other Acts.

7. All parties interested must agree to reference.
8. All the parties, if should apply.
9. Effect of omission to sign or verify the application. See Note 21, infra.
10. Matter in difference.
11. Reference in respect of matters outside suit.
12. Application shall be in writing. See Note 21 below.
13. At any time before judgment is pronounced.
14. Revocation of submission.
15. Withdrawal of suit after reference to arbitration.
16. "Court"—Appellate Court.
17. Death of party, if operates as revocation of reference.
18. Authority of pleader to refer.
19. Authority of agent to refer.
20. Authority of guardian or manager of a joint Hindu family.
21. Form.
22. Agreement to abide by the decision of the Court.

Authority of guardian of minor to refer. See Note 20, Pts. (1) and (2).

Authority of partner to refer. See Note 19, Pts. (4) to (6).

1. Legislative changes:—

The word "agree" has been substituted for the vague word "desire" as being a more definite and legal expression.[1]

Schedule II, Para. 1—Note 1.

[1] *Davuluru Vijayaramaya* v. *Davuluru Venkatasubba Rao,* (1916) 32 Ind Cas 881 (884): 30 Mad L Jour 465: 39 Mad 858 [Dissenting from 21 Ind Cas 989].

Para. 1, Note 2.

2. **Scope of the schedule.**—The law of arbitration in British India is to be found in this Code and in the Arbitration Act, 1899. The Code deals both with arbitrations pending litigation, and with arbitrations without recourse to litigation. The Arbitration Act, on the other hand, applies only to arbitrations by agreement *without the intervention* of the Court of justice, and only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could be instituted in a Presidency Town or other local area to which the Act is made applicable by the Local Government. Where the Act applies, paragraphs 17 to 23 of the second schedule (dealing with references to arbitration without the intervention of the Court) do not apply.[1]

The Act was passed to remedy two defects that were supposed to exist in the provisions as to arbitration enacted in the old Code, *viz.*:—

(1) That the Code did not apply to cases where the dispute which was the subject of reference did not arise at the date of the agreement to refer. In other words where an agreement was entered into to settle differences that may arise in future by arbitration, and a dispute subsequently arose between the parties, the agreement to refer could not be filed in Court under the provisions of the Code.

(2) That the Code applied only to cases where the agreement to refer *named the arbitrator* or stated that he should be appointed by the Court.

The first of these defects was, however, removed by a Full Bench decision of the High Court of Bombay in *Fazulbhoy Mehral Chinoy* v. *The Bombay and Persia Steam Navigation Company, Ltd.*,[1-a] in which it was held that on a correct interpretation of the Code, it applied also to agreements to refer future disputes to arbitration. The second defect also has now been removed by the omission from Paragraph 17 of this schedule the provisions requiring the arbitrator to be named. At present, therefore, there is no material difference between the provisions of the Code and those of the Arbitration Act as regards references without the intervention of the Court, except that the latter applies to particular local areas, and the former applies to other parts of British India.

In *Ghulam Khan* v. *Muhammad Hassan*,[1-b] their Lordships of the Privy Council had occasion to consider the true construction and effect of the provisions of the Code relating to arbitration and they observed that those provisions deal with arbitrations under three heads:—

(1) Where the parties *to a litigation* desire to refer to arbitration any matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the Court. (Paragraphs 1 to 16 deal with such matters.)

(2) Where the parties, *without recourse to litigation*, agree to refer their differences to arbitration and it is desired that the agree-

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Note 2.

(1) *Narendra Nath Das* v. *Haran Chandra Ghose*, 1926 Cal 730 (732): 43 Cal L Jour 292: 94 Ind Cas 177. See also *Tapessier and Company* v. *Nasiruddin*, (1912) 15 Ind Cas 402 (403): 37 Pun Re 1912: 130 Pun W R 1912; *Vishindas* v. *Simpson*, (1909) 4 Ind Cas 1150 (1151): 3 Sind L R 162; *Ramjidas* v. *House*, (1908) 35 Cal 199 (201).

(1a) (1895) 20 Bom 232 F B.

(1-b) (1901) 29 Cal 167 P C.

ment of reference should have the sanction of the Court. In that case, all *further* proceedings are under the supervision of the Court. (Paragraphs 17 to 19 of the schedule deal with such matters.)

(3) Where the agreement of reference is made and the arbitration itself takes place *without the intervention of the Court,* and the assistance of the Court is only sought to give effect to the award. (Paragraphs 20 to 23 of the schedule deal with these matters.)

3. **Applicability of the Schedule to insolvency proceedings.**—The provisions of this schedule do not apply to proceedings under the Provincial Insolvency Act 1920 by virtue of S. 5 of that Act. An Insolvency Court has therefore no power to refer the whole proceedings to arbitrators to decide whether the petitioner for insolvency or (in the case of a petition by a creditor) the debtor, should or should not be declared an insolvent. The proceedings require the exercise of judicial discretion and it would be acting contrary to the whole spirit of the Act for a Court which has special jurisdiction thereunder, to delegate its powers and duties to the arbitrator.[1]

4. **Applicability of the Schedule to execution proceedings.**—This Schedule does not apply to execution proceedings and a Court executing a decree cannot refer the matter in the execution proceedings to arbitration.[1]

5. **Applicability of the Schedule to probate proceedings.**—A dispute relating to the genuineness of a will in a probate proceeding pending before Court cannot be referred to arbitration.[1] So also an application for revocation of the grant of a probate cannot be referred to arbitration.[2] This is based on the view that a decision on such questions is not merely one *inter partes* but is a judgment *in rem* against the whole world and therefore cannot be allowed to be decided by arbitrators selected at the instance of merely the parties to the proceeding.

6. **Applicability of the Schedule to suits for restitution of conjugal rights.**—The *factum* or validity of a marriage, may in a suit for the restitution of conjugal rights be referred to arbitration[1] but the whole suit cannot be referred to arbitration inasmuch as the question whether a decree for restitution should be made or not is a matter entirely in the discretion of the Court and cannot be delegated to arbitrators.[2]

6-A. **Arbitration in proceedings under other Acts.**—1. Section 52 of the Bengal Estates' Partition Act (V of 1897) provides that when a partition has been referred to arbitration, the proceedings shall be conducted in accord-

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Note 3.

(1) *Ladha Singh* v. *Bhag Singh,* (1916) 34 Ind Cas 549 (551): 50 Pun Re 1916: 135 Pun W R 1916: 151 Pun L R 1916.

Note 4.

(1) *Wang* v. *Wangdi,* 1925 Cal 812 (814): 52 Cal 559: 42 Cal L Jour 26: 29 Cal W N 886: 87 Ind Cas 633.

Note 5.

(1) *Gopi Rai* v. *Baij Nath Rai,* 1930 All 840 (841): 128 Ind Cas 817: 1930 All L J 1584.

(2) *G M Campbell* v. *Mrs Simpson,* 1894 Pun Re No 72.

Note 6.

(1) *Malka* v. *Sardar,* 1929 Lah 394 (395): 30 Pun L R 122: 11 Lah L Jour 89: 116 Ind Cas 215; *Kalabatu* v. *Prabh Dial,* (1918) 45 Ind Cas 163 (164): 80 Pun W R 1918: 78 Pun L R 1918; *Faiz Ali* v. *Mt Ashraf Khatun,* 1929 Lah 177 (178): 118 Ind Cas 464: 30 Pun L R 600.

(2) *Kalabatu* v. *Prabh Dial,* (1918) 45 Ind Cas 163 (164): 80 Pun W R 1918: 78 Pun L R 1918 [Following 37 P R 1895].

ance with the provisions of Paragraphs 1 to 16 of this Schedule so far as they are applicable.

2. The provision of this Code relating to arbitration have been made applicable, by S. 265, sub-S. (3) of the Chota-Nagpur Tenancy Act (VI of 1908), to all suits, appeals and proceedings under that Act before the Deputy Commissioner, so far as they may apply.

3. Under S. 43 of the Bengal Survey Act (V of 1875) and S. 16 of the Burma Boundaries Act (V of 1880), the Collector or the Boundary Officer may, with the consent of the parties concerned refer to arbitration any dispute as to a boundary.

4. In cases of reference to arbitration under S. 203 of the U. P. Land Revenue Act (III of 1901) the provisions of Paragraphs 2 to 16 of this Schedule shall apply so far as they are not inconsistent with anything in that Act. (*See* S. 204 of the Act.)

7. **All parties interested must agree to reference.**—The agreement to refer the matter in dispute in a pending suit must have the concurrence of *all* the parties concerned.[1] In other words the foundation of the jurisdiction of the Court to make an order of reference is an *agreement* between all the persons interested.[2] An order of reference made by the Court where all the parties interested have not agreed, is thus without jurisdiction and invalid[3] not only against the absent party, but against all parties, *i.e.*, even those who have joined in the reference.[3-a] A subsequent consent by one of the parties who did not join in the reference at the time it was made cannot make the

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Note 7.

(1) *Ghulam Khan* v. *Muhammad Hassan*, (1902) 29 Cal 167 (183): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 25 Pun Re 1902 P C; *Basudeo Sahai* v. *Must Saraswati*, (1921) 64 Ind Cas 469 (469) All; *Goor Chunder* v. *Joogul Chunder*, (1864) 1 Suth W R 80 (81); *Gopal Das* v. *Baij Nath*, 1926 All 238 (239): 24 All L J 235: 91 Ind Cas 930: 48 All 239.

(2) *Subba Rao* v. *Appadurai Ayyar*, 1925 Mad 621 (623): 48 Mad L Jour 142: 21 Mad L W 498: 1925 Mad W N 97: 86 Ind Cas 839; *Ranga Reddi* v. *Chinasidda Reddi*, 1927 Mad 1154 (1155): 102 Ind Cas 2; *Patita* v. *Narasinga*, (1919) 51 Ind Cas 155 (158): 36 Mad L Jour 538: 42 Mad 632; *Hara Prasanna Bandopadhya* v. *Arab Ali*, 1924 Cal 353 (353): 71 Ind Cas 326; *Laduram Nathumul* v. *Nandalal Karuri*, (1920) 55 Ind Cas 747 (750): 31 Cal L Jour 150: 47 Cal 555; *Miran Baksh* v. *Sher Muhammad*, (1911) 9 Ind Cas 195 (196): 50 Pun L R 1911: 17 Pun Re 1911: 39 and 200 Pun W R 1911; *Choith Ram* v. *Lal Chand*, (1921) 61 Ind Cas 451 (452): 14 Sind L R 156.

Court cannot force a submission on a reluctant party—See the following cases:—*Sheonath* alias *Burra Kaka* v. *Ramanath* alias *Chotay Kaka*, (1863-66) 10 Moo Ind App 413 (425, 426): 5 Suth W R (P C) 21: 1 Ind Jur N S 161: 1 Suth 616: 2 Sar 134 P C; *Ali Buksh* v. *Kadir Buksh*, 1868 Pun Re No 28 [Consent should be voluntary]; *Kazee Kismooddeen* v. *Hajooddeen*, 1869 Pun Re No 52 [A submission to arbitration may be recommended but not ordered by the Court].

(3) *Laduram Nathmull* v. *Nand Lal Karuri*, (1920) 55 Ind Cas 747 (750, 751): 31 Cal L Jour 150: 47 Cal 555; *Debendra* v. *Jogendra*, (1921) 64 Ind Cas 221 (223) Cal; *Hachun Bano* v. *Abdul Hakim*, (1873) 19 Suth W R 321 (321); *Baikantha Nath* v. *Naziruddin*, (1868) 10 Suth W R 171 (171): 1 Beng L R S N 11 [Reference must be by all the parties who are materially *interested*]; *Negipuran Singh* v. *Hira Singh*, (1909) 1 Ind Cas 146 (146): 6 All L J 333; *Venkatasubbayya* v. *Venkataramanayya*, 1930 Mad 646 (647): 126 Ind Cas 735.

(3-a) *Choith Ram* v. *Lal Chand*, (1921) 61 Ind Cas 451 (455): 14 Sind L R 156 [There is no *estoppel* where there is a clear violation of statutory law]; *Venkataramanujacharlu* v. *Vasudevacharyulu*, 1926 Jour 170 (3): 1926 Mad W N 391: 23 Mad L W 769: 96 Ind Cas 278 [Objection can be taken by any party]; *Doolychand* v. *Mannuji Musaji*, (1917) 41 Ind Cas 295 (297): 25 Cal L Jour 339: 21 Cal W N 387 [Party to submission also can object to the validity of reference on the ground of non-joinder of parties interested. It is a matter of jurisdiction and consent cannot give jurisdiction]; *T Waung* v. *Sona Wangdi*, 1925 Cal 812 (814): 52 Cal 559: 42 Cal L Jour 26: 29 Cal W N 886: 87 Ind Cas 633, (Do.); *Gobi Rai* v. *Baij Nath Rai*, 1930 All 840 (841): 128 Ind Cas 817: 1930 All L J 1584 [Party to reference can object to illegality]; *Hara Prasanna* v. *Arab Ali*, 1924 Cal 353 (353): 71 Ind Cas 326 [The *applicant* for reference in this case wanted to set the award aside and it was set aside]; *Girija Nath* v. *Kanai Lal*, (1918) 43 Ind Cas 169 (172): 27 Cal L Jour 339; *Kadhu Singh* v. *Baljit Singh*, (1907) 29 All 423 (426): 4 All L J 347: 1907 All W N 147; *Beni Madhub Mitter* v. *Priya Nath Mandal*, (1900) 28 Cal 303 (306): 5 Cal W N 268; *Ranga Reddi* v. *Chinna Sidda Reddi*, 1927 Mad 1154 (1155): 102 Ind Cas 2.

Para. 1, Note 7.

proceedings valid and an award made on such reference is void and need not be set aside.[4] An objection to the validity of the reference on the ground of the non-agreement of all the parties can be raised at any stage.[5] The decision cited below[6] where it was held that a party may be estopped by his conduct from contesting a reference to which he was no party, cannot be accepted on principle as correct.

It is however, only the parties *interested* that should agree to the reference. Section 506 of the old Code provided that *all the parties to the suit* may apply for a reference to arbitration. But it was held by the High Court of Allahabad that the words "all the parties to a suit" would not necessarily include parties between whom and any of the parties to the submission there was, in fact, no matter in difference in the suit.[7] The word "interested" was added in the present Code to give effect to the above view.[8]

The expression "all parties interested" means parties interested in the *specific dispute* referred to arbitration and not in the subject-matter of the whole suit.[9] Where parties have distinct and severable interests, a party interested only in one such portion need not join in a reference with respect to the other portions.[10]

The question whether a party is interested within the meaning of this paragraph depends upon the facts of each case.[11] One important test is to see whether he is a necessary party or a person who could be joined as a proper party under the provisions of O. 1, R. 10 of the Code.[12] An unnecessary or *pro forma party*,[13] or a party who had been exonerated at the time of the reference[14] cannot be said to be a person interested within the meaning of the

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[But see *Sughomal Vasandimal* v. *Parumal*, 1930 Sind 256 (259): 24 Sind L R 470: 124 Ind Cas 374 [Person who is party to reference cannot object to award on the ground that another person was a necessary party when the latter himself does not object]; *Hakam Rai* v. *Jhanda Mal*, 1883 Pun Re No 130; *Syed Khan* v. *Abdul Gaffoor*, 1929 Notes 7 (*e*).]

(4) *Subba Rao* v. *Appadurai Ayyar*, 1925 Mad 621 (623): 48 Mad L Jour 142: 21 Mad L W 498: 1925 Mad W N 97: 86 Ind Cas 839.

(5) *Girijanath Roy Chowdhury* v. *Kanailal Mitra*, (1918) 43 Ind Cas 169 (172): 27 Cal L Jour 339.

An objection can be raised in revision.—*Venkatasubbayya* v. *Venkataramanayya*, 1930 Mad 646 (647): 126 Ind Cas 735; *Tej Singh* v. *Ghasi Ram*, 1927 All 563 (563): 25 All L J 606: 102 Ind Cas 236: 49 All 812.

(6) *Gian Chand* v. *Behari Lal*, (1913) 18 Ind Cas 761 (762): 78 Pun L R 1913.

(7) *Pitam Mal* v. *Sadiq Ali*, (1902) 24 All 229 (230): 1902 All W N 19.

(8) See *Dwarkanath Chakravarti* v. *Abulchandra Chakravarthy*, 1928 Cal 108 (111): 46 Cal L Jour 853: 106 Ind Cas 509; *Doolychand* v. *Mamuyi Musaji*, (1917) 41 Ind Cas 295 (297): 25 Cal L Jour 339: 21 Cal W N 387; *Raghunath Sukul* v. *Ramrup Raut*, 1924 Pat 33 (35, 36): 2 Pat 777: 1923 Pat H C C 225: 2 Pat L R 76: 76 Ind Cas 2: 5 Pat L Tim 239.

(9) *Hassomal Hirdomal* v. *Kodanmal Motiomal*, 1927 Sind 239 (239): 104 Ind Cas 342; *Mahadev Narayan Nirkar* v. *Narayan Dattatreya Samant*, 1928 Bom 248 (249): 30 Bom L R 530: 52 Bom 408: 110 Ind Cas 343; *Raghunath Sukul* v. *Ramrup Raut*, 1924 Pat 33 (34, 36): 2 Pat 777: 1923 Pat H C C 225· 2 Pat L R (Civ) 76: 76 Ind Cas 2: 5 Pat L Tim 239.

(10) *Banney Lal* v. *Choley Mian Abdul Shakur*, 1931 All 453 (454): 1931 All L J 442: 133 Ind Cas 31: 53 All 669.

(11) *Mahadev Narayan Nerkar* v. *Narayan Dattatreya Samant*, 1928 Bom 248 (249, 250): 30 Bom L R 530: 52 Bom 408: 110 Ind Cas 343: *Jaipal Tewary* v. *Tapeswari Tewari*, (1918) 45 Ind Cas 321 (322) Pat.

(12) *Sharafat* v. *Ali* v. *Mt Bhagwati*, 1929 All 763 (765): 1930 All L J 239.

(13) *Sabta* v. *Dharam*, (1913) 18 Ind Cas 609 (610): 11 All L J 66: 35 All 107 [Unnecessary party]; *Gopal Das* v. *Baij Nath*, 1926 All 238 (239): 24 All L J 235: 91 Ind Cas 930: 48 All 239 [*Pro forma* defendant]; *Ajudhia* v. *Badurul Hussain*, (1917) 41 Ind Cas 357 (360): 15 All L J 427: 39 All 489; *Degumbur* v. *Ram Prea*, 2 Hay 583: Marsh 715; *Sivalinga Pillai* v. *Marutha Pillai*, (1912) 14 Ind Cas 562 (562) Mad; *Jaipal Tewary* v. *Tapeswari Tewari*, (1918) 45 Ind Cas 321 (322) Pat. See also *Sheonath* v. *Ramnath*, (1863-66) 10 Moo Ind App 413 (425, 426): 5 Suth W R (P C) 21: 1 Ind Jur N S 161: 1 Suth 616: 2 Sar 134 P C.

(14) *Bagharanulu* v. *Bollam Seetharamaswami*, 1923 Mad 502 (503): 44 Mad L Jour 359: 17 Mad L W 424: 32 Mad L Tim 298: 1923 Mad W N 296: 73 Ind Cas 202.

paragraph. A person who is *ex parte* in the suit[15] or even a person against whom no relief is claimed[16] is not necessarily a person not interested. Whether he is so interested or not depends upon the facts of the particular case[17] including the conduct of the party up to the end of the proceedings.[18] But the mere fact that the award that was passed is not in fact against him cannot be taken to show that he was not interested at the time of the reference.[18-a] Where there is in fact no matter in difference between the *ex parte* defendant and the parties to the submission, his not joining the reference will not affect the validity of the reference.[19] If on the other hand he *is* interested and does not agree to the reference, the order of reference is *ultra vires* and invalid.[20]

A defendant who makes a complete admission of the plaintiff's claim entitling the latter to a judgment under O. 12, R. 6 of the Code, is no longer interested and need not join in the reference by the plaintiff and the other defendants.[21]

8. All the parties, if should apply.—All the parties interested must not only agree to the reference, but must *apply* to the Court. If before the application is made to the Court one of the parties resiled from the agreement, no order of reference can be passed on the ground that he previously agreed to a reference being made before the application was presented.[1]

9. Effect of omission to sign or verify the application.—*See* Note 21, *infra.*

10. Matter in difference.—The matter in difference is the matter in dispute between the parties.[1] A dispute implies an assertion of a right by one party and the repudiation thereof by another.[2] It is not however necessary that the question should be one which the Court can *legally enquire into.* Thus a dispute as to an uncertified payment or adjustment, which the

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(15) *Bhaghanalu* v. *Seetharamaswami,* 1923 Mad 502 (503): 44 Mad L Jour 359: 17 Mad L W 424: 32 Mad L Tim 298: 1923 Mad W N 296: 73 Ind Cas 202; *Sharafat Ali* v. *Mt Bhagwati,* 1929 All 763 (765): 1930 All L J 239; *Lachman Singh* v. *Naman,* 1929 Lah 174 (175): 118 Ind Cas 393.

(16) *Subba Rao* v. *Appadurai Ayyar,* 1925 Mad 621 (622, 623): 48 Mad L Jour 142: 21 Mad L W 498: 1925 Mad W N 97: 86 Ind Cas 839.

(17) *See* cases cited in foot-note 11 above.

(18) *Sugnomal Vasandmal* v. *Perumal,* 1930 Sind 256 (258): 24 Sind L R 470: 124 Ind Cas 374.

(18-a) *Hassomal Hirdomal* v. *Kodanmal Motiomal,* 1927 Sind 239 (240): 104 Ind Cas 342; *Haswa* v. *Mahala,* (1911) 10 Ind Cas 559 (560): 8 All L J 645. See however *Ishar Das* v. *Keshab Deo,* (1910) 7 Ind Cas 68 (68): 7 All L J 807: 32 All 657.

(19) *Pitam Mal* v. *Sadiq Ali,* (1902) 24 All 229 (230): 1902 All W N 19.

(20) *Palita Parana Panda* v. *Narasinga Panda,* (1919) 51 Ind Cas 155 (158): 36 Mad L Jour 538: 42 Mad 632; *Subba Rao* v. *Appadurai Ayyar,* 1925 Mad 621 (623): 48 Mad L Jour 142: 21 Mad L W 498: 1925 Mad W N 97: 86 Ind Cas 839; *Karan Bibi* v. *Mahomed Alam Khan,* 1929 Lah 477 (478): 119 Ind Cas 235; *Doolychand* v. *Mamji Musaji,* (1917) 41 Ind Cas 295 (300, 301): 25 Cal L Jour 339: 21 Cal W N 387. See also *Mt Brij Raj Kuar* v. *Ram Nath,* 1925 Oudh 201 (202): 80 Ind Cas 821: 9 O & A L R 773.

[But see *Vaithinatha Ayyar* v. *Vaithilinga Mudaliar,* (1915) 31 Ind Cas 206 (207): 18 Mad L Tim 374: 2 Mad L W 960: 1915 Mad W N 847; *Gianchand* v. *Behari Lal,* (1913) 18 Ind Cas 761 (762): 78 Pun L R 1913.]

(21) *Mt Brij Raj Kuar* v. *Ram Nath,* 1925 Oudh 201 (202): 80 Ind Cas 821: 9 O & A L R 773.

Note 8.

(1) *Miran Baksh* v. *Sher Muhammad,* (1911) 9 Ind Cas 195 (196): 50 Pun L R 1911: 17 Pun Re 1911: 39 and 200 Pun W R 1911. See also *Negi Puran* v. *Hira Singh,* (1909) 1 Ind Cas 146 (146): 6 All L J 333.

Note 10.

(1) *Dawoodbhai Abdul Kader* v. *Abdul Kader Ismailji,* 1931 Bom 164 (166): 33 Bom L R 51: 130 Ind Cas 588.

(2) *Dawoodbhai Abdul Kader* v. *Abdul Kader Ismailji,* 1931 Bom 164 (166): 33 Bom L R 51: 130 Ind Cas 588.

Court cannot take notice of, can be a matter in difference between the parties which can be referred to arbitration.[3]

Para. 1, Note 10.

The matter in difference must be one which has *actually arisen at the time of the reference* though it need not have arisen at the time of the *agreement* to refer.[4] There can be no reference to arbitration under this schedule of existing differences as well as *disputes that may arise in the future.*[5] A dispute may exist even where the liability is fully admitted and only the payment is withheld. The facts of each case must be examined to see whether there is a dispute.[6]

Further, the matter in difference must be one arising in the *suit* and between the parties to the suit. The Court has no power to refer to arbitration any questions between the parties to the suit other than those in question in the suit, or any questions in which any person, not a party to the suit is concerned.[7]

A reference is competent on a question of *law* as well as a question of *fact.*[8] Consequently, an error made by the arbitrators on a point of law referred to them does not vitiate the award and cannot be questioned on the ground that it is not in accordance with the received interpretation of the law[9] but the matter in difference must relate only to the *private rights* of the parties to the litigation. A suit under S. 92 of the Code is not one for the determination of the private rights of the parties to the litigation, and matters in such a suit cannot be referred to arbitration.[10] Similarly the selection of a guardian for a minor in a proceeding under the Guardian and Wards Act 1890 is not a matter of private interest and cannot be settled by reference to arbitration.[11] It has been held that a criminal complaint cannot be referred to arbitration.[12]

Where a question arises as to what the matter was that was referred to arbitration, it is for the Court to say on a construction of the reference. The arbitrator's belief about it is immaterial.[13] Where a whole case is referred

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(3) *T Wang* v. *Sona Wangdi,* 1925 Cal 812 (813): 52 Cal 559: 42 Cal L Jour 26: 29 Cal W N 886: 87 Ind Cas 633.

(4) *Dawoodbhai Abdul Kader* v. *Abdul Kader Ismailji,* 1931 Bom 164 (166): 33 Bom L R 51: 130 Ind Cas 588; *Macnaghten* v. *Rameshwar Singh,* (1903) 30 Cal 831 (839, 840); *Velchand Chaganlal* v. *Liston,* (1914) 25 Ind Cas 371 (372): 16 Bom L R 517: 38 Bom 638; *Uttamchand Saligram* v. *Mahomed Jewa Mamooji,* (1920) 54 Ind Cas 285 (286, 288): 46 Cal 534: 23 Cal W N 704.

(5) *Puran Singh* v. *Bahal Kunwar,* 1930 All 319 (320): 125 Ind Cas 583.

(6) *Uttamchand Saligram* v. *Mahomed Jewa Mamooji,* (1920) 54 Ind Cas 285 (286, 288): 46 Cal 534: 23 Cal W N 704.

(7) *Ram Protap* v. *Durga Prosad,* 1925 P C 293 (297): 49 Mad L Jour 812: 3 Oudh W N 127: 24 All L J 13: 43 Cal L Jour 14: 27 Pun L R 85: 1926 Mad W N 96: 3 Pat L R 330: 92 Ind Cas 633: 28 Bom L R 217: 53 Ind App 1: 53 Cal 258 P C [Confirming 1924 Cal 567].

(8) *Ghulam Jilani* v. *Muhammad Hasan,* (1902) 29 Cal 167 (186): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 25 Pun Re 1902 P C; *Sondamissee* v. *Gopal Chandra,* (1915) 28 Ind Cas 557 (559): 21 Cal L Jour 273: 19 Cal W N 948.

(9) *Chhab Lal* v. *Parbati,* (1916) 33 Ind Cas 737 (738): 19 Oudh Cas 48.

(10) *Ganoba* v. *Narayan,* 1923 Nag 112 (114): 6 Nag L J 7: 72 Ind Cas 1016; *Nambi* v. *Narayan,* (1901) 11 Mad L Jour 337 (339). See however *Karedla Perimallayya Naidu* v. *Vemavarapu Sitaramayya,* (1903) 26 Mad 361 (361): 14 Mad L Jour 14 [Under S 16 of the Religious Endowment Act a Court may refer any matter in difference in the suit for decision by an arbitrator *but not the whole suit*].

(11) *Sami Chetti* v. *Adaikalam Chetty,* 1924 Mad 484 (484): 46 Mad L Jour 179: 34 Mad L Tim 15: 1924 Mad W N 222: 47 Mad 459: 84 Ind Cas 613.

(12) *Malka* v. *Sardar,* 1929 Lah 394 (395): 30 Pun L R 122: 11 Lah L Jour 89: 116 Ind Cas 215.

(13) *Gopalam* v. *Myneni Suryanarayana,* 1926 Mad 752 (753): 50 Mad L Jour 514: 28 Mad L W 681: 1926 Mad W N 445: 95 Ind Cas 740.

to arbitration the question of costs also must be taken to have been referred and the arbitrators can give a decision thereon.[14] (*See also* paragraph 13 below.)

11. Reference in respect of matters outside suit.—Matters outside the suit cannot be referred to arbitration under this paragraph and the award made on such a reference is invalid.[1] An agreement to recognise an award on matters beyond the scope of the disputes mentioned in the reference is void.[2] Where, however, an application for reference includes matters outside the suit but the Court orders a reference only as to matters in difference *in the suit* the order of reference is not illegal.[3] Again where on the same day parties apply for reference to arbitration of matters in difference between them *in the suit* and also separately make a reference as to matters outside the suit the order of reference made by the Court with regard to the subject-matter of the suit cannot be questioned on the ground of illegality or invalidity.[4]

12. Application shall be in writing.—*See* Note 21, below.

13. At any time before judgment is pronounced.—The parties are entitled to have the matter in difference between them submitted to arbitration, at any time before judgment is pronounced. The Court has no discretion to reject the application made by the parties for a reference to arbitration.[1]

14. Revocation of submission.—Where an order of reference to arbitration is made through Court, all subsequent proceedings are, as has been seen in Note 2 above, under the supervision of the Court. Consequently a party to the agreement to refer is not entitled to terminate the reference by any revocation on his part. He is bound by it and the arbitration must proceed according to the provisions of the law.[1] The Court may, however, supersede the arbitration on the application of the parties in the cases specified in paragraphs 5 and 8 of the schedule. There is a conflict of opinion whether even the Court can revoke the arbitration in cases not falling within the said paragraphs. According to the decisions cited below[2] the Court has

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(14) *Dharn* v. *Kiddar Khan*, (1918) 46 Ind Cas 182 (184) Nag.

Note 11.

(1) *Peddapalayam Venkatarayachari* v. *Peddapalayam Muniyachari*, 1921 Mad 709 (709): 14 Mad L W 666: 1921 Mad W N 756: 65 Ind Cas 92; *Taranath* v. *Manick Chunder*, (1870) 14 Suth W R 469 (470): 6 Beng L R 386; *Ram Pratap* v. *Durga Prasad*, 1925 P C 293 (297): 49 Mad L Jour 812: 3 Oudh W N 127: 24 All L J 13: 43 Cal L Jour 14: 27 Pun L R 35: 1926 Mad W N 96: 3 Pat L R 330: 92 Ind Cas 633: 28 Bom L R 217: 53 Ind App 1: 53 Cal 258 P C; *Merali Visram* v. *Sheriff Devji*, (1911) 12 Ind Cas 687 (688): 36 Bom 105: 13 Bom L R 1017.

(2) *Parsram Gangandas* v. *Topandas Dholandas*, 1928 Sind 81 (82): 21 Sind L R 253: 102 Ind Cas 183.

(3) *Jatindra Nath Bhattacharya* v. *Manindra Nath Bhattacharya*, 1927 Cal 52 (54): 44 Cal L Jour 224: 98 Ind Cas 803.

(4) *Jatindra Nath Bhattacharya* v. *Manindra Nath Bhattacharya*, 1927 Cal 52 (54): 44 Cal L Jour 224: 98 Ind Cas 803. See also *Roghoo Nundun* v. *Bunwaree*, (1865) 3 Suth W R (Mis) Rul 27 (28) [They should be distinctly separated and not mixed up together].

Note 13.

(1) *Mohendra Lal* v. *Fakirchandra*, (1914) 24 Ind Cas 610 (610) Cal. See also *Datta* v. *Khedu*, (1911) 11 Ind Cas 935 (935): 8 All L J 678: 33 All 645.

Note 14.

(1) *Nil Monee Bose* v. *Mohima Chunder*, (1872) 17 Suth W R 516 (517); *Nagasamy Naik* v. *Rungasamy Naik*, (1874-75) 8 Mad H C R 46 (55). See also *Nainsukh* v. *Umadai*, (1885) 7 All 273 (276): 1885 All W N 12; *Chet Kunwar* v. *Puttu Singh*, (1915) 27 Ind Cas 424 (425): 17 Oudh Cas 886: 2 Oudh L J 129.

(2) *Kalimbhai* v. *Shanker*, (1886) 10 Bom 381 (388); *Robindra Deb Manna* v. *Jogendra Deb Manna*, 1923 Cal 410 (411, 416): 27 Cal W N 420: 80 Ind Cas 459; *Chatarbujh* v. *Raghubar*, (1914) 23 Ind Cas 758 (760, 761): 12 All L J 529: 36 All 854; *Thoongan* v. *Chinna Alagu Kudumban*, 1927 Mad 910 (911): 39 Mad L Tim

Para. 1, Notes 14—16.

no power to deal with the matter in difference between the parties until the award is made. Thus the Court could not even allow the withdrawal of the suit after an order of reference has been made, though if there is any partiality or misconduct on the part of the arbitrator, the Court could, *after the award is made,* set it aside.[3] The High Court of Allahabad has, on the other hand in a recent case[4] held that there is an *inherent* jurisdiction to intervene and supersede the arbitration in cases not falling within paragraphs 5 and 8 where such an order is necessary for the ends of justice or to prevent an abuse of the process of the Court. The High Court of Patna has also taken a similar view.[4-a]

Where an agreement to refer has been entered into without recourse to litigation it may be filed in Court under paragraph 17 *where no sufficient cause is shown against its being filed.* On an interpretation of S. 326 of the Code of 1859 corresponding to paragraph 17 of this Schedule it was held by their Lordships of the Privy Council in *Pestonji Nusserwanjee* v. *D. Maneckjee and Co.,* 12 Moore's Indian Appeals 112, that where parties have agreed to submit the matter in difference between them to arbitration of one or more certain specified persons, no party to submission can revoke the submission to arbitration *unless for good cause,* and that a mere arbitrary revocation of the authority is not permitted. And this has been followed in numerous cases. *See* notes to paragraph 17, *infra.* In cases falling within the Arbitration Act, 1899, a submission to arbitration may be revoked by *leave of the Court.* As to the circumstances under which such leave may be given *see* the undermentioned cases.[5]

15.—Withdrawal of suit after reference to arbitration.—As has been seen in Note 14 above, the Court has no jurisdiction to allow a withdrawal of the suit after reference[1] or after an award has been made on such reference.[2] An application to file an award under paragraph 20 of the Code, can however be allowed to be withdrawn as if it were a suit.[3]

16. "Court"—Appellate Court.—As has been seen in Note 8 to O. 41, R. 25, *ante* where the appellate Court remits a case under that rule, the lower Court has no power to refer the case for arbitration.[1] Nor can the appellate Court, by its order of remand direct the lower Court to do so.[2]

195: 1927 Mad W N 921: 105 Ind Cas 92; *Ganesh Prasad* v. *Damodar Das,* (1912) 16 Ind Cas 177 (177): 10 All L J 23; *Mangar Sahu* v. *Bhatoo Singh,* (1920) 57 Ind Cas 473 (476): 5 Pat L Jour 672: 1 Pat L Tim 416. See also *Shiam Sundar Lal* v. *Bhairon Singh,* (1906) 3 All L J 185 (187): (1906) 26 All W N 51.

(3) *See* cases cited in foot-notes (1) and (2) to Note 15, *infra.*

(4) *Bhola Nath* v. *Raghunath Das,* 1929 All 743 (744, 745): 1929 All L J 918: 51 All 1010 [This decision purports to follow 1 Ind Cas 14 which was a case under S 5 of the Arbitration Act under which the Court can grant leave to revoke a submission].

(4-a) *Lachman Machhua* v. *Moghal Mian,* 1925 Pat 720 (723): 6 Pat L Tim 488: 86 Ind Cas 540.

(5) *Gaya Prasad* v. *Firm of Mathu Lal Bhudha Lal,* 1925 All 202 (202): 78 Ind Cas 1050: 5 L R A (Civ) 319; *The Bombay Fire Insurance Co* v. *Ahmedbhoy Habibbhoy,* (1909) 1 Ind Cas 14 (16, 17): 11 Bom L R 1: 34 Bom 1.

Note 15.

(1) *Shoeamber* v. *Deodat,* (1887) 9 All 168 (172): 1887 All W N 13; *Purna Chandra* v. *Kunja Behari,* (1918) 46 Ind Cas 477 (478): 28 Cal L Jour 275 [Portion of the claim under reference to an arbitration cannot be withdrawn without the consent of the other party].

(2) *Debi Charan Manna* v. *Bipin Prasad Jana,* (1903) 7 Cal W N 186 (187); *Kalian Singh* v. *Lekhraj,* (1884) 6 All 211 (213): 1884 All W N 28; *Abdul Karim* v. *Muhammad Husain,* (1916) 32 Ind Cas 347 (347): 2 Oudh L J 497.

(3) *Gauri Shankar* v. *Maida Koer,* (1904) 31 Cal 516 (517).

Note 16.

(1) *Nand Ram* v. *Fakirchand,* (1885) 7 All 523 (526, 527): 1885 All W N 139.

(2) *Puna Bibee* v. *Khoda Buksh,* (1874) 22 Suth W R 396 (397).

Para. 1, Notes 16—18.

By virtue of sub-S. (2) of S. 107, *ante* the appellate Court has the same powers of acting under this Schedule as the Court of first instance. Thus the appellate Court can refer, with the consent of parties, matters in dispute in appeal to arbitration.[3] Where the Court of first instance passes a decree not in accordance with the award, but the appellate Court holding that the award is not open to any objections passes a decree in accordance with this award, it is final under paragraph 16 of the Schedule.[4]

17. Death of party, if operates as revocation of reference.—Under the English Common Law, the death of a party to a reference operates as a revocation of the authority of the arbitrator, unless the submission contained either expressly or by necessary implication a provision to the contrary. This view proceeded on the principle that an arbitrator was, in the contemplation of the law, merely an agent appointed by the parties to decide the matter in dispute between them.[1] The law in this country is however, quite the reverse, and the death of a party pending arbitration proceedings through Court does not necessarily revoke the reference.[2] If on the death of the party the right to sue survives to his representatives, they should be brought on record under the provisions of O. 22.[3] Where no application is made within time for bringing the legal representatives on the record, and the suit abates, the award made by the arbitrators subsequent thereto cannot be filed in Court.[4]

In a proceeding before the arbitrator on a reference made *without the intervention of the Court*, there is no provision of law enabling the arbitrator to bring the legal representatives of a deceased party to the submission on record, and the fact that the arbitrator failed to do so does not make the award illegal and not binding on the representatives[5] especially where the party dies after the hearing is terminated and nothing remains for the arbitrators to do but to deliver their award.[6]

18. Authority of pleader to refer.—Section 506 of the old Code required a special authority for a pleader to make a reference to arbitration on behalf of his client.[1] In the present paragraph the words as to special

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(3) *Datta* v. *Kedu*, (1911) 11 Ind Cas 935 (936): 8 All L J 678: 33 All 645; *Chiranji Lal* v. *Jamna Das*, (1875) 7 N W P 243 F B; *Suresh Chunder* v. *Ambika Churn*, (1882) 18 Cal 507 (509); *Bhugwan Das* v. *Nand Lal*, (1886) 12 Cal 173 (177); *Russol Bibi* v. *Jan Ali*, (1872) 17 Suth W R 31 (32): 12 Beng L R 267 Note; *Jageswar* v. *Kirtarthe*, (1874) 21 Suth W R 210 (211): 12 Beng L R 266; In re *Sangaralingam*, (1880) 3 Mad 78 (79): 5 Ind Jur 76.

(4) *Nauraung Singh* v. *Sadapal Singh*, (1887) 10 All 8 (11, 12): 1887 All W N 240.

Note 17.

(1) *Halsbury's Laws of England*, Vol 1, pp. 450 and 448.

(2) *Sanday Patrick and Co* v. *Ramrattan*, (1910) 7 Ind Cas 590 (591): 4 Sind L R 14 [A case under the Arbitration Act]; *Ramat Ram* v. *Salig Ram*, (1911) 11 Ind Cas 481 (495): 14 Cal L Jour 188; *Datta* v. *Khedu*, (1911) 11 Ind Cas 935 (936): 33 All 645: 8 All L J 678 [Death after application, but before order of reference—Arbitrator's authority not revoked].

(3) *Satyanarayana* v. *Venkata*, (1904) 27 Mad 112 (116): 13 Mad L Jour 311; *Tagha* v. *Ram Singh*, 1924 Lah 725 (726): 79 Ind Cas 67. [If they are not brought on the record the award is not binding on them].

(4) *Merali Vis Ram* v. *Sheriff Devji*, (1911) 12 Ind Cas 687 (688): 36 Bom 105: 13 Bom L R 1017.

(5) *Binayak Das* v. *Nalini Kumar*, 1922 Cal 226 (228): 26 Cal W N 804: 70 Ind Cas 459.

(6) *Manindra Nath* v. *Moha Nanda Roy*, (1912) 13 Ind Cas 161 (166, 167): 15 Cal L Jour 360 [It was however observed that if the death occurred before the hearing was concluded, it would have been necessary to bring the representatives on the record—How this could be done is not clear].

Note 18.

(1) *Ram Jiwan* v. *Kali Charan*, (1907) 29 All 429 (430): 4 All L J 342; 1907 All W N 139; *Luxumibai* v. *Widina*, (1899) 23 Bom 629 (634): 1 Bom L R 617; *Goor Chunder* v. *Joogal*, (1864) 1 Suth W R 80 (81). *Sheo Das Misser* v. *Nandan*, (1905) 7 Cal W N 343 (344); *Wazeera* v. *Mookum*, 1869 Pun Re No 11.

authority have been omitted. It has been held by the Sind Judicial Commissioner's Court that the effect of the omission is to enable a pleader to make a reference to arbitration even though the vakalatnama does not specifically authorise him to do so.[2] The general trend of opinion is, however that a pleader has no such authority.[3] A counsel as distinguished from a *pleader* who derives his authority only from the vakalatnama, has implied authority even to make a reference to arbitration.[4] But neither a counsel nor a pleader expressly authorised to refer to arbitration can delegate his power to refer to arbitration to another pleader without express authorisation to that effect.[5] Nor will the reference to arbitration by the counsel of a party be binding on the party where he had given the counsel express instructions against making any such reference.[6] A pleader has no authority to revoke the appointment of an arbitrator by the party himself, without the latter's knowledge or instructions.[7]

19. **Authority of agent to refer.**—The authorised agent of a party within the meaning of O. 3, Rr. 1 and 2 can make a reference on behalf of his principal.[1] No special power of authorisation is, however, necessary to enable him to do so.[2] The principal can also subsequently ratify the agent's act in referring to arbitration, even where the agent had originally no authority to do so.[3] A partner is an agent of the firm only for the purpose of *the business of the firm*.[4] It is not part of the business of the firm to refer matters in dispute to arbitration and therefore one partner cannot, as such, make or authorise a reference to arbitration on behalf of the firm.[5] But the *managing* partner of the firm can validly make a reference to arbitration so as to bind the firm.[6]

20. **Authority of guardian or manager of a joint Hindu family.**—The next friend or natural guardian of a minor is entitled to refer disputes to arbitration, where there is no pending suit in respect of it, if the same is for

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(2) *Sri Krishna* v. *Relu Mal*, (1916) 34 Ind Cas 845 (848): 9 Sind L R 183.

(3) *Jaipal Tewary* v. *Tapeswari Tewary*, (1918) 45 Ind Cas 321 (322) Pat; *Dwarkanath Roy* v. *Fanindranath Roy*, (1919) 49 Ind Cas 262 (263) Cal; *Hussainbhai* v. *Bansilal*, 1924 Nag 338 (342, 343): 79 Ind Cas 48; *Ahmad* v. *Sardara*, 1929 Lah 171 (172): 114 Ind Cas 712; *Rajendra Prosad* v. *Panna Lal Champa Lal*, 1932 Cal 343 (344): 36 Cal W N 8: 138 Ind Cas 386 [Attorney].

(4) See *Amirshah* v. *Abdul Aziz*, 1932 Lah 373 (374): 136 Ind Cas 712: 33 Pun L R 388.

(5) *Amir Shah* v. *Abdul Aziz*, 1932 Lah 373 (374): 136 Ind Cas 712: 33 Pun L R 388 [Counsel]; *Aziz Din* v. *Moti Ram*, 1926 Lah 563 (564): 96 Ind Cas 277 [*Pleader*].

(6) *Chuni Lal Mandal* v. *Hira Lal Mandal*, 1928 Cal 378 (380): 32 Cal W N 44: 106 Ind Cas 309.

(7) *Kashiram* v. *Cuddoo*, 1922 Nag 39 (40): 65 Ind Cas 879: 5 Nag L Jour 229: 18 Nag L R 140.

Note 19.

(1) *Bhugwan Das* v. *Nand Lal*, (1886) 12 Cal 173 (178); *Ahmad* v. *Mst Bhagbari*, 1883 Pun Re No 170; *Hurdeo* v. *Thana*, 1882 Pun Re No 48.

(2) *Ram Das* v. *Abbas Khan*, 1893 Pun Re No 51 (F B).

(3) *Unniraman* v. *Chattan*, (1886) 9 Mad 451 (452); *Saturjit Partab* v. *Bulap Koer*, (1897) 24 Cal 469 (472).

(4) *Mohammad Akbar* v. *Dwarka Nath*, (1910) 6 Ind Cas 63 (67): 11 Cal L Jour 658: 14 Cal W N 1106.

(5) *Gopaladas* v. *Baij Nath*, 1926 All 238 (241): 24 All L J 235: 91 Ind Cas 930: 48 All 239; *Gainda Mal* v. *Nihal Chand*, 1925 Lah 261 (262): 6 Lah L Jour 502: 84 Ind Cas 726; *Rajendra Prasad* v. *Panna Lal Champa Lal*, 1932 Cal 343 (343): 36 Cal W N 8: 138 Ind Cas 386; *Ram Bharose* v. *Kattu*, (1900) 22 All 135 (138): 1900 All W N 12; *Chandooru Punnayya* v. *Venugopala Rice Factory Company Ltd*, (1918) 43 Ind Cas 508 (510): 22 Mad L Tim 520: 7 Mad L W 114: 1918 Mad W N 51; *Radhakrishna Chuni Lal* v. *Ahsa Mal Ishar Das*, 1926 Lah 91 (93): 7 Lah L Jour 603: 92 Ind Cas 705 [Reference made by one partner on behalf of firm is invalid—All partners must join]; *Bhagwan Manaji* v. *Hiraji Premaji*, (1932) 34 Bom L R 1112 (1119): 1932 Bom 516: 140 Ind Cas 519 (518, 519); *Rajendra Prasad* v. *Panna Lal Champa Lal*, 1932 Cal 343 (344): 36 Cal W N 8: 138 Ind Cas 386.

(6) *Tejbhan Jagannath* v. *Somnath*, 1930 Sind 40 (41): 117 Ind Cas 783; *Bishambhar Mal Palamal* v. *Gangadabai Nihal Chand*, 1923 Lah 212 (213): 5 Lah L Jour 5: 71 Ind Cas 734.

Para 1, Notes 20—21.

the benefit of the minor, and the award passed on such a reference will be binding on the minor.[1] As to the powers of a guardian *ad litem* to agree to refer the subject-matter of the suit to arbitration, *see* Note 15 to O. 32, R. 7 and the undermentioned case.[2] The manager of a joint Hindu family represents the other members of the family and can refer the family disputes to arbitration.[3]

21. Form.—The agreement to refer should clearly set forth in the form of issues, what are the matters in difference between the parties on which the arbitrator is required to arbitrate.[1] If the agreement is so vague as to make it impossible to ascertain what the dispute was which was referred to arbitration, it is bad for indefiniteness.[2] The paragraph requires that the agreement to refer shall be in *writing*. Where there is no written reference and there is nothing to show what the parties agreed to refer, the reference and the award will be invalid.[3] But the provision as to the requirement of writing is only *directory* and not *mandatory*, the object thereof being merely to avoid a subsequent controversy as to whether there was or was not any such application.[4] An award is not therefore invalid merely because it was not made in writing if it is clear that the parties did agree to refer.[5] In the undermentioned case[6] an application for an adjournment on the ground that the parties had referred the dispute to arbitration was assumed to be an application for an order of reference. It was however held in the case cited below[7] that the requirement as to writing cannot be said to be directory but that nevertheless the parties were estopped from defeating the arbitration proceedings on the ground of non-compliance with the paragraph. The High Court of Bombay has also held that want of writing undermines the founda-

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Note 20.

(1) *Sadashiv Ramchandra* v. *Trimbak Kesheo*, (1920) 56 Ind Cas 399 (402, 403): 22 Bom L R 266: 44 Bom 202; *Balaji* v. *Nana*, (1903) 27 Bom 287 (291): 5 Bom L R 95; *Mg Po Mya* v. *Ma Doung*, (1915) 29 Ind Cas 800 (801): 8 Bur L Tim 122; *Romonkissen* v. *Hurrolal*, (1892) 19 Cal 334 (335); *Temmakal* v. *Subbammal*, (1864-65) 2 Mad H C 47 (49); *Ramnarain* v. *Sreemutty*, (1864) 1 Suth W R 280 (281). [If injurious to the minor the award will be set aside].

(2) *Haidar* v. *Mauju*, 1885 Pun Re 92; *Hanuman Singh* v. *Ram Lakhan*, 1930 All 646 (646): 1930 All L J 923: 128 Ind Cas 437.

(3) *Ramai Ram* v. *Saligram*, (1911) 11 Ind Cas 481 (488): 14 Cal L Jour 188 [Arbitration without recourse to litigation]; *Jagan Nath* v. *Mannu Lal*, (1894) 16 All 231 (233): 1894 All W N 60 [Award out of Court]; *Uppara Chinngappa* v. *Gaddam Chinna Hanumanna*, (1919) 50 Ind Cas 471 (472): 9 Mad L W 314: 1919 Mad W N 425, (Do.); *Guran Ditta* v. *Pokhar Ram*, 1927 Lah 362 (364): 9 Lah L Jour 569: 104 Ind Cas 202: 8 Lah 693 [Arbitration pending suit].

Note 21.

(1) *Puran Singh* v. *Bahal Kunwar*, 1930 All 319 (320): 125 Ind Cas 583.

(2) *Babua Lal Pardhan* v. *Badri Lal Pardhan*, (1919) 49 Ind Cas 522 (525) Pat.

(3) *Jaipal Tewary* v. *Tapeswari Tewary*, (1918) 45 Ind Cas 321 (322) Pat; *Mir Amunullah* v. *Chota Mirza*, (1879) Pun Re No. 67.

(4) *Shama Sundara* v. *Abdul Latif*, (1900) 27 Cal 61 (63): 4 Cal W N 92; *Ve N K R M A Venkatachalam Chettiar* v. *Ve N K Rm A Ramanathan Chettiar*, 1922 Mad 429 (433): 15 Mad L W 111: 31 Mad L Tim 52: 70 Ind Cas 410: 1921 Mad W N 423; *Subbaya* v. *Seshayya*, 1923 Mad 48 (49): 105 Ind Cas 105; *Abdul Hamid* v. *Riazuddin*, (1907) 30 All 32 (35): 4 All L J 691: 1907 All W N 273.

(5) *Gokaran Nath* v. *Gur Prasad*, (1911) 9 Ind Cas 412 (413) Oudh [Subsequently, the parties appeared in person before the arbitrator and even evidence was taken in their presence]; *Mahabir* v. *Manohar Singh*, 1924 All 540 (540): 46 All 208: 22 All L J 67: 79 Ind Cas 816 [Oral consent of both parties recorded by Court]; *Jeyasankara Devi* v. *Nagannada Devi*, (1862-63) 1 Mad H C 106 (106): 1 Ind Jur O S 136 [Case under the Code of 1859—Reference was agreed to by all the parties present in open Court]; *Mirza Akbar Beg* v. *Bunda Ali*, (1870) 2 Nag W P 419; *Walidullah* v. *Bhaggan*, 1925 Oudh 269 (270): 11 O L J 570: 80 Ind Cas 7: 28 Oudh Cas 74: 1 Oudh W N 394.

(6) *Venkatachalam Chettiar* v. *Ramanathan Chettiar*, 1922 Mad 429 (434): 15 Mad L W 111: 31 Mad L Tim 52: 70 Ind Cas 410: 1921 Mad W N 423; *Kulasam Fatima* v. *Ali Akbar*, (1917) 39 Ind Cas 730 (733): 15 All L J 452: 39 All 401. See also *Nidamanthi Krishnamurthy* v. *Garijipathi Ganapathilingam*, (1916) 34 Ind Cas 741 (742): 3 Mad L W 375.

(7) *Muhammad Hasan* v. *Shaker Beg*, 1924 Oudh 400 (401): 11 Oudh L J 142: 78 Ind Cas 378.

Para. 1, Notes 21—22.

tion of *jurisdiction* but that it is not sufficient by itself, to set aside the award.[8] These two cases cannot, it is submitted, be accepted as correct on principle. The breach of a mandatory provision or the want of jurisdiction will render the proceedings void and there can be no question of estoppel.

Where the parties have agreed and applied to the Court for a reference, the mere fact that one of them has not *signed* the application does not vitiate the reference.[9] Where the pleader of a party duly authorised signs the reference the fact that the party himself does not sign it will not invalidate the award.[10] It was held by the Privy Council in the undermentioned case[11] that where the guardian *ad litem* of a minor party is present in Court and assents to the application for reference, the fact that he did not sign the reference did not render it invalid.

22. **Agreement to abide by the decision of the Court.**—A consent by the parties to abide by the decision of the *Court* is not such a reference to arbitration as is contemplated by this schedule.[1] But the award of the Court is binding on the parties not because of the fact that this schedule applies but because on general principles of jurisprudence parties cannot go back on their consent to abide by the decision of the Court after such decision is given.[2]

Para. 2.

Appointment of arbitrator.

P. 2. [S. 507, Para. 1.] The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

[1877—S. 507, Para. 1; 1859—S. 314.]

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(8) *Merali Visram v. Devji,* (1911) 12 Ind Cas 687 (688): 13 Bom L R 1017: 36 Bom 105.

(9) *Umed Singh v. Sobhagmal,* 1915 P C 79 (80): 43 Cal 290: 43 Ind App 1: 14 All L J 97: 18 Bom L R 308: 23 Cal L Jour 130: 20 Cal W N 137: 30 Mad L Jour 67: 19 Mad L Tim 108: 3 Mad L W 145: (1916) 1 Mad W N 67: 32 Ind Cas 161 P C; *Parbu Lal v. Firm Sheo Daya',* 1924 All 457 (457): 4 L R A (Civ) 472: 84 Ind Cas 640: *Mahomed Sulaiman v. Mazhar,* 1931 All 320 (321): 133 Ind Cas 606: 1931 All L J 904; *Gopal Das v. Baij Nath,* 1926 All 238 (239): 24 All L J 235: 91 Ind Cas 930: 48 All 239; *Sharafat Ali v. Bhagwati,* 1929 All 763 (764): 1930 All L J 239; *Tekat Mal v. Anandamoyi,* (1917) 38 Ind Cas 226 (227) Cal; *Subbayya v. Seshayya,* 1928 Mad 48 (49): 105 Ind Cas 105; *Gauri Shanker v. Ganga Ram,* (1919) 52 Ind Cas 859 (859): 77 Pun Re 1919. See also *Jai Mal Singh v. Tib Ram,* 1930 Lah 523 (524): 31 Pun L R 192: 122 Ind Cas 100 [Some of the parties not joining—All parties appearing before arbitrator through pleader—Defect in reference—Cured].

(10) *Gurran Ditta v. Pokar Ram,* 1927 Lah 862 (864): 9 Lah L Jour 569: 104 Ind Cas 202: 8 Lah 698.

(11) *Umed Singh v. Sobhagmal,* 1915 P C 79 (80): 43 Cal 290: 43 Ind App 1: 14 All L J 97: 18 Bom L R 308: 23 Cal L Jour 130: 20 Cal W N 137: 30 Mad L Jour 67: 19 Mad L Tim 108: 3 Mad L W 145: (1916) 1 Mad W N 67: 32 Ind Cas 161 P C.

Note 22.

(1) *Chengalraya Chetty v. Raghava Ramanuja Doss,* (1919) 52 Ind Cas 569 (571, 573): 37 Mad L Jour 100 [Doubting 26 Mad 76 and approving 23 Bom 752]; In re *Nimmagaddu Peda Nagamma,* (1915) 26 Ind Cas 355 (355) Mad; *China Venkataswamy v. Venkataswamy,* (1919) 51 Ind Cas 827 (828): 36 Mad L Jour 291: 1919 Mad W N 221: 25 Mad L Tim 397: 42 Mad 625.

But see *Kerali Vis Ram v. Sheriff Devji,* (1911) 12 Ind Cas 687 (688): 13 Bom L R 1017: 36 Bom 105 [Where a contrary view was assumed].

(2) *Chengalraya Chetti v. Raghava Ramanuja Doss,* (1919) 52 Ind Cas 569 (573): 37 Mad L Jour 100; *Sayad Zain v. Kalabhai,* (1899) 23 Bom 752 (755): 1 Bom L R 366; *Kumar Saradindu Roy v. Bhagabati Debya,* (1906) 10 Cal W N 835 (838); *Parbati v. Baikunth,* (1907) 4 All L J 89 (91): 1907 All W N 35; *Shahzadi Begam v. Muhamed Ibrahim,* 1921 All 310 (310): 43 All 266: 19 All L J 14: 59 Ind Cas 787; *China Venkataswamy v. Venkataswamy,* (1919) 51 Ind Cas 827 (828, 829): 42 Mad 625: 36 Mad L Jour 291: 1919 Mad W N 221: 25 Mad L Tim 397.

Para. 2, Notes 1—2.

Synopsis.

1 Appointment of arbitrator.
2. Appointment of Court itself as arbitrator—See Note 22 to paragraph 1 above.

1. **Appointment of arbitrator.**—It is essential that the parties should either name the arbitrators or consent to the nomination of the arbitrators by the Court. The Court has no authority to force upon a reluctant party the decision of any question in the cause by arbitrators selected at its discretion.[1] A party may, however, waive such an irregularity; but if he appears before the arbitrator under protest, he cannot be held to have forfeited his right to question the validity of the proceedings.[2]

Before the Court refers a case to arbitration it should ascertain whether the persons nominated are willing to accept the office, and till then it cannot make a reference.[3]

2. **Appointment of Court itself as arbitrator.**—*See* Note 22 to paragraph 1 above.

Para. 3, Note 1.

Order of reference.

P. 3. [S. 508.] (1) The Court shall, by order, refer to the arbitrator, the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the same suit.

[1877—S. 508, 1859—S. 315.]

Synopsis.

1. Legislative changes.
2. "The Court shall, by order, refer." . .
3. Revocation or withdrawal from arbitration—See Notes 14, 15 and 17 to paragraph 1, ante.
4. "Matter in difference."
5 Shall fix such time as it considers reasonable.
6. Court if can extend time fixed—See paragraph 8, infra.
7. When award is said to be "made".
8. Effect of order of reference.
9. Form.

Discretion of Court to refuse application for order of reference. See paragraph 1, Note 13.

1. **Legislative changes.**—

The word "delivery" has been substituted by the word "making" in sub-Paragraph (1). *See* Note 7, below.

Schedule II, Para. 2—Note 1.

[1] *Sheonath* alias *Burray Kaka* v. *Ramnath* alias *Chotay Kaka*, (1865) 5 Suth W R P C 21 (24): 10 Moo Ind App 413: 1 Ind Jur N S 161.

[2] *Sheonath* alias *Burray Kaka* v. *Ramnath* alias *Chotay Kaka*, (1865) 5 Suth W R P C 21 (25): 10 Moo Ind App 413: 1 Ind Jur N S 161. See also *Kumola Dassee* v. *Syud Azmur Ali*, (1867) 7 Suth W R 13 (13).

[3] *Troylockho Nath Roy* v. *The Collector of Beerbhoom*, (1864) Suth W R Gap 338 (339).

Para. 3, Notes 2—5.

2. **"The Court shall, by order, refer."**—As has been seen in Note 13 to paragraph 1 *ante*, where the parties apply to the Court for an order of reference, the Court is *bound* to make an order of reference and has no discretion in the matter. In the absence of an order of reference by the Court under this Paragraph, the arbitration proceedings and the award made therein are illegal.[1] Where the parties applied for adjournment of the suit from time to time on the ground that the matters in dispute had been referred to arbitration and the Court granted time, it was held that the order granting adjournment on the application of the parties should under the circumstances of the case be construed as an order of reference.[2]

3. **Revocation or withdrawal from arbitration.**—*See* Notes 14, 15 and 17 to Paragraph 1, *ante*.

4. **"Matter in difference".**—*See* Note 10 to Paragraph 1. Where it is found that one matter in difference agreed to be referred, has been omitted from the reference and that consequently the arbitrators have not given any decision thereon, the party interested should bring the omission to the notice of the Court so that the Court may send the case back to the arbitrators with a fresh reference on the point omitted. If he does not do so, the Court is not wrong in deciding the point itself.[1] The decision of the arbitrators on matters not in dispute, nor referred to them is null and void for want of jurisdiction.[2]

5. **"Shall fix such time as it considers reasonable".**—These words are mandatory and imperative and the Court is bound to fix in its order of reference, a time for the making of the award.[1] This fixing of a limit of time is, in fact, the "pillar" and "pivot" of the scheme of this schedule, enabling the Court to have control over the arbitrators, and the power cannot be delegated to the arbitrators themselves.[2] But where the order of reference does fix a time but describes it as one fixed for the *hearing of the suit* instead of for making the award, there is only an irregularity which may not vitiate the reference.[3] An award made beyond the time fixed is liable to be set aside under Paragraph 15, *infra*, though an award made within the time fixed but *filed* after time is not bad.[4]

As to the power of the Court to extend time fixed, *see* paragraph 8 below.

Schedule II. Para. 3—Note 2.

[1] *Harchand Rai* v. *Chuttan Lal*, (1884) Pun Re No. 35.

[2] *Kulsum Fatma* v. *Ali Akbar*, (1917) 39 Ind Cas 730 (733, 734): 15 All L J 452: 39 All 401.

Note 4.

[1] *Raj Narain* v. *Juggessur Mookerjee*, (1870) 14 Suth W R 247 (248).

[2] *Moshahel Singh* v. *Konomutty Bewa*, (1871) 15 Suth W R 172 (173).

Note 5.

[1] *Raja Har Narain* v. *Chaudhrain*, (1891) 13 All 300 (303): 18 Ind App 55: 6 Sar 14: 15 Ind Jur 283; *Robindra Deb Manna* v. *Jogendra Deb Manna*, 1923 Cal 410 (413): 27 Cal W N 420: 80 Ind Cas 459. See also *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan*, (1854) 6 Moo Ind App 134 (156, 157) [Case under Bombay Regulation, VII of 1827 but on analogous provisions]; *Negi Puran Singh* v. *Hira Singh*, (1909) 1 Ind Cas 146 (147): 6 All L J 333.

But see *Muthukutti* v. *Acha*, (1895) 18 Mad 22 (22) [This decision followed the decision in 10 All 137 which was subsequently reversed by the Privy Council in 13 All 300. It is, therefore, no longer law].

[2] *Robindra Deb Manna* v. *Jogendra Deb Manna*, 1923 Cal 410 (412, 414): 27 Cal W N 420: 80 Ind Cas 459 [Dissenting from 31 Ind Cas 597]; *Gur Das* v. *Garul Dhul*, (1911) 9 Ind Cas 241 (243) Oudh.

[3] *Raja Har Narain* v. *Chaudhrain*, (1891) 13 All 300 (303): 18 Ind App 55: 6 Sar 14: 15 Ind Jur 283 P C. See also *Bhagwan Din Singh* v. *Fakir Singh*, (1913) 20 Ind Cas 773 (774): 16 Oudh Cas 233 [Time fixed for *filing* award, not *making* it—Award filed before that date not bad].

[4] *See* Note 7, *infra*.

Para. 3,
Notes
6—8.

6. **Court if can extend time fixed.**—*See* paragraph 8, *infra.*

7. **When award is said to be "made".**—An award is *made* when the arbitrators have drawn up, executed and signed it. It is the *making* of the award that should be within the time fixed. The filing thereof into Court after the time fixed will not vitiate the award.[1] Under the old Code, the word used was "delivery" and even then it was interpreted to mean only the *making* of the award as distinguished from its being filed in Court.[2]

8. **Effect of order of reference.**—Where a Court makes an order of reference to arbitration, its jurisdiction to deal with the case, so long as the proceedings are pending before the arbitrator, is suspended. It cannot, therefore, deal with the case except as provided in this schedule (*viz.*, paragraphs 5, 8 and 15).[1] Thus it cannot

(1) allow the withdrawal of the suit under O. 23, R. 1.[2]

(2) dismiss the suit under O. 9, R. 3.[3]

(3) remove the arbitrator or substitute a new one.[4]

(4) record a compromise between the parties.[5]

(5) deal with the case on the merits.[6]

In the following matters, however, it has been held that the Court can, pass appropriate orders in the suit:—

(1) It can deal with an application to appoint an interim receiver or to grant an injunction.[7]

(2) It can deal with application to bring the legal representatives of a deceased party on record.[8]

Note 7.

(1) *Sitaram* v. *Bhawani Din,* (1904) 26 All 105 (107): 1908 All W N 205; *Asadulla* v. *Muhammad Nur,* (1905) 27 All 459 (461): 1905 All W N 47: 2 All L J 201; *Umersey* v. *Shamji,* (1889) 13 Bom 119 (124); *Debendra Nath* v. *Sarbamongola,* (1904) 8 Cal W N 916 (918); *Sri Lal* v. *Arjun Das,* (1915) 27 Ind Cas 233 (235): 18 Cal W N 1325; *Roberts* v. *Harrison,* (1881) 7 Cal 333 (337): 9 Cal L Rep 209; *Bhagat Ram* v. *Ganda Singh,* (1907) Pun Re No 89: 162 Pun W R 1907. See also *Muhammad Yusuf* v. *Karim Bakhsh,* 1899 Pun Re No. 78 [Where the date fixed for filing an award was a holiday it could be filed on the following day]; *Arumugam Chetti* v. *Arunachalam Chetti,* (1899) 22 Mad 22 (24): 8 Mad L Jour 287: *Rada Kanta Misser* v. *Jaladhar Jha,* (1917) 37 Ind Cas 844 (846) Pat: *Mohan Lal* v. *Baz Khan,* (1918) 46 Ind Cas 324 (325): 5 Oudh L J 205.

But see *Behari Das* v. *Kalian Das,* (1886) 8 All 543 (544): 1886 All W N 179.

(2) *Bhagat Ram* v. *Gandha Singh,* (1907) Pun Re No 89: 162 Pun W R 1907; *Arumugam* v. *Arunachalam,* (1899) 22 Mad 22: 8 Mad L Jour 287.

Note 8.

(1) *Shankar* v. *Chunila: Mulchand,* 1926 Nag 37 (39): 89 Ind Cas 782; *Kaikabad* v. *Khambatta,* 1930 Lah 26 (30): 124 Ind Cas 339: 11 Lah 342: 31 Pun L R 668; *Haradhun* v. *Radhanath,* (1868) 10 Suth W R 398 (400): 2 Beng L R S N 14.

(2) See *Note 15 to paragraph* 1, ante.

(3) *Imam Din* v. *Jawahari,* 1899 Pun Re No 10; *Musst Ram Kauer* v. *Seth Multanichand,* (1910) 8 Ind Cas 224 (224): 29 Pun L R 1910; *Maharaj Bhagat* v. *Harihar Bhagat,* 1923 Pat 115 (116): 3 Pat L Tim 846: 65 Ind Cas 144: *Hari Singh* v. *Alla Baksh,* (1916) 38 Ind Cas 769 (771): 115 Pun Re 1916 [Suit dismissed for default pending arbitration proceedings—Subsequent restoration and arbitrators directed to proceed—Award filed without objection—Held award legal].

(4) *Halimbhai Karimbhai* v. *Shankar Sai,* (1886) 10 Bom 381 (389).

(5) *Dooly Chand* v. *Mohanlal,* 1924 Cal 722 (724): 51 Cal 432: 83 Ind Cas 606.

(6) *Jamna* v. *Nasib,* (1902) 24 All 812 (814): 1902 All W N 72; *Hira* v. *Gaya,* 1932 All 183 (184): 1931 All L J 1155: 136 Ind Cas 789: 54 All 122 [Question of costs referred to arbitration—Court cannot deal with it].

(7) *Chetanisingh Bagasingh* v. *Gulbai,* 1925 Sind 102 (102): 78 Ind Cas 84: 18 Sind L R 303; *Surendra Kumar Ray* v. *Sushil Kumar Roy,* 1928 Cal 256 (258): 55 Cal 249: 109 Ind Cas 759.

(8) See *cases cited in Note* 17, *Foot-notes* (3) *and* (4) *to paragraph* 1, ante.

Para. 3, Notes 8—9.

As to the power of the Court to revoke the arbitration except as provided by paragraphs 5 and 8, *see* Note 14 to paragraph 1 above.

The Court has no power to direct that money should either be deposited or paid to the arbitrators for their remuneration, unless the parties had specifically agreed to such a course.[9]

9. **Form.**—*See* Form No. 2 to the Appendix to this schedule.

Para. 4, Note 1.

Where reference is to two or more orders to provide for difference of opinion.

P. 4. [S. 509.] (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

(*a*) by the appointment of an umpire; or

(*b*) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or

(*c*) by empowering the arbitrators to appoint an umpire; or

(*d*) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

[1877—S. 509; 1859—S. 316.]

Synopsis.

1. **Scope of the Paragraph.**
2. **Decision of majority—Cl. (b).**
3. **Appointment of umpire by arbitrators.**
4. **Extension of time for submission by umpire.**
5. **Delegation of duty by arbitrators.**

1. **Scope of the Paragraph.**—Where two or more arbitrators are appointed, the Court is bound to provide, in its order of reference, for a difference of opinion among the arbitrators, in the manner specified in this Paragraph. Where no such provision was made, and there having been a difference of opinion among the arbitrators, the Court decided the case itself on the evidence given *before the arbitrators*, the High Court remanded the case to the lower Court to make a fresh submission to the arbitrators after complying with the requirements of this Paragraph.[1] Where, however, under similar circumstances the lower Court decided the case on evidence taken *before itself* it was held by the High Court that it would not be right to remand the case for a fresh reference.[2] *See also* Note 2, Pts. (4) and (5), *infra.*

An arbitrator cannot, himself, be appointed as an umpire under this paragraph.[3]

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(9) *Mulchand* v. *Niranjan Das*, 1894 Pun Re No. 94; *Steel* v. *Roberts*, (1881) 6 Cal 809 (810): 8 Cal L Rep 439

Schedule II, Para. 4—Note 1.

(1) *Haradhan Dat* v. *Radha Nath*, (1869) 10 Suth W R 398 (399): 2 Beng L R S N 14.

(2) *Thakoor Das* v. *Ram Jeeban*, (1870) 14 Suth W R 150 (151).

(3) *Kafurchand Fulchand* v. *Jevraj Chunni Lal*, 1932 Cal 491 (491): 36 Cal W N 332: 138 Ind 651.

Para. 4, Notes 2—4.

2. Decision of majority—Cl. (b).—Unless the order of reference provides that the decision of the majority or of the umpire, if any, shall prevail, the award must be by *all* the arbitrators. An award by only a majority of the arbitrators in such cases is not valid.[1] If, however, the *application for the order of reference* provides that the opinion of the majority shall prevail, the fact that the *order* of reference does not refer to it will not invalidate the award by the majority of the arbitrators.[2] The reason is that the authority of the Court to make a reference depends upon the agreement of the parties, that if the parties agree that the opinion of the majority shall prevail, the only order that the Court could pass is an order of reference to that effect, and that it should therefore be deemed to have passed the order that it ought to have passed.[3] Where one of the parties to a reference is a minor, his guardian can consent to abide by the decision of a majority of the arbitrators.[3-a] But the fact that neither the application for an order of reference nor the order of reference makes any such provision as provided by this Paragraph will not nullify an *unanimous* award by all the arbitrators.[4] Where, in such a case, the arbitrators gave an unanimous award as to *part* and were divided as to part, the former is binding on the parties though the opinion of the majority as to the latter is not.[5]

It should be noted that even if a provision is made in the order of reference that the decision of the majority shall prevail, it is essential that *all* the arbitrators should be *present* at the deliberations. If they are present at the proceedings but some of them thereafter express their dissent and leave the place, the decision of the majority will be perfectly valid.[6] But if they are not so present and do not take part in the deliberations the award is invalid and not binding on the parties.[7] *See also* Note 2 to paragraph 10, *infra.*

3. Appointment of umpire by arbitrators.—When an umpire is appointed he is under no obligation to agree with one or other of the dissenting arbitrators. He is entitled to settle the matter in his own way according to what he thinks proper. He need not confer with the arbitrators.[1]

4. Extension of time for submission by umpire.—The umpire has the same powers of the arbitrators and could by application get extension of time for filing his award. *See* paragraph 8, below.

Note 2.

[1] *Aiyaswami* v. *Appandai Nayanar,* (1920) 54 Ind Cas 912 (913): 88 Mad L Jour 145; *Babua Lal Pardhan* v. *Badri Lal Pardhan,* (1919) 49 Ind Cas 522 (527) Pat; *Lala* v. *Abdus Samed,* (1912) 17 Ind Cas 820 (822): 16 Oudh Cas 94; *Nem Roy* v. *Bharut,* (1874) 22 Suth W R 129 (130); *Fatesh Singh* v. *Gango,* (1865) 4 Suth W R 4 (4); *Sat Kumar* v. *Atmaram,* 1885 All W N 60 (60); *Haridas* v. *Baidya Nath,* (1917) 40 Ind Cas 646 (647): 21 Cal W N 895.

[2] *Narendranath Dey* v. *Brojeswari Dasi,* (1914) 23 Ind Cas 842 (848) Cal.

[3] *Haridas Dutta* v. *Baidya Nath Ghose,* (1917) 40 Ind Cas 646 (647): 21 Cal W N 895.

[3-a] *Polipillai* v. *Ammanna,* 1929 Mad 144 (144): 114 Ind Cas 367.

[4] *Manindra Nath* v. *Mohananda Roy,* (1912) 13 Ind Cas 161 (166): 15 Cal L Jour 360; *Bepin Behary Sen* v. *Krishna Behary Sen,* (1908) 8 Cal L Jour 475 (476, 477); *Gour Chunder* v. *Sodey Chunder,* (1872) 17 Suth W R 80 (81).

[5] *Sheikh Ponaoollah* v. *Sheikh Tumeezuddeen,* (1865) 2 Suth W R 32 (33).

[6] *Dhurman Singh* v. *Surat Singh,* 1925 Oudh 712 (712): 88 Ind Cas 547; *Kanhya Lal* v. *Harbhagwan,* (1885) 5 Pun Re No 112; *Kamta Prasad* v. *Jodda Singh,* (1910) 7 Ind Cas 99 (99): 7 All L J 890; *Ram Narain Ram* v. *Pati Ram Tewary,* (1916) 34 Ind Cas 105 (105): 1 Pat L Jour 90: 2 Pat L W 411 [Refusal of minority to sign will not affect validity of award].

[7] *Nandram* v. *Fakirchand,* (1885) 7 All 528 (528): 1885 All W N 139.

Note 3.

[1] *Jumma* v. *Mubarik Khan,* (1915) 30 Ind Cas 87 (88): 55 Pun Re 1915: 167 Pun W R 1915: 50 Pun L R 1916; *Karim Baksh* v. *Subhan Ali,* 1891 Pun Re No 6.

Para. 4, Note 5.

5. **Delegation of duty by arbitrators.**—The arbitrators appointed by Court under this Schedule cannot delegate their authority to a third person, nor can the parties by their consent confer such a power on the arbitrators in derogation of the Court's order.[1]

But an arbitrator may delegate to a third person the performance of any acts which are merely ministerial in their nature.[2]

Where the arbitrators are empowered to choose an umpire, they have themselves to make the choice and ought not to delegate it to a third person.[3]

Para. 5.

Power of Court to appoint arbitrator in certain cases.

P. 5. [Ss. 507, 510-511.] (1) In any of the following cases, namely:—

(*a*) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or

(*b*) where an arbitrator or umpire—

- (i) dies, or
- (ii) refuses or neglects to act or becomes incapable of acting, or
- (iii) leaves British India in circumstances showing that he will probably not return at an early date, or

(*c*) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit.

[1877—Ss. 507, 510-511 ; 1859—Ss. 314, 319.]

Note 5.

(1) *Jamna* v. *Nasib*, (1902) 24 All 812 (814): 1902 All W N 72.

(2) *Buta* v. *Municipal Committee of Lahore*, (1902) 29 Cal 854 (868): 29 Ind App 168: 87 Pun Re 1902: 7 Cal W N 82: 4 Bom L R 678: 8 Sar 827 P C.

(3) *Smith* v. *Ludha*, (1893) 17 Bom 129 (142): Chitty's S C C R 320.

Para. 5,
Notes
1—3.

Synopsis.

1. **Legislative changes.**
2. **Appointment of new arbitrator or umpire.**
3. **Arbitrator refusing to act.**
4. **Arbitrator becoming incapable of acting.**
5. **Appointment of new arbitrator.**
6. **Appointment of an umpire.**
7. **Order superseding arbitration.**
8. **Revision.**

Duty of Court under this paragraph. See Note 3, Pts. (2) and (3).

Notice to appoint new arbitrator. See Note 5, Pts. (1) and (2).

1. Legislative changes:—

The words "and the parties *desire* that the nomination shall be made by the Court" which occurred in S. 507 of the old Code have been omitted.

2. Appointment of new arbitrator or umpire.—Under Ss. 507 and 510 of the old Code where the arbitrator nominated *refused to accept the "office,"* the Court could not appoint a new arbitrator unless *all* the parties *desired* the Court to do so, but that where the arbitrator, after accepting the office refused to *act*, the Court may appoint an arbitrator on the application of some only of the parties.[1] In *Sadik Hussain* v. *Kaniz Zhora Begam,*[2] the Judicial Committee pointed out on a true construction of S. 510, there is no room for such a distinction and that the expression "refuses to act" in S. 510 included also a case where an arbitrator refused to accept the office inasmuch as the acceptance of the office was the first essential act of an arbitrator. The omission of the words "and the parties desire, etc." has brought the present Paragraph in conformity with the decision of the Privy Council. The Court can under the present Paragraph appoint an arbitrator without the consent of *all* the parties in both cases, *viz.*, where an arbitrator refuses to accept the office as well as where he refuses to act; though this can be done only on *application* by either party and after *notice* to the opposite party.

3. Arbitrator refusing to act.—It is one of the most essential principles of the law of arbitration that the adjudication of disputes by arbitrators should be the result of their *free consent* to undertake the duties of arbitrating between the contending parties. The finality of an award is based on the principle that the arbitrators are judges chosen by the parties themselves and are *willing* to settle the disputes referred to them. Hence where an arbitrator refuses to act, the Court has no power to compel him to arbitrate against his will.[1] The duty of the Court in such a case is either to appoint a new arbitrator, or supersede the reference and proceed with the suit.[2] If the Court does neither of these two things, the further proceedings in arbitration and the resulting award thereon are *invalid.*[3] But an arbitrator has full power to

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Schedule II, Para. 5—Note 2.

(1) *Pugardin* v. *Moidinsa,* (1883) 6 Mad 414 (416); *Bepin* v. *Annoda,* (1891) 18 Cal 324 (327); *Fayazuddin* v. *Aminuddin,* (1909) 1 Ind Cas 354 (356): 6 All L J 351; *Radha Kishun* v. *Daulat Ram,* 1901 Pun L R 38: 110 Pun Re 1900; *Troyluckonath Roy* v. *Collector of Beerbhoom,* 1864 Suth W R Gap 388 (389).

(2) (1911) 12 Ind Cas 15 (17): 33 All 743: 38 Ind App 181: 15 Cal W N 1005: (1911) 2 Mad W N 132: 13 Bom L R 826: 21 Mad L Jour 1151: 14 Cal L Jour 813: 14 Oudh Cas 289: 8 All L J 1164: 10 Mad L Tim 173 P C.

Note 3.

(1) *Shib Charan* v. *Ratiram,* (1885) 7 All 20 (21, 22): 1884 All W N 212; *Nandram* v. *Fakir Chand,* (1885) 7 All 528 (526, 528): 1885 All W N 139; *Basdeo Mal* v. *Wanhaiya Lal,* 1921 All 361 (362): 43 All 101: 59 Ind Cas 667: 18 All L J 952; *Lal Khan* v. *Kashmiri Lal,* 1930 Lah 125 (126): 31 Pun L R 386: 124 Ind Cas 676.

(2) *Thakur Das* v. *Narain,* (1920) 56 Ind Cas 644 (645): 2 Lah L Jour 637.

(3) *Thammiraju* v. *Bapiraju,* (1889) 12 Mad 113 (114); *Thakur Das* v. *Narain,* (1920) 56

retract his resignation before it is accepted and acted upon by the Court; and an award made subsequent to such retraction is not invalid by reason of the original refusal to act.[4] Similarly, if the Court asks the arbitrator to reconsider his refusal or resignation and he thereupon agrees to act and proceeds to arbitrate, the award will not be invalid.[5]

A refusal on the part of the arbitrator to act can be implied from his conduct as, for instance, where he fails to submit the award within the time fixed.[6]

4. **Arbitrator becoming incapable of acting.**—When an arbitrator becomes incapable of acting by reason, for example, of illness, the Court can supersede the reference or appoint a new arbitrator.[1] The Court can act similarly when an umpire leaves British India and there is no evidence to show his intention to return at an early date.[2]

5. **Appointment of new arbitrator.**—Before the Court proceeds to make a new appointment under this Paragraph not only should one of the conditions mentioned in Cls. (*a*) and (*b*) happen, but the requirement as to the *notice* to the opposite party should also be fulfilled.[1] If the Court proceeds to make an appointment without such notice it acts with material irregularity.[2]

Where, however, the parties by *mutual agreement* make a change in the personal of the arbitrators without the intervention of the Court and carry on the arbitration proceedings the award is not invalid by reason of the omission to follow the procedure prescribed by this Paragraph. The reason is that the very foundation of arbitration proceedings is the consent of the parties and such consent will cure any defect in the matter of procedure.[3]

After notice is given to the opposite party as required, by sub-Para. (1) it is open to the parties themselves to appoint an arbitrator provided all the parties agree.[4] (Cf. the provisions of Para. 2, *supra*, and S. 8 of the Indian Arbitration Act, IX of 1899.) If the parties fail to make such appointment the Court can appoint the arbitrator after hearing the parties. But it is not bound to do so in all cases. It has a *discretion* either to appoint the arbitrator

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Ind Cas 644 (645): 2 Lah L Jour 637. *See also cases cited in point* (1), supra.

(4) *Joy Mungal Singh* v. *Mohun Ram*, (1875) 23 Suth W R 429 (431) P C; *Har Narain* v. *Bhagwant Kuar*, (1888) 10 All 137 (145): 1888 All W N 28; *G Grant and the Court of Wards* v. *Kunjahee Deo*, (1871) 15 Suth W R 38 (38): 6 Beng L R 652. See also *Ghissa* v. *Bhawani*, (1904) 1 All L J 683 (684).

(5) *Keshavalal* v. *Bai Laxmi*, 1929 Bom 50 (51): 52 Bom 568: 30 Bom L R 950: 112 Ind Cas 284; *Mahadeo Prasad* v. *Badri Das Ram Sarup*, 1928 All 740 (744): 26 All L J 1009: 110 Ind Cas 881: 50 All 955.

(6) *Narendra Nath Dey* v. *Brojeswari Dasi*, (1914) 23 Ind Cas 842 (843) Cal.

Note 4.

(1) *Bishen* v. *Bhag*, 1870 Pun Re No. 66; *Joseph* v. *Sreerkar*, Bourke O C 359.

(2) *Gadadhar* v. *Ganga Prasad*, (1870) 4 Beng L R 89.

Note 5.

(1) *Ram Lagan Tewari* v. *Phatagan Lohar*, 1928 All 674 (675); 1929 All L J 31: 111 Ind Cas 559; *Thakur Das* v. *Ram Das*, 1925 Lah 374 (375): 7 Lah L Jour 163: 88 Ind Cas 975: 26 Pun L R 476; *Hasan Bano Begum* v. *Wasi Ali Khan*, 1925 Oudh 361 (364): 12 Oudh L J 174: 2 Oudh W N 64: 86 Ind Cas 613 [Held the requirement as to notice is fulfilled having regard to the circumstances of this case]; *Jagannath Sahu* v. *Chedi Sahu*, 1929 All 144 (145): 1929 All L J 182: 115 Ind Cas 611: 51 All 501.

(2) *Poran Lal* v. *Rup Chand*, 1931 All 761 (762, 764): 53 All 778: 1931 All L J 682: *Abdul Ghani* v. *Dindayal*, (1919) 50 Ind Cas 655 (656): 41 All 578: 17 All L J 643.

(3) *Mahomed Sheikh* v. *Kankinarah & Co, Ltd*, 1924 Cal 665 (666): 28 Cal W N 634: 81 Ind Cas 574.

(4) *Chartaram* v. *Sajan Mal*, (1918) 48 Ind Cas 395 (396): 112 Pun Re 1918: 139 Pun L R 1918; *Sada Sook* v. *Shiva Dyal*, (1866) 1 Agra 109 [Refusal on the part of a party to nominate an arbitrator in the place of one, who refused to act does not amount to a withdrawal from the agreement to proceed to arbitration].

or to supersede the reference.[5] In making a new appointment the Court has no power to compel an unwilling party to pay remuneration to the arbitrator chosen by it especially where there is no provision for the same in the original reference.[6]

If a party does not object to the appointment by the Court of the nominee of the opposite party as arbitrator, but acquiesces in it by taking part in proceedings before him, he will be estopped from questioning the validity of the appointment later on when the award goes against him.[7]

6. **Appointment of an umpire.**—The power of the Court to appoint an umpire under this Para. is not unlimited; but is controlled and limited by the terms of the agreement between the parties as to what course is to be adopted if there is a difference of opinion among the arbitrators. Thus where the terms of the submission to arbitration were that an umpire should be selected from *out of seven persons named* therein and the umpire first chosen declined to act, it was held that the Court could not ignore the remaining six persons and appoint a stranger as an umpire, and that the award in such a case was not valid.[1]

7. **Order superseding arbitration.**—The Court cannot supersede the reference under this Paragraph unless the conditions prescribed herein are fulfilled.[1] Thus, an accusation of partiality against the arbitrator[2] or an allegation that an umpire has been tampered with[3] or the fact that one of the parties fails to pay his share of the remuneration fixed for the arbitrator[4] are not grounds for superseding the reference under this Paragraph.

The Court cannot *suo motu* supersede the reference without there being any application by the parties and without the procedure as to notice being complied with.[5] Nor can a mere agreement of the parties to refer the matter to a person other than the arbitrator already chosen have the effect of superseding the reference.[6]

Where the Court decides to supersede the reference, it is bound to proceed with the suit. Where there is no suit pending and the Court has discharged itself of the *Lis* by passing a final decree, it cannot supersede the reference. Thus, where the parties to a suit settled their disputes as to partition but agreed that the shares should be worked out and properties allotted by certain arbitrators and the Court passed a *decree* in pursuance of the settlement under S. 375 (now O. 23, R. 3) and subsequently one of the arbitra-

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(5) *Thakur Das* v. *Ram Das*, 1925 Lah 374 (375): 7 Lah L Jour 163: 88 Ind Cas 975: 26 Pun L R 476.

(6) *Jagannath Sahu* v. *Ohedi Sahu*, 1929 All 144 (145): 1929 All L J 182: 115 Ind Cas 611: 51 All 501.

(7) *Gajadhar* v. *Chunni Lal*, 1929 All 559 (560): 1929 All L J 868: 117 Ind Cas 844; *Harnam Singh* v. *Harnam Singh*, (1910) 8 Ind Cas 222 (223): 27 Pun L R 1910: 144 Pun W R 1910. See also *Suroop Ram* v. *Gobind Ram*, (1867) 7 Suth W R 13 (13).

Note 6.

(1) *Barracho* v. *De Souza*, (1871-74) 7 Mad H C R 72 (76).

Note 7.

(1) *Abdul Hamid* v. *Riyazuddin*, (1907) 4 All L J 691 (694): 30 All 32: 1907 All W N 278.

(2) *Kothandarama Aiyer* v. *Sivagnana Desikar*, (1901) 11 Mad L Jour 128 (129).

(3) *Kashmiri Das* v. *Mussamat Paras*, 1874 Pun Re No. 28.

(4) *Abdul Hamid* v. *Riyazuddin*, (1908) 30 All 32 (35): 4 All L J 691: 1907 All W N 278.

(5) *Budh Sen* v. *Nanakchand*, 1932 Oudh 151 (152): 7 Oudh W N 1043: 129 Ind Cas 162.

(6) *Jamna Kunwar* v. *Nasib Ali*, (1902) 24 All 312 (314): 1902 All W N 72.

Para. 5. Notes 7—8.

tors declined to act as an arbitrator, the Judicial Committee held that the Court could not supersede the reference and allot the shares. Their Lordships observed: "to proceed with the suit (to use the language of S. 510) was, in this case, in their Lordships' view, impossible" and referring to the decree they proceeded to say "it put an end to the suit and that was the very object of the compromise. The alternative in S. 510 is impossible because there is no suit now pending with which the Court can proceed. All that the Courts in India could do was to take advantage of the sections of the Code which enabled them to keep the machinery of arbitration going".[7]

Where an arbitration fails and the Court decides to supersede the reference, it ought not to dispose of the suit at once without fixing a date for its hearing and giving due notice thereof to the parties.[8] But the Court need not consider a second reference to arbitration when it decides to go on with the case.[9]

An order superseding an arbitration can be implied as where the arbitrators refuse to act and the Court proceeds to try the suit.[10]

8. **Revision.**—An order passed under this Paragraph is not appealable. But an omission to comply with the formalities prescribed by this Paragraph as to notice amounts to a *material irregularity* and can be revised.[1] An order superseding the arbitration or appointing a fresh arbitrator is an order deciding a "case" within the meaning of S. 115 of the Code.[2]

Para. 6, Note 1.

Powers of arbitrator or umpire appointed under Paragraph 4 or 5

P. 6. [S. 512.] Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

[1877—S. 512; 1859—S. 319.]

1. **Powers of an arbitrator.**—An arbitrator is not bound by the technical rules of the Court[1] but should act in accordance with the rules of equity, justice

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(7) *Sadik Hussain* v. *Kaniz Zohra Begam,* (1911) 12 Ind Cas 15 (17): 33 All 743: 38 Ind App 181: 15 Cal W N 1005: (1911) 2 Mad W N 132: 13 Bom L R 826: 21 Mad L Jour 1151: 14 Cal L Jour 313: 14 Oudh Cas 289: 8 All L J 1164: 10 Mad L Tim 173 P C.

(8) *Muddun Mohan* v. *Kanaye Dass,* (1895) 23 Suth W R 21 (21).

(9) *Mt Hasanbibi* v. *Talewarkhan,* (1891) 4 C P L R 105 (106).

(10) *Mangar Sahu* v. *Bhatoo Singh,* (1920) 57 Ind Cas 473 (476): 1 Pat L Tim 416: 5 Pat L Jour 672. See also *Kashibai* v. *Ram Krishna,* (1904) 1 All L J 257 (258) [Where the arbitrator does not file his award on the day fixed, and the plaintiff applies to withdraw the suit with liberty to bring another suit and the Court grants the application].

Note 8.

(1) *Jagannath Sahu* v. *Chedi Sahu,* 1929 All 144 (145): 1929 All L J 182: 115 Ind Cas 611: 51 All 501; *Poran Lal* v. *Rup Ohand,* 1931 All 761 (763): 53 All 778: 1931 All L J 682; *Abdul Ghani* v. *Dindayal,* (1919) 50 Ind Cas 655 (656): 41 All 578: 17 All L J 643; *Shib Dayal* v. *Ali Baksh and Sons,* 1926 Lah 505 (505): 94 Ind Cas 483.

(2) *Jagannath Sahu* v. *Ohedi Sahu,* 1929 All 144 (145): 1929 All L J 182: 115 Ind Cas 611: 51 All 501.

Schedule II, Para. 6—Note 1.

(1) *Reedoy* v. *Puddo Lochun,* (1864) 1 Suth W R 12 (13); *Purushotamdas* v. *Jeta Bhai Nagji,* (1912) 17 Ind Cas 33 (35): 1912 Mad W N 1076 [An arbitrator need not give reasons for his decision].

Para. 6, Note 1.

and good conscience.[2] Thus it has been held that he is not bound to follow the technical provisions of the Evidence Act and his decision cannot be challenged on the ground that he relied upon a document not admissible under that Act.[3] He can administer oath to a witness or party and a party can agree before him to be bound by the oath of the opposite party or witness.[4]

An arbitrator cannot, however, delegate his functions, as for instance, the appointment of an umpire when the order of reference does not authorise him to do so.[5] But there is nothing objectionable in his delegating functions which are purely of a ministerial character.[6]

Para. 7, Note 1.

Summoning witnesses and default.

P. 7. [S. 513.] (1) The Court shall issue the same processes to the parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any comtempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

[1877—S. 513; 1859—S. 317.]

Refusing to give evidence.—See Note 1, Pt. (5).

1. **Scope of the Paragraph.**—This Paragraph empowers the arbitrator to seek the assistance of the Court in the matter of summoning witnesses and enforcing their attendance. An arbitrator should notify the date of the hearing to the parties and he cannot take evidence in the absence of the parties and without their knowledge.[1] But where after notice either party fails to appear or notifies his withdrawal from the submission[2] he can proceed *ex parte*. An award passed *ex parte* cannot be set aside unless sufficient cause is shown for the non-appearance of the party.[3]

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(2) *Narasingh Narain Singh* v. *Ajodhya Prasad Singh*, (1912) 13 Ind Cas 118 (119): 16 Cal W N 256: 15 Cal L Jour 110.

(3) *Kaikobad* v. *Khambatta*, 1930 Lah 280 (282): 120 Ind Cas 494.

(4) *Bhagirath* v. *Ram Gulam*, (1882) 4 All 283 (288): 1882 All W N 34; *Muthukaruppa Kone* v. *Veerabhadra Kone*, (1915) 29 Ind Cas 49 (50): 2 Mad L W 320: 17 Mad L Tim 241.

But see *Wali-ulla* v. *Ghulam Ali*, (1875-78) 1 All 535 (537); *Lekhraj Singh* v. *Dhulhma Kuar*, (1882) 4 All 302 (304) [Agreement to be bound by the oath of a third person not assented to by all the parties—Held award on oath not valid].

(5) *Smith* v. *Ludha*, (1893) 17 Bom 129 (145): Chitty's S C C R 320; *Surubjeet* v. *Gouree*, (1867) 7 Suth W R 269 (270).

(6) *Buta* v. *Municipal Commissioner of Lahore*, (1902) 29 Cal 854 (868): 29 Ind App 168: 87 Pun Re 1902: 7 Cal W N 82: 4 Bom L R 678: 8 Sar. 327 P C; *Juggobundhu Saha* v. *Chand Mohan Saha*, (1915) 31 Ind Cas 38 (83, 84): 22 Cal L Jour 237.

Schedule II, Para. 7—Note 1.

(1) *Palavesam Chettiar* v. *Narayana Aiyar*, 1925 Mad 1086 (1087): 49 Mad L Jour 115: 1925 Mad W N 503: 88 Ind Cas 660.

(2) *Subraya Prabhu* v. *Manjunath*, (1906) 29 Mad 44 (45).

(3) *Firm Mothram Dowlatram* v. *Firm Mayadas Dowlatram*, 1925 Sind 150 (152): 78 Ind Cas 521: 19 Sind L R 251.

An arbitrator should take only such evidence as is required by the terms of the agreement referring the question in dispute to arbitration.[4]

The words "refusing to give evidence" in Cl. 2 refers to the case of a person who refuses to give evidence when placed on oath and is required to answer any question put to him and not to a case where a person elects not to produce any evidence.[5]

Extension of time for making award.

P. 8. [S. 514.] Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration, and in such case shall proceed with the suit.

[1877—S. 514; 1859—S. 318.]

Synopsis.

1. Legislative changes.
2. Award made out of time—See Notes to Paragraph 3, ante.
3. Extension of time.
4. Estoppel.
5. Or may make any order superseding the reference.
6. Appeal.

1. Legislative changes:—

1. The words "where the arbitrators or the umpire cannot complete the award" have been substituted for the words "if from the want of necessary evidence or information or from any other cause" which occurred in the corresponding S. 514 of the old Code. The effect of the alteration is that the scope of this Paragraph has been enlarged.

2. The words "either before or after the expiration of the period fixed" have been newly added after the words "from time to time". They give effect to the undermentioned decisions under the old Code[1] which held that the Court had power to extend the time for the making of an award even after the expiry of the time originally fixed.

2. Award made out of time.—*See* Notes to Para. 3, *ante.*

3. Extension of time.—The Court can extend the time fixed for making an award at any time *before the award is actually made* even though the time originally fixed may have expired at the time of such further extension.[1] But when once an award is made, the power of the Court to grant

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[4] *Krishna Kantha* v. *Bidya Sundaree,* (1869) 2 Beng L R App 25.

[5] *Janan* v. *Narain Das,* (1911) 11 Ind Cas 259 (260): 8 All L J 929.

Schedule II: Para. 8—Note 1.

[1] *Har Narain Singh* v. *Bhagwant Kuar,* (1888) 10 All 137 (143): 1888 All W N 28; *Mangal Singh* v. *Gobind Ram,* 1886 All W N 151 (152); *Suppu* v. *Govinda Charyar,* (1888) 11 Mad 85 (87); *Lakshminarasimham* v. *Somasundaram,* (1892) 15 Mad 384 (386): 2 Mad L Jour 45; *Anund Mohan* v. *Ram Kishen,* (1865) 2 Suth W R 297 (298).

Note 3.

[1] *Harnarain* v. *Bhagwant Kuar,* (1881) 10 All 137 (143): 1888 All W N 28; *Gopalaji Kallianji* v. *Chhaganlal Vithalji,* 1921 Bom 419 (421): 45 Bom 1071: 23 Bom L R 614: 63 Ind Cas 929. *Khan Singh* v. *Mohan Lal,* (1917) 34 Ind Cas 177 (178): 44 Pun W R 1916: 56 Pun L R 1917; *Ram Manohar Misr* v. *Lal Behari Misr,*

Para. 8, Notes 3—5.

further time under this Paragraph becomes spent and cannot be exercised thereafter.[2] Nor has the Court power under S. 148 of the Code to extend the time in such a case, for that section does not enable the Court to extend the time for the doing of any particular act when in truth and in fact the act has already been done.[3] Where, however, an award is simply signed but not announced to the parties or sent to Court, the award cannot be said to be finally made and complete, and an order of extension of time subsequent to such signing is not invalid.[4] On an application for extension of time under this Paragraph, the Court should, as has been seen in Note 5 to Para. 3 above, *itself*, fix the further time and cannot delegate the power to do so to the arbitrators.

An order of extension of time can be *implied* from the proceeding of the Court.[5] In the case cited below[6] it was held that an *oral* application for extension of time was not incompetent.

4. **Estoppel.**—As will be seen from the Notes to Para. 15, *infra*, an award passed out of time is not a *nullity* under the present Code. Consequently the parties may, in such cases, be estopped by their conduct from disputing the validity thereof.[1]

5. **Or may make an order superseding the reference.**—The Court has a discretion under this Paragraph either to extend the time fixed for the award or to supersede the reference. Thus, where the arbitrators are guilty of neglect in submitting their award in spite of several extensions of time, the Court can supersede the reference and proceed with the suit.[1] But the Court has no jurisdiction to deal with the suit and cannot dismiss it for default until and unless it supersedes the reference.[2] An order superseding the reference need not, however, be express. It can be implied from the procedure adopted by the Court.[3]

As already seen in Note 5 to Para. 3 above an award made within time but filed into Court later is not invalid, and the Court cannot supersede the reference in such a case.[4]

(1892) 14 All 343 (345): 1892 All W N 16; *Kupu Rau* v. *Venkataramayyar*, (1882) 4 Mad 311 (315): 6 Ind Jur 129.

(2) *Raja Har Narain Singh* v. *Chandarain Bhagwant Kuar*, (1891) 13 All 300 (304): 18 Ind App 55: 6 Sar 14: 15 Ind Jur 283 P C; *Kewal* v. *Baij Nath*, (1906) 2 Nag L R 81 (85); *Simson* v. *Venkatagopalan*, (1886) 9 Mad 475 (476); *Nusserwanjee Pestonji* v. *Meer Mynoodeen Khan*, (1854) 6 Moo Ind App 134 (161).

But see *Seth Utoomal Vasoomal* v. *Seth Haridas Asanand*, 4 Sind L R 26: 7 Ind Cas 595 (599). See also *Patto Kumari* v. *Upendra Nath*, (1919) 50 Ind Cas 52 (54): 4 Pat L Jour 265.

(3) *Shibkrishna* v. *Satish*, (1911) 12 Ind Cas 13 (14): 38 Cal 522.

(4) *Harbhajan Singh* v. *Mewa Singh*, 1928 Lah 753 (755): 110 Ind Cas 748.

(5) *Debri-ull-Din* v. *Amina Bibi*, 1925 Cal 475 (476): 78 Ind Cas 335 [On the date fixed for filing the award the Court ordered—"The arbitrators have not submitted their award. Issue *Takid* at once, fixing the 10th November, for hearing"—So, held, that the order may be taken as an order extending the time for filing the award].

(6) *Sakal Chand Moti* v. *Ambaram*, 1924 Bom 360 (380): 26 Bom L R 280: 80 Ind Cas 260 [Distinguishing 3 Mad 59].

Note 4.

(1) *Patoo Kumari* v. *Upendra Nath*, (1919) 50 Ind Cas 52 (54, 55): 4 Pat L Jour 265; *Kishen Lal* v. *Jai Lal*, (1919) 52 Ind Cas 352 (354, 355) Lah [Parties acquiescing in Court's order of extension cannot question the same].

Note 5.

(1) *Hrishikesh Das* v. *Mohan Das*, (1920) 57 Ind Cas 890 (892) Cal; *Jumna Kunwar* v. *Nasib Ali*, (1902) 24 All 312 (314): 1902 All W N 72.

(2) *See* Note 8 to Paragraph 8.

(3) *Chokkappa Mudaliar* v. *Ahmedullah Sahib*, (1913) 21 Ind Cas 558 (559): 14 Mad L Tim 388: 1913 Mad W N 863; *Manger Sahu* v. *Bhatoo Singh*, (1920) 57 Ind Cas 473 (476): 1 Pat L Tim 416: 5 Pat L Jour 672.

(4) *Lala* v. *Abdus Samed*, (1912) 17 Ind Cas 320 (321): 16 Oudh Cas 94.

Para. 8, Notes 5–6.

Where the Court supersedes the reference, it cannot straightaway dispose of the suit on the same day. It should fix a date for the hearing and give due notice of the same to the parties.[5] As to whether the Court has power to set aside an order superseding the reference, *see* the case cited below.[6]

6. **Appeal.**—An order superseding an arbitration where the award has not been completed within the period allowed by the Court is appealable under S. 104, sub-S. (1), Cl. (*a*).

Where umpire may arbitrate in lieu of arbitrators.

Para. 9, Note 1.

P. 9. [S. 515.] Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators,—

(*a*) if they have allowed the appointed time to expire without making an award, or

(*b*) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree.

[1877—S. 515; 1859—S. 318.]

1. **Umpire when empowered to arbitrate in liew of arbitrators.**—An umpire can enter on the reference and himself make the award only in two cases:—

(1) Where the arbitrators have allowed the appointed time to expire without making an award.

(2) When they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree.[1]

Thus, where one of several arbitrators absented himself from the arbitration proceedings and after the expiry of the time fixed for the award, the umpire approached the Court for direction, it was held that Cl. (*a*) applied to this case and the umpire was himself entitled to make an award.[2] An umpire is under no obligation to agree with one or others of the dissenting arbitrators or to confer with them, but is entitled to settle the matter in his own way according to what he thinks proper.[3] But where the *agreement of reference* provides that the umpire should agree with one or other of the sets of the dissenting arbitrators, an award by the umpire which agrees with neither of the two sets of arbitrators, is not valid.[4]

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(5) *Kundan Lal* v. *Chainu Lal*, (1910) 8 Ind Cas 876 (877, 878): 13 Oudh Cas 841; *Gopal Lal Mandel* v. *Suresh Chandra*, (1910) 8 Ind Cas 1107 (1108): 12 Cal L Jour 624; *Krishna Kishore* v. *Banwari Lal*, 1929 All 259 (259): 27 All L J 100: 113 Ind Cas 749.

(6) *Salle Singh* v. *Mullo Singh*, (1932) 138 Ind Cas 524 (524): 1932 All 656 [Held the Court cannot set aside the order—S. 151 does not apply].

Schedule II, Para. 9—Note 1.

(1) *Niaz Ahmad* v. *Abdul Hamid*, (1904) 1 All L J 29 (32): 1904 All W N 49.

(2) *Ram Lagan Tewari* v. *Phatangan Lohar*, 1928 All 674 (675): 1929 All L J 31: 111 Ind Cas 559.

(3) *Jumma* v. *Mubarik Khan*, (1915) 30 Ind Cas 87 (88): 55 Pun Re 1915: 167 Pun W R 1915: 50 Pun L R 1916.

(4) *Jannat Bibi* v. *Abdul Aziz*, (1887) 7 All W N 197 (197).

Para. 10,
Note 1.

P. 10. [S. 516.] Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.

Award to be signed and filed.

Synopsis.

1. Award to be signed.
2. Necessity of presence of arbitrators at meetings.
3. "Together with any depositions and documents."
4. Notice of the filing shall be given.
5. Delivery of the award.
6. Form of award.

Addition or alteration of award. See Note 1, Pts. (11) to (13).
Determination by some of the arbitrators. See Note 2, see also Note 1, Pt. (7).
Filing of award by arbitrator. See Note 5.
Oral award. See Note 1, Pt. (15).

1. **Award to be signed.**—An award embodies the decision of an arbitrator and must be *signed* by him[1] before it is filed into Court.[2] Where there are several arbitrators it is essential that all of them should sign the award.[3] Where, however, the parties agree to be bound by the decision of the majority, it is enough if the award is signed by the majority of the arbitrators.[4] An award made by more persons than those appointed is invalid[5] unless the parties acquiesce in the same.[6]

It is not necessary in the case of several arbitrators that all of them should sign the award at the *same time* and in the *same place*.[7] Where an award is duly signed the fact that it is not stamped[8] or that the fair copy of the award is not signed by all of them[9] would not affect the validity of the award. But where an arbitrator signs a blank paper before the decision is embodied in it, the award is not properly signed.[10]

Schedule II, Para. 10—Note 1.

(1) *Ramdas Sahu* v. *Judagi Lohar*, 1928 Pat 231 (232): 107 Ind Cas 532; *Nemichand Sowcar* v. *Kesarimull Sowcar*, 1929 Mad 31 (31): 56 Mad L Jour 35: 29 Mad L W 227: 114 Ind Cas 818.

(2) *Khudiram* v. *Chandi Charan*, (1916) 35 Ind Cas 358 (362): 1 Pat L Jour 306: 2 Pat L W 377 [Court cannot allow arbitrators to sign after filing]; *Ramesh Chandra* v. *Karunamoyi*, (1906) 33 Cal 498 (501).

(3) *Ayyasamy Mudaliar* v. *Appandai Nynan*, (1920) 54 Ind Cas 912 (913): 38 Mad L Jour 145 [41 Ind Cas 264 dissented from].

[But see *Mohamed Ali Adamji* v. *The Secretary of State for India in Council*, (1917) 41 Ind Cas 264 (266): 42 Bom 668: 19 Bom L R 618 [Reference to uneven number of valuers. There is a presumption that parties agree to abide by the majority decision].

(4) *Bhoj Nath* v. *Shiva Nandan*, 1930 Oudh 389 (392): 7 Oudh W N 541: 127 Ind Cas 254; *Ram Narain Ram* v. *Patti Ram Tewari*, (1916) 34 Ind Cas 105 (105): 1 Pat L Jour 90: 2 Pat L W 411; *Nasir Ali* v. *Tinoo*, (1866) 6 Suth W R 95 (95).

(5) *Phiran* v. *Bahoran*, (1875) 7 N W P 367.

(6) *Abdul Shakur* v. *Muhammad Yusuf*, 1921 All 64 (65): 43 All 456: 19 All L J 348: 62 Ind Cas 426.

(7) *Muthukutti* v. *Acha Bayakan*, (1895) 18 Mad 22 (23); *Manphool* v. *Sahi Ram*, (1918) 43 Ind Cas 154 (155) All; *Bhobosundari* v. *Makhun Lal*, (1872) 8 Beng L R 128; *Abdul Rahman* v. *Shaheb-Uddin*, (1920) 55 Ind Cas 883 (886, 888): 1 Lah 481: 85 Pun W R 1920.

But see *Joy Mungal*, Petitioner, (1869) 3 Beng L R A C 82: 11 Suth W R 433; *Bhagwan Das* v. *Shiv Dial*, (1913) 22 Ind Cas 811 (814): 92 Pun Re 1913: 109 Pun L R 1914.

(8) *Ramchand Gurdasmal* v. *Gobind Ram*, (1919) 53 Ind Cas 337 (337): 13 Sind L R 75.

(9) *Kula Nagabushanam* v. *Kula Seshachalam*, (1862-63) 1 Mad H C R 178 (180).

(10) *Benode Lal* v. *Pran Chandra*, (1911) 11 Ind Cas 893 (899): 14 Cal L Jour 148; *Benode Lal Pakrasy* v. *Pran Chander Pakrasy*, (1897) 2 Cal W N ccxciv (ccxcv).

When once an award is made the arbitrators become *functus officio* and they have no power to alter[11] or review[12] the award, unless the Court or the parties by consent, remit the matter to them for reconsideration.[13] In the case cited below[14] it was held that an arbitrator was justified in refusing to sign the award before it was engrossed on stamp paper, although he had signed the memorandum of award, on the ground that owing to some misunderstanding in the language his opinion had to be changed.

The provisions of this Paragraph apply only to a reference to arbitration *through the intervention of the Court,* and not to an award made on a private reference out of Court. The award in the latter case is not invalid by reason of the want of signature of the arbitrators.[15] The reason is that a private award can even be an *oral* one and an award in *writing* will not be less valid because it was not signed by the arbitrators.

The report of arbitrators embodying a compromise arrived at between the parties subsequent to the reference is not an award.[16]

2. Necessity of presence of arbitrators at meetings.—Where there are several arbitrators appointed, it is essential for the validity of the award that all of them should be *present* at all the meetings including the last, that witnesses should be examined in their presence and all of them should act together and give the award.[1] *See also* Note 2 to Para. 4, *ante*. But the absence of one of them at a meeting in which nothing material was done and no enquiry was made will not invalidate the award.[2]

3. "Together with any depositions and documents."—Though this paragraph contemplates the possibility of the depositions of witnesses being reduced to writing by the arbitrators, it does not oblige them to keep such a record.[1] The mere fact that an arbitrator has omitted to file along with his award the depositions of the witnesses examined by him or the documentary evidence filed before him will not justify the Court in holding on that ground that the award is invalid though it may lead to the conclusion that the arbi-

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(11) *Jaffri Begam* v. *Syed Ali,* (1901) 23 All 363 (392): 28 Ind App 111: 5 Cal W N 585: 11 Mad L Tim 149: 3 Bom L R 311: 8 Sar 27 P C [Entry made in schedule of property after award is no part of the award].

(12) *Amar Nath* v. *Ishar Singh,* (1917) 43 Ind Cas 350 (351) 99 Pun Re 1917: 178 Pun W R 1917.

(13) *Kisanchandra* v. *Ramlal,* (1919) 53 Ind Cas 992 (995). Nag.

(14) *Ramji Ram* v. *Salig Ram,* (1911) 11 Ind Cas 481 (487): 14 Cal L Jour 188.

(15) *Ram Bilas Singh* v. *Birich Singh,* 1932 Pat 60 (61): 12 Pat L Tim 733: 135 Ind Cas 516: 11 Pat 131; *Dandekar* v. *Dandekar,* (1881-1882) 6 Bom 663 (666); *Savalappa* v. *Devchand,* (1902) 26 Bom 132 (135): 3 Bom L R 691.

(16) *Shanker* v. *Govinda,* (1920) 54 Ind Cas 311 (313) Nag; *Ghulam Rasul* v. *Begum,* (1920) 55 Ind Cas 218 (220) Lah.

Note 2.

(1) *Mamidi Appayya* v. *Yedan Venkataswami,* (1918) 47 Ind Cas 597 (598): 8 Mad L W 171: 1918 Mad W N 477: 24 Mad L Tim 102; *Nandram* v. *Fakir Chand,* (1885) 7 All 528 (527): 1885 All W N 139; *Parmeshur* v. *Hari Naik,* (1875) 7 N W P 357; *Dwitiar Chand Mandal* v. *Dharanidhar Mandal,* 1929 Cal 831 (832); *Benode Lal* v. *Pran Chandra,* (1911) 11 Ind Cas 898 (899): 14 Cal L Jour 143; *Rash Beharee* v. *Doorgabur,* (1870) 14 Suth W R 211 (212); *Joy Mungul Singh* v. *Mohun Ram,* (1875) 23 Suth W R 429 (430); *Sankata Prasad* v. *Jagannath,* 1922 Oudh 276 (277): 9 Oudh L J 410: 26 Oudh Cas 1: 69 Ind Cas 714: *Lekha Singh* v. *Bodil Singh,* (1915) 30 Ind Cas 384 (384): 2 Oudh L J 365.

(2) *Varanasi Ramanna* v. *Kilamsetti Appanna,* (1921) 60 Ind Cas 181 (182): 12 Mad L W 505.

Note 3.

(1) *Sompat* v. *Kisan,* 1929 Nag 264 (265): 119 Ind Cas 694: 26 Nag L R 168.

Para. 10, Notes 3--5.

trator has not acted in accordance with law and is guilty of misconduct as stated in Para. 15.[2]

An arbitrator should not permit the removal of documents entrusted to him and forming part of the record.[3] He should return them to the Court. The Court can also call upon him to give up the same to the Court when his right to keep them as arbitrator has come to an end.[4]

4. **Notice of the filing shall be given.**—The provisions of this Paragraph are *mandatory* and the Court is bound to give notice of the filing of the award to the parties.[1] Under Article 158 of the Limitation Act, the parties are enitled to ten days time for filing their objections to the award and such period is to be computed from the date on which the notice is given.[2] The omission to give notice is a *material irregularity* and affords a ground for interference by the High Court in revision.[3] If a decree is passed in terms of the award without the notice required by this paragraph to be given, the decree is bad and is liable to be set aside.[4]

There is a conflict of opinion as to whether a *formal* notice under this paragraph is necessary where the parties are made aware of the filing of the award without such formal notice. In the undermentioned cases[5] it has been held that where the parties are made aware of the filing of the award, the absence of a formal notice would not vitiate the proceedings. A contrary view, namely, that a *formal* notice under this paragraph is necessary and knowledge *aliunde* is not sufficient has been taken in the following decisions.[6]

5. **Delivery of the award.**—An award should be filed into the Court and then only the Court can proceed further and pass a decree.[1] But the

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(2) *Yusuf Khan* v. *Riyasat Ali*, 1926 Oudh 307 (308, 309): 3 Oudh W N 284: 93 Ind Cas 677: 13 Oudh L J 224.

(3) *Joy Mungal Singh* v. *Mohan Ram*, (1872) 8 Beng L R 319 (Note): 8 Beng L R 130 (Note): 12 Suth W R 397.

(4) *Nursing Chander Dawn* v. *Nuffer Chander Dutt*, (1890) 17 Cal 832 (839).

Note 4.

(1) *Muhammad Husain* v. *Laltu*, (1912) 17 Ind Cas 430 (430): 15 Oudh Cas 294.

(2) *Sitaram* v. *Rup Ram*, (1917) 42 Ind Cas 266 (268): 13 Nag L R 172; *Sahib Rai* v. *Chait Ram*, (1915) 28 Ind Cas 427 (427): 96 Pun L R 1915: 30 Pun W R 1915; *Jawahir Singh* v. *Meher Singh*, (1916) 34 Ind Cas 250 (251): 14 Pun W R 1916; *Sm. Nobin Kally Dabee* v. *Ambica Churn*, (1901) 5 Cal W N 813 (815); *Rudraji Soorapparaju* v. *Narayanaraju*, (1912) 17 Ind Cas 431 (431): 1912 Mad W N 1232: 12 Mad L Tim 608; *Ravibhai Kashibhai* v. *Dahyabhai*, 1921 Bom 32 (32): 45 Bom 832: 59 Ind Cas 811: 22 Bom L R 1454; *Rangiah Chetty* v. *Govindasami*, 1922 Mad 179 (179): 15 Mad L W 160: 71 Ind Cas 266: 1921 Mad W N 793; *Sona Chand Bhutoria* v. *Hurry Bux Deora*, (1919) 53 Ind Cas 46 (47): 46 Cal 721: 23 Cal W N 280; *Sohamari* v. *Chattaram*, (1914) 23 Ind Cas 591 (592): 69 Pun L R 1914: 27 Pun W R 1914 [Where parties have accepted the award no time for objections need be allowed].

(3) *Rangasami* v. *Muthusami*, (1888) 11 Mad 144 (145): *Baij Nath* v. *Narain*, 1927 All 614 (615): 102 Ind Cas 608: 25 All L J 787; *Ranjit Chandra Talukdar* v. *Bissay Ram Mandal*, 1926 Cal 1018 (1019): 94 Ind Cas 115; *Gopi Nath* v. *Naresh Chandra*, (1921) 63 Ind Cas 243 (243) Cal; *Ma Shire* v. *Maung Tok Tho*, (1877-1901) 2 U B R 24.

(4) *Sohan Lal* v. *Munna Lal*, 1921 Oudh 154 (154): 24 Oudh Cas 263: 8 Oudh L J 280: 62 Ind Cas 849; *Mani Ram* v. *Ram Asray*, 1921 Oudh 148 (148): 24 Oudh Cas 234: 8 Oudh L J 626: 64 Ind Cas 90; *Ram Kumar* v. *Khushal Chand Ganeshdas*, 1928 Nag 166 (167, 168): 107 Ind Cas 668.

(5) *Saroj Bala Bose* v. *Jatindra Nath Bose*, 1927 Cal 619 (621): 45 Cal L Jour 458: 103 Ind Cas 625; *Valchand* v. *Gulba*, 1926 Bom 312 (312): 28 Bom L R 511: 95 Ind Cas 547 [Parties themselves bringing the award into Court. Held sufficient notice]; *Ghulam Mustafa* v. *Halima Bibi*, (1913) 21 Ind Cas 298 (301): 310 Pun L R 1913: 176 Pun W R 1913; *Bhola Nath Ray* v. *Batta Krishta Ray*, 1927 Pat 135 (139): 1926 Pat H C C 161: 7 Pat L Tim 739: 95 Ind Cas 321 [Held there was a waiver of the right to notice].

(6) *Chaturbhuj* v. *Ganesh*, (1898) 20 All 474 (475): 1898 All W N 132; *Gurditta Mal* v. *Firm of Basanta Mal Pannalal*, 1925 Lah 619 (619): 89 Ind Cas 240; *Punoo Ram* v. *Nebh Raj*, 1930 Lah 228 (229): 119 Ind Cas 331.

Note 5.

(1) *Himutoollah* v. *Heerun*, (1870) 13 Suth W R 62 (62).

Para. 10, Notes 5—6.

filing of the award need not be personally made by the arbitrator. It can be handed over to the parties who may file it into Court.[2] It is, however, necessary that the *arbitrator* should cause the award to be filed into Court. Where an award reached the Court mysteriously by the post and none of the arbitrators took the responsibility of saying who caused the same to be sent, it was held that the Court could not act upon the award.[3]

The act of an arbitrator in handing over an award to the proper officer of the Court for the purpose of being filed is not an application within the meaning of Article 178 of the Limitation Act. Hence, the Article does not apply to the delivery of an award by an arbitrator to the Court.[4]

6. **Form of award.**—For form of award *see* Appendix to this Schedule, Form No. 5. *See also* the undermentioned case.[1]

Para. 11, Note 1.

Statement of special case by arbitrators or umpire.

P. **11.** [S. 517.] Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order, such opinion to be added to and to form part of the award.

[1877—S. 517; 1859—S. 321.]

Synopsis.

1. **Special case.**	2 **Appeal.**

1. **Special case.**—This paragraph is intended to provide for cases where any difficult and complicated questions of law arise for consideration before the arbitrators and they require the help of the Court to enable them to complete the award.[1] Though this paragraph does not expressly state that the special case should relate only to a question of law, yet sufficient indication as to the scope of this paragraph is given by the form prescribed (Form No. 4 of Appendix to this Schedule) which expressly mentions only questions of law.[2] But there is nothing objectionable in the Court's helping the arbitrators with advice and orders when they come to it in a difficulty.[3]

Where a special case is submitted to the opinion of the Court and the Court completes the award by deciding the special case it is bound to give the

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(2) *Jagatsundari* v. *Sanatan,* (1870) 6 Beng L Rep 357 [The proceedings and depositions ought not to be handed over to parties].

(3) *Ram Narain Rai* v. *Dalji Rai,* 1929 Pat 178 (179): 118 Ind Cas 606.

(4) *Roberts* v. *Harrison,* (1881) 7 Cal 333 (337): 9 Cal L Rep 209.

Note 6.

(1) *Ma Thet Tin* v. *Ma Saw Kin,* (1902-1903) U B R Vol II, Arbitration, P. 1 [Where arbitrators resolve the award to be in the form of a document, it is only that document which is award].

Schedule II, Para. 11—Note 1.

(1) *Sree Lal Mangtulal* v. *Madan,* 1925 Cal 599 (603): 52 Cal 100: 88 Ind Cas 49.

(2) *Lakshman Baburao Sonar* v. *Ramachandra Raja Ram Sonar,* 1925 Bom 22 (23, 24): 26 Bom L R 836: 48 Bom 663: 84 Ind Cas 378.

(3) *Kanhia Lal* v. *Narain Singh,* (1915) 31 Ind Cas 700 (702): 28 Pun Re 1916: 11 Pun W R 1916.

Para. 11, Notes 1—2.

parties an opportunity of objecting to the award before a judgment is pronounced upon it.[4]

A charge of misconduct against the umpire cannot be strengthened from the mere fact that, in the exercise of his *discretion*, he refused to state a special case for the opinion of the Court.[5] As to the form of special case in general, *see* O. 36, *ante*.

2. **Appeal.**—Under S. 104, sub-S. (1), Cl. (*b*) an order on an award stated in the form of a special case is appealable. Where an agreement of reference provided that in case of disagreement between the arbitrators, the matter in difference should be referred to the umpire who should make the award, and the arbitrators who differed on a question of law, without referring the matter to the umpire, referred it to the opinion of the Court, it was held that the order of the Court was not an order on an *award* stated in the form of a special case and was not therefore appealable.[1]

Para. 12, Note 1.

Power to modify or correct award.

P. 12. [S. 518.] The Court may, by order, modify or correct an award,—

(*a*) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(*c*) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

[1877—S. 518; 1859—S. 322.]

Synopsis.

1. **Power of Court to modify an award.**
2. **"Part of the award is upon a matter not referred to arbitration."**
3. **Award imperfect in form or containing an obvious error, Cl. (b).**
4. **Clerical mistake: Cl. (1).**
5. **Power of an arbitrator to set aside gift deed conditional on payment of compensation.**
6. **Limitation.**
7. **Appeal.**
8. **Presidency Small Cause Court.**

1. **Power of Court to modify an award.**—The general principle is that the parties having by consent substituted a *forum domesticum* of their own choice, they are bound by its decisions on questions of fact and law, however, erroneous they may be, and the Court has no power to alter or vary the

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(4) *Lakshman Babu Rao* v. *Ramachandra*, 1925 Bom 22 (25): 26 Bom L R 886: 48 Bom 668: 84 Ind Cas 378.

(5) *Louis Dreyfus & Co* v. *Arunachalla Ayya*, 1931 P C 289 (293): 8 Oudh W N 1066: 35 Cal W N 1287: 58 Ind App 381: 1931 All L J 1116: 33 Bom L R 1536: 54 Cal L Jour 372: 61 Mad L Jour 623: 34 Mad L W 676: 134 Ind Cas 1080 P C.

Note 2.

(1) *Purshotham Das* v. *Ramgopal*, (1910) 8 Ind Cas 171 (174): 35 Bom 186: 12 Bom L R 852.

Para. 12, Notes 1—2.

award except in the limited manner prescribed by this paragraph.[1] Where a dispute is referred to arbitration and the arbitrators are empowered to decide upon all the points involved in it, the arbitrators have full power not only to fix the liability between the parties but also the manner in which such liability is to be discharged. Thus the arbitrators can order the amount due to the plaintiff to be paid by instalments, and the Court cannot interfere with such a direction in the award.[2] Nor can the Court add a direction of its own to the award.[3] It is well settled that a Court acts without jurisdiction if it modifies an award because it takes a different view from that held by the arbitrators.[4]

Where the Court modifies an award under this paragraph, it is the modified award and not the original award with which the decree should accord.[5]

The provisions of this paragraph apply only to an award made *through the intervention of the Court;* the Court has no power under this paragraph to modify or correct an award made on a private reference out of Court.[6]

2. **"Part of the award is upon a matter not referred to arbitration."**— An award should be made with reference to the points in dispute referred to them by the parties. Where the award decides matters extraneous to the reference, the award is not valid unless that portion which is in excess can be separated from the rest and does not affect the decision on the matter referred to. In the latter case, the Court can under Cl. (*a*) give effect to the valid portion of the award ignoring the rest.[1] Where no separation is possible, the Court can remit the award to the arbitrators for reconsideration under Para. 14 and if they fail to reconsider it the award becomes void by virtue of Para. 15.

Schedule II, Para. 12—Note 1.

(1) *Kaikabad* v. *Khambatta,* 1930 Lah 26 (31): 124 Ind Cas 339: 11 Lah 342: 31 Pun L R 668; *Nanak Chand* v. *Ram Kishen,* (1933) 141 Ind Cas 72 (73): 1933 Lah 139; *Nanak Chand* v. *Ram Kishen,* 1933 Lah 139 (140): 141 Ind Cas 72: 34 Pun L R 34 [Power to modify award is limited by Cls. (*a*), (*b*) and (*c*) of this Paragraph].

But see *Ram Kurn* v. *Zahira,* 1868 Pun Re No. 101. See also *Baij Nath* v. *Dhani Ram,* 1929 All 747 (748): 1929 All L J 808: 117 Ind Cas 610: 51 All 903 [Judge constituted arbitrator—Award such that if it was by another person Court would have to remit it for reconsideration —Judge can amend it].

(2) *Ram Surup* v. *Bindra Prasad,* (1909) 1 Ind Cas 328 (329): 12 Oudh Cas 23; *Kaikabad* v. *Khambatta,* 1930 Lah 26 (31): 124 Ind Cas 339: 11 Lah 342: 31 Pun L R 668; *Jawahar Singh* v. *Mulraj,* (1886) 8 All 449 (451): 1886 All W N 210. See also *Jaharmal Debi Dutta* v. *Birinchi Bhusan Nandi,* (1920) 56 Ind Cas 941 (944) All [Arbitrator has power to award interest].

(3) *Kaikabad* v. *Khambatta,* 1930 Lah 26 (32): 124 Ind Cas 339: 11 Lah 342: 31 Pun L R 668 [The Court can't give a relief as to easement right on the ground that it was omitted in the award].

(4) *Mahendra Nath Kundu* v. *Suresh Chandra Pramanik,* 1925 Cal 332 (333): 80 Ind Cas 10; *Aftab Begum* v. *Haji Abdul,* 1924 All 800 (800): 22 All L J 816: 81 Ind Cas 525; *Parma Dat* v. *Bipju,* (1916) 35 Ind Cas 887 (888): 78 Pun Re 1916: 124 Pun W R 1916: 40 Pun L R 1917; *Jan Mahomed* v. *Haji Mukhi Gazi,* 1925 Sind 89 (90): 78 Ind Cas 60.

(5) *Nanak Chand* v. *Rami Kishan,* (1933) 141 Ind Cas 72 (73): 1933 Lah 139; *Mazhar Ali* v. *Fateh Din,* 1930 Lah 219 (220): 120 Ind Cas 673: 31 Pun L R 837; *Kalu* v. *Khair Din,* 1906 Pun Re No. 18: 83 Pun L R 1906: 45 Pun W R 1906; *Hyder Sahib* v. *Giria Chettiar,* (1913) 19 Ind Cas 496 (496): 24 Mad L Jour 483: 1913 Mad W N 338: 13 Mad L Tim 349.

(6) *Nga Tok* v. *Nga Kasim,* (1912) 14 Ind Cas 978 (978): 5 Bur L Tim 55; *Fazal Ahmad* v. *Enayat,* 1922 Oudh 189 (190, 191): 29 Oudh Cas 213: 9 Oudh L J 219: 68 Ind Cas 209; *Ma Chaung* v. *Ma Aing,* (1897-1901) U B R II 297; *Mahomed Afzul* v. *Abdul Hamid,* 1925 Lah 570 (570): 7 Lah L Jour 468: 88 Ind Cas 161: 26 Pun L R 706; *Ahmed* v. *Essa,* (1893) 17 Bom 657 (661); *Yegna Rama Dikshadar* v. *Gopala Pattar,* (1918) 47 Ind Cas 548: 1918 M W N 595: 8 Mad L W 357 F B. See, however, *Thakar Das* v. *Ram Das,* (1914) 23 Ind Cas 950 (951): 13 P W R 1914: 114 Pun L R 1914 [A clerical error in the award can be set right by amending the decree on the award under S. 151].

Note 2.

(1) *Amir Begam* v. *Badruddin,* 1914 P C 105 (106): 36 All 336: 17 Oudh Cas 120: 12 All L J 537: 16 Bom L R 413: 19 Cal L Jour

Para. 12, Notes 3—5.

3. **Award imperfect in form or containing an obvious error. Cl. (b).**—The Court can rectify an *obvious error* in the award. Thus where an issue as to whether a particular property was endowed property and whether it was partible or not was referred to arbitration, and the arbitrators decided that the property was not an endowed one but nevertheless declared that it should not be partitioned, it was held that there was an obvious error in the award and that the Court could amend the direction that the property should remain impartible.[1]

The provisions of this clause can be invoked only if the imperfection in form exists in the award at the time when it is filed in Court, and not where it comes into existence at a subsequent stage on the happening of an unanticipated event.[2]

4. **Clerical mistake. Cl. (c).**—As in the case of decrees the Court has power under this paragraph to correct clerical mistakes and errors arising from accidental slips or omissions.[1] But the Court has no power to go into the merits and award a sum different from that awarded by the arbitrators, on the ground that the calculation then made was wrong.[2] The Chief Court of Oudh[3] has held that the Court can, under this paragraph, as also under its inherent powers amend a clerical slip in the award even after a decree is passed in terms of the award.

5. **Power of an arbitrator to set aside gift deed conditional on payment of compensation.**—Where the parties to a suit agree to refer their disputes in relation to a deed of gift to arbitration, and the terms of the reference do not contain any limitation as regards the powers of the arbitrators, an award by the arbitrators setting aside the deed of gift upon payment of compensation to the plaintiff and directing the defendant to remain in possession until the amount is paid is perfectly valid. The Court has no

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494: 18 Cal W N 755: 27 Mad L Jour 181: 16 Mad L Tim 35: 1 Mad L W 1015: 1914 Mad W N 472: 1 Oudh L J 249: 23 Ind Cas 625 P C; *Buta* v. *Municipal Committee of Lahore,* 1902 Pun Re No. 87: 29 Ind App 168: 29 Cal 854: 7 Cal W N 82: 4 Bom L R 673: 8 Sar 327 P C; *Mumtaz Ali* v. *Farhat Ali,* (1900) 23 All 394 (404, 405): 28 Ind App 190: 5 Cal W N 881: 8 Sar 85 P C; *Luchmee* v. *Pyle,* (1870) 2 N W P 150; *Juggobundhu* v. *Chand Mohan,* (1915) 31 Ind Cas 33 (34): 22 Cal L Jour 237; *Hurmukhroy Ram Chunder* v. *Japan Cotton Trading Co, Ltd,* 1922 Cal 399 (400): 66 Ind Cas 342: 34 Cal L Jour 253; *Nilmoni Pal* v. *Dakshineswar Pal,* 1932 Cal 713 (714): 138 Ind Cas 848: 36 Cal W N 1069; *Krishna Kanta* v. *Bidya Sundari,* (1868) 2 Beng L R App 25: *Moshahel Singh* v. *Konamutty,* (1871) 15 Suth W R 172 (173): *Raghoo Nundun* v. *Bunwaree,* (1865) 3 Suth W R Mis 27 (27): *Hanu Ram* v. *Dhanna Singh Diwan Singh,* 1928 Lah 915 (916): 110 Ind Cas 401; *Miran Bakeh* v. *Rahim Baksh,* 1892 Pun Re No. 18; *Raghunath Sukul* v. *Ram Rup Raut,* 1924 Pat 33 (35): 3 Pat 777: 1923 Pat H C C 225: 2 Pat L R (Civ) 76: 76 Ind Cas 2: 5 Pat L Tim 239.

Note 3.

(1) *Jani Durlabh Shankarji* v. *Jani Lalja Shankarji,* (1909) 2 Ind Cas 858 (858) All.

(2) *Kaikabad* v. *Khambatta,* 1930 Lah 26 (31): 124 Ind Cas 339: 11 Lah 842: 31 Pun L R 668.

Note 4.

(1) *Hyder Saheb* v. *Giria Chettiar,* (1913) 19 Ind Cas 496 (496): 24 Mad L Jour 483: 1913 Mad W N 338: 13 Mad L Tim 349; *Gopal Dinkar Nagarkar* v. *Ganesh Narayan,* 1921 Bom 191 (193): 45 Bom 512: 59 Ind Cas 785: 22 Bom L R 1416; *Har Prasad* v. *Raghubar Dayal,* 1924 All 62 (62): 45 All 628: 21 All L J 541: 4 L R All (Civ) 553: 74 Ind Cas 817 [Apparent inconsistencies such as a flat contradiction in measurement can be amended].

(2) *Gopal* v. *Ganesh,* 1921 Bom 191 (193): 45 Bom 512: 59 Ind Cas 785: 22 Bom L R 1416; *Lukshiminarayanappa* v. *Batchayya,* 1927 Mad 720 (721): 53 Mad L Jour 38: 1927 Mad W N 242: 103 Ind Cas 829; *Shiam Lal* v. *Parshottam,* (1920) 58 Ind Cas 585 (589): 42 All 277: 18 All L J 241 [Arithmetical error is no ground for setting aside award under Para. 15].

(3) *Mohamed Mumtaz Ali Khan* v. *Syed Mohamed Saadat Ali Khan,* 1932 Oudh 293 (296): 9 Oudh W N 803: 140 Ind Cas 412.

Para. 12, Notes 6—8.

power under this paragraph to interfere with the direction so contained in the award.[1]

6. **Limitation.**—No specific provision is made in the Limitation Act for an application to modify or correct an award under this paragraph. The ten days period prescribed by Article 158 of the Limitation Act does not apply to an application under this paragraph.[1]

In the undermentioned case[2] it has been held that even a *formal application* by a party is not necessary.

7. **Appeal.**—By virtue of S. 104, sub-S. (1) Cl. (*a*) an appeal lies from an order modifying or correcting an award.

8. **Presidency Small Cause Courts.**—An order of a single Judge of the Presidency Small Cause Court modifying an award under this paragraph is not a decree passed on an award, and an application to the Full Bench under S. 38 of the Presidency Small Cause Courts Act is competent.[1]

Para. 13, Note 1.

Order as to costs of arbitration.

P. **13.** [S. 519.] The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Synopsis.

1. Power of an arbitrator to award costs. **2. Award of costs by the Court.**

1. **Power of an arbitrator to award costs.**—An arbitrator is empowered to deal with the question of costs when it is included in the reference[1] or where all the questions involved in the suit are referred to him.[2] But where only some of the issues arising in the case are the subject of reference and the question of costs is not one of them, the arbitrator has no power to award costs.[3] If he nevertheless makes an order as to costs the award is not invalid if the remainder of the award remains unaffected by the order as to costs. In such a case the Court can proceed under Cl. (*a*) of the last paragraph.[4]

As to the remuneration of the arbitrators, *see* the cases cited below.[5]

Note 5.

(1) *Ganesh Singh* v. *Bhikham Singh*, 1928 Oudh 1 (7): 4 Oudh W N 1085: 107 Ind Cas 548: 3 Luck 1 F B.

Note 6.

(1) *Hyder Sahib* v. *Giriya Chettiar*, (1913) 19 Ind Cas 496 (496): 24 Mad L Jour 483: 1918 Mad W N 338: 13 Mad L Tim 349; *Mamidi Appayya* v. *Vedan Venkataswamy*, (1918) 47 Ind Cas 597 (598): 8 Mad L W 171: 1918 Mad W N 477: 24 Mad L Tim 102.

(2) *Hyder Saheb* v. *Giria Chettiar*, (1913) 19 Ind Cas 496 (496): 24 Mad L Jour 483: 1913 Mad W N 338: 13 Mad L Tim 349.

Note 8.

(1) *Munisamy Chetti* v. *Subbarayachari*, 1926 Mad 878 (879): 24 Mad L W 66: 95 Ind Cas 442: 1926 Mad W N 772: 51 Mad L Jour 498.

Schedule II, Para. 13—Note 1.

(1) *Barrut Chunder* v. *Damgee*, Bourke O. C. 7 Cor 150.

(2) *Dharn* v. *Dilaar Khan*, (1918) 46 Ind Cas 182 (184) Nag; *Mohan Lal* v. *Nathuram*, (1868) 1 Beng L R O C 144; *Mudoosoodun* v. *Koylas Chunder*, 2 Ind Jur N S 12.

(3) *Hargolal* v. *Kartar Singh*, 1888 Pun Re No. 91.

(4) *Mohendra Nath Das* v. *Mohi Lal Koley*, (1918) 43 Ind Cas 770 (772): 27 Cal L Jour 104; *Dagusa Tilakchand* v. *Bhukan Govind Shet*, (1885) 9 Bom 82 (86); *Lang* v. *Holland*, (1915) 27 Ind Cas 526 (526): 8 Sind L R 136 [Held the direction as to costs is nothing more than a recommendation].

(5) *Thadomol* v. *Menhraj*, 1930 Sind 190 (192): 123 Ind Cas 694 [Fees fixed not forming part of the award—Award not invalid. But Court may reduce amount]; In the matter of *Mr Cyril Kirkpatrick*, 1897 Pun Re No. 22 [Arbitrator can refuse to deliver award until his charges are paid]; *Steel* v. *Roberts*, (1881) 6 Cal 809 (810): 8 Cal L Rep 439 [But the Court has no power to sanction an order passed by the arbitrators to

Para. 13, Note 2.

2. **Award of costs by the Court.**—Where the award does not make provision for costs it is open to the Court to make an order as to costs under this paragraph.[1] In the undermentioned case[2] where all the matters in dispute in a suit were referred to arbitration, and the award did not deal with the question of costs, the High Court of Allahabad has held that the Court could not, under this paragraph award costs incurred up to the date of the reference but could only award the costs incurred subsequent thereto.

Para. 14, Notes 1—2.

Where award or matter referred to arbitration may be remitted

P. **14.** [S. 520.] The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

(*a*) where the award has left undetermined any of the matters referred to arbitration,[3] or where it determines any matter not referred to arbitration,[4] unless such matter can be separated without affecting the determination of the matters referred;

(*b*) where the award is so indefinite as to be incapable of execution;[5]

(*c*) where an objection to the legality of the award is apparent upon the face of it.[6]

[1877—S. 520; 1859—S. 323.]

Synopsis.

1. Legislative changes.
2. Scope of the Paragraph.
3. Award leaving undetermined any of the matters referred to arbitration.
4. Award determining matter not referred to arbitration.
5. "Where the award is so indefinite as to be incapable of execution."
6. Where an objection to the legality of the award is apparent upon the face of it.
7. Remittal of private awards.
8. Limitation.
9. Appeal.
10. Revision.
11. Arbitration under other Acts.

Remittal of award in part. See Note 2, Pts. (3) to (5).

1. **Legislative Changes**:—

The words "unless such matter can be separated without affecting the determination of the matters referred" in Cl. (*a*) have been newly added.

2. **Scope of the Paragraph.**—Paragraph 12, *ante*, enables the Court to modify or correct an award under certain circumstances. This paragraph empowers the Court to remit the award to the *arbitrator himself* for recon-

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whom a matter has been referred, making the payment of their fees a condition precedent to their hearing the reference].

Note 2.

(1) *Ram Charan* v. *Jasoda*, 1930 Oudh 89 (89): 7 Oudh W N 97: 126 Ind Cas 508; *Gurdinomal* v. *Wadhumal*, (1913) 19 Ind Cas 611 (611): 6 Sind L R 226 [Court can award arbitration fees as costs where it is silent]; *Wilson* v. *Jagmaunir Das Baldeo Singh*, (1919) 52 Ind Cas 653 (653): 17 All L J 1053 [Omission of Court to fix the "fee before preparation" of the decree does not prevent the Court from fixing it later].

(2) *Hira* v. *Gaya*, 1932 All 183 (184): 1931 All L J 1155: 136 Ind Cas 789: 54 All 123.

Para. 14, Notes 2—3.

sideration where there are omissions or defects therein which are such as cannot be modified or corrected by the Court itself under Paragraph 12.[1] The Court is, however, confined to the specific grounds mentioned in this paragraph and has no power to remit an award on other grounds.[2]

There is a difference of opinion as to whether the Court can remit the award in *part* only and treat the award as to the other part as final. According to the High Court of Allahabad there is no provision in the Code by which a portion of an award only may be remitted.[3] "It is impossible to say for any person who is not the arbitrator, how the arbitrator proceeded to frame his award. It may be that the portion objected to has an intimate connection with the portion which is not objected to. The arbitrators, therefore, must be given a free hand to recast the award".[4] The Judicial Commissioner's Court of Sind has held that where an award is bad as to a part only and is sent back as to that alone, the arbitrator is *functus officio* as to the good parts and cannot alter his judgment as to them.[5] It is submitted, that the former view is correct. When the Court decides to remit the award under this paragraph, it is not final[6] and so long as it is not final and is in the hands of the arbitrator, it can be altered by him.[6-a]

The Court has a *discretion* to remit or not to remit an award.[7] Thus, where there is any circumstance in the position of the arbitrator such which tends to produce a bias in his mind, the Court will in its discretion, refuse to remit the award to the arbitrator for reconsideration.[8]

3. **Award leaving undetermined any of the matters referred to arbitration.**—Where the arbitrators have not, in their award, decided any matter referred to them, the Court may, under Cl. (*a*), remit the award for reconsideration.[1] "The ground upon which an award which does not dispose of all the matters referred has been held to be invalid appears to be that

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Schedule II, Para. 14—Note 2.

(1) *Mohun Kishen* v. *Bhoobun*, (1867) 7 Suth W R 406 (406, 407).

(2) *Abdul Rahman* v. *Yar Muhammad*, (1881) 3 All 636 (642): 1881 All W N 34; *Badruddin Hasan* v. *Amir Begam*, (1912) 13 Ind Cas 520 (523): 14 Oudh Cas 308; *Tallapragada Suryanaraina* v. *Tallapragada Sarabaya*, (1911) 9 Ind Cas 173 (178): 21 Mad L Jour 263: (1911) 1 Mad W N 151: 9 Mad L Tim 251 F B [Alleged defect in the tribunal which gave the award is no ground for remitting it]; *Palut Bhagat* v. *Monohur Bhagut*, (1883) 13 Cal L Rep 171 (175) [An objection by a party that he did not agree to the terms of the reference is not a ground under this Para.]; *Annamalai* v. *Ramaswamy*, (1916) 33 Ind Cas 67 (68): (1916) 1 Mad W N 208: 19 Mad L Tim 228 [The fact that the obligations imposed under the award have been performed between the date of the award and the date of the application to file it, is no ground]; *Venusamy Gavaramma* v. *Chilukuri Pitchamma*, (1912) 15 Ind Cas 573 (573): 1912 Mad W N 901 [The passing of a conditional award is no ground for a remission under Para. 14].

(3) *Tursi Ram* v. *Basdeo*, 1926 All 567 (570): 96 Ind Cas 531: 24 All L J 705.

(4) *Tursi Ram* v. *Basdeo*, 1926 All 567 (570): 24 All L J 705: 96 Ind Cas 531.

(5) *Satumal* v. *Khudadad*, 1929 Sind 164 (165): 116 Ind Cas 590.

(6) *Mohun Kishen* v. *Bhoobun*, (1867) 7 Suth W R 406 (407): *Tursi Ram* v. *Basdeo*, 1926 All 567 (569): 24 All L J 705: 96 Ind Cas 531.

(6-a) *Anant Ram Mangat Rai* v. *Gurditta Mal Ram Partap*, 1926 Lah 519 (520): 7 Lah 327: 8 Lah L Jour 460: 27 Pun L R 541: 98 Ind Cas 336.

Compare S. 10 of the English Arbitration Act, 1889, which runs thus:—

"In all cases of references to arbitration the Court or a Judge may from time to time remit the matters referred, or any part of them to the reconsideration of the arbitrators or umpire"

(7) *Abdullah Khan* v. *Ali Mardan Khan*, 1931 Lah 215 (216): 12 Lah L Jour 314: 131 Ind Cas 303; *Sant Singh* v. *Jiwan Singh*, 1905 Pun Re No 41: 63 Pun L R 1905: 70 Pun W R 1905; *Sita Ram* v. *Dhani Ram*, 1903 Pun Re No. 92: 35 Pun L R 1904.

(8) *Firm of Muhammad Ali A Karinji & Sons* v. *Charat Singh Bud Singh*, 1925 Sind 51 (52): 80 Ind Cas 586.

Note 3.

(1) *Sadik Ali* .v *Imdad Ali*, (1881) 3 All 286 (291, 292); *Hakim Ullah* v. *Karim Bux*, 1925 All 393 (394): 6 L R All (Civ) 158: 86 Ind Cas 788; *Gopalchandra Das* v. *Kshetra Mohun*, (1918) 46 Ind Cas 195 (196): 22 Cal W N 933 [Reference authorising to proceed *ex parte* if a

Para. 14, Notes 3—5.

there is an implied condition that it shall do so''.[2] But it is open to the parties to waive this condition.[3] Thus, where all the parties agree before the arbitrator that an incomplete award may be made or where they all represent that there is no longer and controversy between them upon a particular point, the fact that the award is incomplete or silent on such point will not vitiate it.[4] An award cannot be said to be incomplete because, in a suit involving a number of issues, the arbitrators have not given a decision on each of them. It is enough if they give a decision on the whole matter in issue between the parties.[5]

4. **Award determining matter not referred to arbitration.**—It is a fundamental principle of the Law of Arbitration that the submission furnishes the source and prescribes the limits of the arbitrators' authority and, that, therefore, the award must conform to the submission both in substance and in form.[1] Consequently if the award decides matters not within the scope of the submission it is void as regards the portion in excess of the submission. If such portion is, however, separable from and independent of the remainder effect can be given to the rest of the award[1-a] but if the extraneous matters cannot be so separated without affecting the determination of the matters referred, the Court may remit the award for reconsideration.[2]

5. ''**Where the award is so indefinite as to be incapable of execution**''.—An award, to be capable of execution, ought to be certain, so that no reasonable doubt can 'arise' upon the face of it as to the arbitrators' meaning or as to the nature and extent of the right and duties imposed by it upon the parties.[1] The fact that a particular expression used in an award

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party absent—One party absent—Arbitrator's award without evidence—Held he should have heard the evidence of the other side and, therefore, remitted award under this clause]; *Ananda Prasad* v. *Jogesh Chandra*, (1914) 23 Ind Cas 862 (863) Cal; *Janardan* v. *Sambu Nath*, (1892) 16 Cal 806 (809); *Purushotumdas* v. *Jetabhai Naigi*, (1912) 17 Ind Cas 33 (34): 1912 Mad W N 1076. See *Roj Narain* v. *Juggesur*, (1870) 14 Suth W R 247 (248); *Shadkh Irruttoola* v. *Shaikh Bhikaree*, (1870) 14 Suth W R 469 (470): 6 Beng L R 386.

(2) *Makund Ram Sukal* v. *Saliq Ram Sukal*, (1894) 21 Cal 590 (600): 21 Ind App 47: 6 Sar P C J 423.

(3) *Makund Ram* v. *Saliq Ram*, (1894) 21 Cal 590 (600): 21 Ind App 47: 6 Sar P C J 423; *Janendra Nath Bagchi* v. *Sures Chunder Roy*, 1928 Pat 7 (10): 6 Pat 556: 109 Ind Cas 821; *Ramji Ram* v. *Saliq Ram*, (1911) 11 Ind Cas 481 (493): 14 Cal L Jour 188.

[But see *Alagu Pillai* v. *Veluchami* alias *Mavilappa Pillai*, 1923 Mad 576 (577): 45 Mad L Jour 76: 18 Mad L W 26: 32 Mad L Tim 369: 1923 Mad W N 331: 74 Ind Cas 609].

(4) *Harakh Ram Jani* v. *Lakshimi Ram Jani*, 1921 All 384 (387): 43 All 108: 60 Ind Cas 626: 18 All L J 960; *Hari Kunwar* v. *Lakhmi Ram Jani*, (1916) 35 Ind Cas 833 (836): 38 All 380: 14 All L J 481; *Ananta Lal Pakrasi* v. *Jnanada Sundari Debya*, 1930 Cal 255 (257): 50 Cal L Jour 323: 125 Ind Cas 290; *Shoshimukhi* v. *Nobinchand*, (1879) 4 Cal L Rep 92 (94); *Janendra* v. *Sures Chandra*, 1928 Pat 7 (10, 11): 6 Pat 556: 109 Ind Cas 821. See also *Khub Lal* v. *Bhishambhar Sahai*, 1925 All 103 (106): 22 All L J 919: 5 L R All (Civ) 649: 82 Ind Cas 219 [Omission to partition one item of property on account of impossibility does not vitiate award]; *Purna Chandra* v. *Kunja Behari*, (1918) 46 Ind Cas 477 (478): 28 Cal L Jour 275 [Where some of the matters referred to have not been decided, the Court cannot allow a party without the consent of the other to withdraw his claim as to those matters].

(5) *Ghulam Khan* v. *Muhammad Hassan*, (1902) 29 Cas 167 (186): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 25 Pun Re 1902; *George* v. *Vastian Sourty*, (1899) 22 Mad 202 (204); *Narpat Rai* v. *Devi Das*, (1912) 14 Ind Cas 371 (373): 13 Pun W R 1911.

[But see *Luchmee Narain* v. *Pyle*, (1879) 2 N W P H C 150].

Note 4.

(1) *Narsing Narain* v. *Ajodhya Prasad*, (1912) 15 Cal L Jour 110 (113, 114): 16 Cal W N 256: 13 Ind Cas 118.

(1-a) *Juggobundhu* v. *Chand Mohan*, (1915) 31 Ind Cas 83 (84): 22 Cal L Jour 237.

(2) See *Ramasamy Chettiar* v. *Venkatarama Iyer*, 1926 Mad 201 (204): 49 Mad L Jour 523: 91 Ind Cas 745; *Mt Cordi Bai* v. *Thakar Das*, 1896 Pun Re No. 60; *Mansa Ram* v. *Karla Ram*, 1923 Lah 411 (412): 76 Ind Cas 1007.

Note 5.

(1) *Lal Jagroop Singh* v. *Bankateshwar Rawan*, (1916) 34 Ind Cas 355 (356): 3 Oudh L J 137.

is capable of more than one interpretation does not show, that it is so indefinite as to be incapable of execution.[2] Where the arbitrators give the method for calculating the amount awarded without specifying the actual amount due, the award can be considered as sufficiently certain inasmuch as the actual result can be worked out.[3]

6. Where an objection to the legality of the award is apparent upon the face of it.—It has been seen in Note 10 to Paragraph 1, *ante* that parties are entitled to submit questions of law as well as questions of fact for arbitration and that the arbitrators have jurisdiction to decide the same. Where they so decide a question specifically submitted to them for decision, but such decision happens to be erroneous in law, it cannot, nevertheless be said that there is any error apparent on the face of the award,[1] and the Court has no right to sit in judgment over the views of the arbitrator.[2]

Illustration.

S sued *V* and others for a share in the family properties. *V* contended in defence that *S* was born blind and that, therefore, he was not entitled to any share under the Hindu Law. The suit was then referred to arbitration and the arbitrators awarded *S* a life interest in a fourth share of the properties subject to its becoming an absolute interest in case he married. It was held that the award was not vitiated by an error of law apparent on the face of the award.[3]

But where a question of law is not specifically submitted to the arbitrators for decision and they state a wrong legal proposition and base their award on the matters referred to them, on such proposition, there is an error of law on the face of the award.[4] In *Chamsey Bhara and Co., Ltd., v. Jivraj Balloo Spinning and Weaving Co., Ltd.*[5] their Lordships of the Privy Council observed as follows:—"An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can say is erroneous".

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(2) *Ranghuraj Bahadur* v. *Rajeswar Bali*, (1916) 35 Ind Cas 761 (763): 8 Oudh L J 258.

(3) *Manindra Nath* v. *Mohanunda Roy*, (1912) 13 Ind Cas 161 (163): 15 Cal L Jour 360; *Nathu* v. *Abdul Ghani*, 1930 Lah 22 (23): 119 Ind Cas 720: 11 Lah L Jour 269.

Note 6.

(1) *Madapalli Venkatasamy* v. *Madapalli Suramma*, (1918) 45 Ind Cas 644 (645): 34 Mad L Jour 323: 24 Mad L Tim 60: 8 Mad L W 202: 41 Mad 1022: 1918 Mad W N 482; *Nanak Chand* v. *Ram Narain*, (1878-80) 2 All 181 (187, 191); *Firm of Madhowram Hardeodas* v. *Mitsui Bhusan Kaisha Ltd*, 1925 Sind 186 (188): 78 Ind Cas 230: 19 Sind L R 54; *Chhab Lal* v. *Parbate*, (1916) 33 Ind Cas 737 (738): 19 Oudh Cas 48. See also *Mt Sartaj Fatima* v. *Muhammad Jawad*, 1931 Oudh 6 (7): 7 Oudh W N 1095. 129 Ind Cas 322: 6 Luck 423.

(2) *Ghulam Khan* v. *Muhammad Hassan*, (1902) 29 Cal 167 (183): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 25 Pun Re.1902 P C; *Madapalli Venkatasamy* v. *Madapalli Suramma*, (1918) 45 Ind Cas 644 (645): 34 Mad L Jour 323: 24 Mad L Tim 60: 8 Mad L W 202: 41 Mad 1022: 1918 Mad W N 482.

(3) *Madapillai Venkataswamy* v. *Madapalli Suramma*, (1918) 45 Ind Cas 644 (645): 34 Mad L Jour 323: 24 Mad L Tim 60: 8 Mad L W 202: 41 Mad 1022: 1918 Mad W N 482.

(4) *Firm, Madhowram Hardeodas* v. *Mitsui Bhusan Kaisha, Ltd*, 1925 Sind 186 (188): 78 Ind Cas 230: 19 Sind L R 54.

(5) 1923 P C 66 (69): 44 Mad L Jour 706: 25 Bom L R 588: 1923 Mad W N 596: 73 Ind Cas 436: 38 Cal L Jour 130: 47 Bom 578: 50 Ind App 324: 28 Cal W N 897: 33 Mad L Tim 419: 4 L R P C 99 P C [Reversing 44 Bom 780]. This case has been followed in the following cases:—

Ram Devi v. *Ganeshlal*, 1926 All 501 (505): 24 All L J 480: 95 Ind Cas 416: 48 All 475; *Sreelal Mangtulal* v. *J F Madan*, 1925 Cal 599 (602): 52 Cal 100: 88 Ind Cas 49; *U M Chowdhry & Co* v. *Jihan Krishna Ghose and Son*, 1922 Cal 447 (451, 452): 49 Cal 646: 69 Ind Cas 995; *Vasudeva Iyer* v. *Sundararaja Iyer*, 1930 Mad 38 (41): 124 Ind Cas 209: 30 Mad L W 868; *Firm of Mohammadali A. Karimji*

Para. 14, Note. 6.

Illustrations.

1. *A*, an arbitrator, states a special case and gets an opinion of the Court. In making the award, he states that opinion and bases his award upon it. The appellate Court finds that the opinion as given is erroneous. There is an error in law on the face of the award which will entitle appellate Court to remit the award for reconsideration.[6]
2. A reference was made to arbitrators to divide family properties between a Hindu father and his sons. The eldest son had assisted the father to attain success in his business and thus to acquire the property. In consideration of that the arbitrators awarded him Rs. 11,000 in excess of his share describing it as "*Jyeshta Bhagam*". It was held that though the rule of "*Jyeshta Bhagam*" is obsolete and illegal, the mere use of the term in the award did not make it illegal, when the Court is satisfied that the extra amount was really given to the eldest son for services rendered.[7]

See also the undermentioned cases[8] as to what is and what is not illegality apparent on the face of the award.

An arithmetical error in the award made by the arbitrator in arriving at the sums due by one party to another is not an illegality apparent on the face of the award.[9]

It has been already mentioned above that an error of law, in order to vitiate an award, must be apparent on the face of the award or some other document attached to the award.[9-a] Thus, where a dispute arising out of a contract is referred to arbitrators and a reference is made in the award to a contention of one party, it does not open the door to seeing first what the contention is and then going to the contract on which the rights of parties depends to see if that contention is sound.[10] Similarly, where an award makes an allusion to the contract very guardedly and for the purpose only of ear-marking the origin of the dispute in question, it does not enable a party to contend that the contract was incorporated into the award by the

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and Sons v. *Charat Singh Budsingh*, 1925 Sind 51 (52): 80 Ind Cas 596; *Firm of Madhowram Hardendas* v. *Mitsui Bhusan Kaisha, Ltd*, 1925 Sind 186 (188): 19 Sind L R 54: 78 Ind Cas 230; *Dutton Massey & Co* v. *Jamna Das Harprasad*, 1924 Sind 51 (53): 76 Ind Cas 84: 19 Sind L R 152. See *Muhammad Yusuf Hussain* v. *Wilayat Hussain*, 1929 Oudh 1 (9): 5 Oudh W N 1001: 113 Ind Cas 785.

[6] *British Westing-house Company* v. *Underground Electric Railway Company*, 1912 A C 673: 81 L J K B 1132: 107 L T 325: 56 Sol J 734.

[7] *Vasudeva Iyer* v. *Sundararaja Iyer*, 1930 Mad 38 (41): 30 Mad L W 868: 124 Ind Cas 209; *Vaithinatha Iyer* v. *Subramaniya Iyer*, 1925 Mad 301 (301, 302): 78 Ind Cas 238.

[8] *Secunder Beg* v. *Mt Rajee*, 1869 Pun Re No. 12 [Open disregard by arbitrators of proved law or custom is a good ground for remitting the award]; *Ram Kurn* v. *Zakiral*, 1868 Pun Re No. 101 [Award allowing set off founded on wagering transaction is illegal]; *Mamidi Appayya* v. *Venkatasamy*, (1918) 47 Ind Cas 597 (599): 8 Mad L W 171: 1918 Mad W N 477: 24 Mad L Tim 102 [Award when presented bore the signatures of only 2 out of 3 arbitrators—It is an illegality on the face of the award]; *Ablakhee Koer* v. *Oodun*, (1871) 15 Suth W R 331 (331) [Award given by arbitrators along with some others—Comes under Cl. (*c*)]; *Narain* v. *Kanha*, 1872 Pun Re No. 8 [Plaintiff and one defendant agreed to reference—Award against all defendants is illegal]; *Sarat* v. *Rajkumar*, 1928 Cal 135 (138): 35 Cal L Jour 482: 26 Cal W N 967: 69 Ind Cas 863 [Private award made after institution of suit is illegal]; *Soudamini* v. *Gopal Chandra*, (1915) 28 Ind Cas 557 (560): 21 Cal L Jour 273: 19 Cal W N 948; *Muhammad Ismail Khan* v. *Fidayatunnissa*, 1884 All W N 43 (44); *Pachkaur Ram* v. *Nand Rai*, (1908) 30 All 505 (507): 5 All L J 658: 1908 Al W N 228; *S and C Nord Linger* v. *Chandmal Mulchand*, 1924 Cal 1051 (1053): 21 Cal W N 888: 82 Ind Cas 341.

[9] *Riaz-Ud-Din* v. *Shuja-Ud-Din*, 1925 Lah 86 (86): 78 Ind Cas 1042.

[9-a] *Messrs Beith Stevenson & Co* v. *Firm of Naroomal Khemchand*, 1924 Sind 117 (119): 17 Sind L R 86: 80 Ind Cas 1009. See also cases cited in Points (5) and (5-a), *supra*.

[10] *Champsy Bhara & Co* v. *Jivraj Balloo Spinning and Weaving Co, Ltd*, 1923 P C 66 (69): 44 Mad L Jour 706: 25 Bom L R 588: 1923 Mad W N 596: 73 Ind Cas 436: 38 Cal L Jour 130: 47 Bom 578: 50 Ind App 321: 28 Cal W N 397: 33 Mad L Tim 419: 4 L R P C 99 P C.

reference mentioned above and then to say that the award discloses an error in law in construing the terms of the contract.[11]

7. Remittal of private awards.—Where an award is made without the intervention of a Court and an application is made under Para. 20, *infra* to file the award, the Court may, under Para. 21, file the award if no such ground as is mentioned in Paras. 14 and 15 is proved. But the fact that there are any of the grounds specified in this paragraph does not empower the Court to remit the award for reconsideration of the arbitrators, as in the case of an award made through the intervention of the Court.[1] Therefore, if the award leaves undetermined any of the matters referred to arbitration[2] or is so indefinite as to be incapable of execution[3] the award is invalid and the application under Para. 20 must be dismissed. But where the award determines any matter not referred to arbitration and such matter can be separated without affecting the determination of the matters referred, the whole award is not invalid and the decisions on the portions in excess of the authority of the arbitrators can be treated as null and void.[4]

8. Limitation.—Art. 158 of the Limitation Act does not apply to proceedings under this paragraph and, therefore, there is no period of limitation for making an application under this paragraph to remit an award for the reconsideration of the arbitrators.[1]

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(11) *Sallah Muhammad* v. *Nathoomal*, 1927 P C 164 (165): 53 Mad L Jour 18: 29 Bom L R 1150: 46 Cal L Jour 9: 31 Cal W N 1027: 39 Mad L Tim 61: 104 Ind Cas 476: 54 Ind App 427: 21 Sind L R 101: 55 Cal 126 P C.

Note 7.

(1) *Karam Chand* v. *Mt Jasodhan*, 1927 Lah 347 (348): 100 Ind Cas 896; *Riaz-Ud-Din* v. *Shuja-Ud-Din*, 1925 Lah 86 (86): 78 Ind Cas 1042; *Bhagwan Das* v. *Shiv Dial*, (1914) 22 Ind Cas 811 (814): 92 Pun Re 1913: 109 Pun L R 1914; *Dandekar* v. *Dandekars*, (1881-82) 6 Bom 663 (668); *Jagroop Singh* v. *Bankateshwar Rawan*, (1916) 34 Ind Cas 355 (356, 357): 3 Oudh L Jour 137; *Mga Tok* v. *Nga Kasim*, (1912) 14 Ind Cas 978 (978): 5 Bur L Tim 55.

(2) *Ganesh Narain Singh* v. *Malid Koer*, (1911) 10 Ind Cas 450 (453): 13 Cal L Jour 899; *Dandekar* v. *Dandekars*, (1881-1882) 6 Bom 663 (668); *Bhagwan Das* v. *Shiv Dial*, (1914) 22 Ind Cas 811 (814): 92 Pun Re 1913: 109 Pun L R 1914; *Subramaniya* v. *Vellian*, (1914) 24 Ind Cas 132 (132): 8 L B R 58: 7 Bur L Tim 287; *Hari Kunwar* v. *Lakshmi Ram*, (1916) 35 Ind Cas 833 (836, 837): 38 All 380: 14 All L J 481.

(3) *Lal Jagroop Singh* v. *Babu Banktiswar Rawan Bahadur Pal Singh*, (1916) 34 Ind Cas 355 (356, 357): 3 Oudh L J 137.

(4) *Buta* v. *Municipal Committee of Lahore*, (1902) 29 Cal 854 (869): 7 Cal W N 82: 29 Ind App 168: 87 Pun Re 1902: 4 Bom L R 673: 8 Sar 327 P C; *Mohendra Nath* v. *Mohilla*, (1918) 48 Ind Cas 770 (771): 27 Cal L Jour 104; *Amir Begam* v. *Badruddin Hassain*, 1914 P C 105 (106): 36 All 336: 17 Oudh Cas 120: 12 All L J 587: 16 Bom L R 413: 19 Cal L Jour 494: 18 Cal W N 755: 27 Mad L Jour 181: 16 Mad L Tim 85: 1 Mad L W 1015: 1914 Mad W N 472: 1 Oudh L J 249: 23 Ind Cas 629 P C; *Bhim Sen* v. *Tara Chand*, 1932 All 154 (155): 1931 All L J 1087: 135 Ind Cas 230; *Shyamlal* v. *Purushotham Das*, (1920) 58 Ind Cas 585 (586, 587): 18 All L J 241: 2 U P L R (A) 104: 42 All 277; *Sabitree Debi* v. *Promoda Prosad Chatterjee*, (1913) 19 Ind Cas 941 (943): 21 Cal L Jour 248; *Kishenchandra* v. *Ramlal*, (1919) 53 Ind Cas 992 (993) Nag; *Mahomed Khalil* v. *Abdul Rahim*, 1925 Pat 810 (816, 818): 4 Pat 670: 7 Pat L Tim 644: 93 Ind Cas 261 [1923 Pat 470 and 48 Ind Cas 711 not followed]; *Md Syed Khan* v. *Abdul Gafoor*, (1929) 115 Ind Cas 680: 10 P L T 53: 1929 Notes 7-e; *Kotumal* v. *Jeyrandas*, 1928 Sind 144 (146). See *Harmukhoy Ram Chunder* v. *Japan Cotton Trading Co*, 1922 Cal 399 (400): 66 Ind Cas 342: 34 Cal L Jour 258 [If in an award the bad is not separable from the good, the whole is bad]; *Soudamani* v. *Gopal Chandra*, (1915) 28 Ind Cas 557 (560): 21 Cal L Jour 273: 19 Cal W N 948. The following cases are not good law in the view of the Privy Council ruling in 1914 P C 105 and 29 Cal 854; *Mustafa Khan* v. *Phulja Bibi*, (1905) 27 All 526 (528): 1905 All W N 86: 2 All L J 416; *Allarakha* v. *Jehangur*, (1873) 10 Bom H C R 391; *Dinabhandu* v. *Chintamani*, (1915) 26 Ind Cas 697 (698): 19 Cal W N 476; *Narsing Narain Singh* v. *Ayodhya Prasad Singh*, (1912) 13 Ind Cas 118 (119): 15 Cal L Jour 110: 16 Cal W N 256; *Ahmed Din Auisul Rahaman* v. *Atlas Trading Co*, (1915) 31 Ind Cas 80 (81): 66 Pun Re 1915: 146 Pun W R 1915; *Lala Dhonpat Rai* v. *Khan Devi*, (1914) 23 Ind Cas 422 (423): 11 Pun W R 1914: 31 Pun L R 1914: 30 Pun Re 1914; *Bhagat Ram* v. *Paras Ram*, 1907 Pun Re No. 84: 184 Pun L R 1908: 128 Pun W R 1907; *Thiruvengahdathathaiyangar* v. *Vaithinatha Iyer*, (1906) 29 Mad 303 (305); *Jaldhari Rai* v. *Mahomed Abdul Kabir*, 1923 Pat 470 (473): 1 Pat L R 244: 4 Pat L Tim 669: 74 Ind Cas 649; *Babu Kunj Lal* v. *Babu Benwari Lal*, (1918) 48 Ind Cas 711 (715): 4 Pat L Jour 394; *Maung Tin* v. *Maung Pya*, 1923 Rang 130 (131): 4 U B R 157: 1 Bur L Jour 265: 72 Ind Cas 193.

Note 8.

(1) *Mamidi Appayya* v. *Yedham Venkata-*

Para. 14, Notes 9—11.

9. **Appeal.**—An order remitting[1] or refusing to remit[2] an award for the reconsideration of the arbitrators is not appealable. Where an award is remitted under this paragraph and the arbitrators refuse to reconsider the award, which consequently becomes void under Para. 15, *infra* and the Court ultimately passes a decree on the merits, the legality of the order remitting the award may be challenged in an appeal against the decree.[3] *See also* S. 105, Note 6, Pt. 3. But where after remittal, the arbitrators submit a fresh award and the Court passes a decree in accordance with the revised award, no appeal will lie from such decree on the ground that the order of remittal under this paragraph was wrong and that the original award ought to have been accepted and acted upon.[4] *See also* notes to Para. 16, *infra*.

10. **Revision.**—The High Court cannot interfere in revision with an order of the Court remitting an award for reconsideration of the arbitrators.[1]

11. **Arbitration under other Acts**.—*See* Note 6-a to Para. 1. In an arbitration proceeding regarding boundary disputes under S. 120 of the Bombay Land Revenue Code (V of 1879), the Superintendent of Survey or the Boundary Officer is empowered to remit an award for the reconsideration of the arbitration committee for any of the causes set forth in this paragraph.

Para 15.

Grounds for setting aside award.

P. **15**. [S. 521.] (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds namely:—

(*a*) corruption or misconduct[5] of the arbitrator or umpire;

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed,[10] or of wilfully misleading or deceiving the arbitrator or umpire;

(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court [12] or being otherwise invalid.[13]

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swamy, (1918) 47 Ind Cas 597 (598): 1918 Mad W N 477: 24 Mad L Tim 102: 8 Mad L W 171.

Note 9.

(1) *Abdul Rahman* v. *Yar Muhammad*, (1881) 3 All 636 (639): 1881 All W N 84.

(2) *Ananda Prosad* v. *Jogesh Chandra*, (1914) 23 Ind Cas 862 (868) Cal; *Vemisami Gavarama* v. *Chidukari Pathamma*, (1912) 15 Ind Cas 573 (573): 1912 (1) Mad W N 901; *Sree Ram* v. *Deno Bundhoo*, (1881) 7 Cal 490 (493): 9 Cal L R 147.

(3) *George* v. *Vastian Soury*, (1899) 22 Mad 202 (204); *Abdul Rahman* v. *Yar Mohamed*, (1881) 3 All 636 (642): 1881 All W N 84 [Per Oldfield, J].

(4) *Subbiah Iyer* v. *Subramaniya Iyer*, (1908) 31 Mad 479 (481): 4 Mad L Tim 328: 18 Mad L Jour 485; *Baland Baksh* v. *Ram Chandra*, 1925 Lah 267 (267): 26 Pun L R 77: 6 Lah L Jour 500: 84 Ind Cas 693; *Chohar Singh* v. *Jeet Singh*, 1870 Pun Re No. 64 F B.

Note 10.

(1) *Lalchand* v. *Kishori Das*, (1888) All W N 128 (123).

(2) Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit.

[1877—S. 521; 1859—S. 324.]

Synopsis.

1. **Legislative changes.**
2. **Procedure in enquiry under this Paragraph.**
3. **Refusal to reconsider award remitted.**
4. **Grounds for setting aside award.**
    5. **"Corruption or misconduct."**
        6. **Acts amounting to misconduct.**
        7. **Acquiescence in acts amounting to misconduct.**
        8. **Acts not amounting to misconduct.**
    9. **Evidence of arbitrator.**
    10. **"Fraudulent concealment of any matter which he ought to have disclosed."**
    11. **Award made after order superseding arbitration.**
    12. **Award made after the expiry of the period allowed by the Court.**
    13. **"Being otherwise invalid."**
14. **Appeal.**
15. **Revision.**

Appeal from decree based on award. See Notes to Para. 16, infra.

Limitation for application to set aside award. See Notes to Para. 16, infra.

1. Legislative changes.—

1. The words "and no award shall be valid unless made within the period allowed by the Court" which occurred at the end of S. 521 of the old Code have been omitted and the words "or after the expiration of the period allowed by the Court or being otherwise invalid" have been newly added at the end of Cl. (*c*) of sub-S. (1). *See* Notes 12 and 13, *infra.*
2. Sub-section (2) is new.

2. Procedure in enquiry under this paragraph.—Where an application is made to set aside an award on any of the grounds mentioned in this paragraph, the Court is bound to allow the applicant an opportunity to produce evidence to substantiate his objections[1] and to enquire into the allegations made by him.[2] The burden of proving such allegations is on the person seeking to have the award set aside.[3]

A party in whose *favour* an award has been passed cannot object thereto on the ground that the arbitrators exceeded their jurisdiction.[4]

3. Refusal to reconsider award remitted.—If an award has been remitted to the arbitrators for their reconsideration under Para. 14, *ante* and the arbitrators decline to submit a fresh award, the award becomes void and

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Schedule II, Para. 15—Note 2.

(1) *Hila Ram* v. *Mukund Rai*, (1912) 15 Ind Cas 57 (59): 229 Pun W R 1912: 1 Pun L R 1913; *Nizam-Ud-Din* v. *Ghulam Ahmad*, (1909) 4 Ind Cas 553 (554): 53 Pun L R 1909: 64 Pun W R 1909.

(2) *Secunder Beg* v. *Mt Rajee*, (1869) Pun Re No. 12; *Senuk Kachee* v. *Oree Doobey*, (1870) 2 N.W. P H C 241.

(3) *Amir Begam* v. *Badr-ud-din*, 1914 P C 105 (107): 19 Cal L Jour 494: 36 All 336: 17 Oudh Cas 120: 12 All L J 537: 16 Bom L R 413: 18 Cal W N 755: 27 Mad L Jour 181: 16 Mad L Tim 35: 1 Mad L W 1015: 1914 Mad W N 472: 1 Oudh L J 249: 23 Ind Cas 625; *Gobind Singh* v. *Bhirgunath Singh*, 1924 All 788 (789): 46 All 686: 22 All L J 676: 5 L R A Civ 465: 82 Ind Cas 16; *Firm, Sitaram Nathimal* v. *Firm, Sushil Chandra Das*, (1921) 64 Ind Cas 706 (707): 3 U P L R (A) 60; *Ramchand Gurdasmal* v. *Gobindram Gurdasmal*, (1919) 53 Ind Cas 337 (337): 13 Sind L R 75.

(4) *Bhagwatibai* v. *Bhagwandas*, 1927 Sind 206 (208): 102 Ind Cas 277.

Para. 15, Notes 3—6.

the Court has no alternative but to try the case itself.[1] It is not necessary in such a case for the Court to find corruption or misconduct.[2] But where the arbitrators after remittal reconsider the matter to the best of their ability and come to the same conclusion, the award does not become void.[3]

4. **Grounds for setting aside award.**—An award can be set aside only on one or more of the grounds mentioned in this paragraph.[1] Therefore a provision in the agreement of reference that any of the parties might object to the award on any account is *ultra vires* and contrary to the procedure prescribed by this paragraph.[2]

As to the several grounds on which an award may be set aside *see* Notes 5 to 13, *infra*.

5. **"Corruption or misconduct".**—The word "Misconduct" when applied to the proceedings of arbitrators does not necessarily imply moral turpitude; it is used in the sense of breach or neglect of such duties and responsibilities as devolve on the arbitrators acting judicially and as the Courts of Justice expect from them before allowing finality to their awards.[1] In other words it comprehends action on the part of the arbitrator which, upon the face of it, is opposed to all rational and reasonable principles that should govern the procedure of any person who is called upon to decide questions in difference referred to him by the parties.[2]

The word "corruption" necessarily implies misconduct; but "misconduct" does not of necessity imply corruption. Thus an award may be set aside on the ground of misconduct which does not amount to corruption.[3]

Where it is proved that an arbitrator has been guilty of misconduct, it is not necessary to prove *prejudice* in order that the award may be set aside; but the irregularity may be cured by waiver.[4]

6. **Acts amounting to misconduct.**—We now proceed to discuss some instances of misconduct justifying the setting aside of an award under clause (*a*) of this paragraph:—

(1) Where more than one arbitrator is appointed, the presence of all of them at all meetings and, above all, at the last meeting when the final act of arbitration is done, is essential to the validity

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Note 3.

[1] *Jonardun* v. *Sambhu Nath*, (1889) 16 Cal 806 (808, 810); *Deb Narain* v. *Rajmonee*, (1865) 3 Suth W R 168 (169); *Sujan Rai* v. *Jhabha*, (1893) All W N 45 (45).

[2] *Mohun Kishen* v. *Bhoobun Shyam*, (1867) 7 Suth W R 406 (407).

[3] *Lalti Dai* v. *Baldeo Sahi Sahai*, 1881 All W N 25 (26).

Note 4.

[1] *Muhammad Sheikh* v. *Kankinarah & Co, Ltd*, 1924 Cal 665 (666): 28 Cal W N 634: 81 Ind Cas 574.

[2] *Khudiram Mahto* v. *Chandi Charan*, (1916) 35 Ind Cas 358 (361): 1 Pat L Jour 306: 2 Pat L W 377.

Note 5.

[1] *Ganga Sahai* v. *Lakhraj*, (1887) 9 All 253 (266); *Thammiraju* v. *Bapiraju*, (1889) 12 Mad 113 (113); *Bhogi Lal* v. *Chimanlal*, 1928 Bom 49 (50): 52 Bom 116: 30 Bom L R 92: 107 Ind Cas 707; *Yusuf Khan* v. *Riyasat Ali*, 1926 Oudh 307 (309): 3 Oudh W N 279: 98 Ind Cas 446: 13 Oudh L J 224: 1 Luck 139.

[2] *Deoki Nandan* v. *Raj Kumar*, (1889) All W N 124 (125).

[3] *Kalicharan Sirdar* v. *Sarat Chunder Chowdhury*, (1903) 30 Cal 397 (400): 7 Cal W N 545.

[4] *Alagappa Chettiar* v. *Chidambaram Chettiar*, 1931 Mad 619 (621): 1931 Mad W N 461: 133 Ind Cas 522: 34 Mad L W 507.

Para. 15, Note 6.

of the award. Therefore the absence of some of the arbitrators at some of the meetings is misconduct within the meaning of this paragraph.[1] The reason is that in such cases the parties intend that all the persons to whom the reference is made shall meet and discuss together all the matters referred and that the award should be the result of their united deliberations. This conference and deliberation in the presence of all the arbitrators are the very essence of the arbitration and the sole reason why the award is made binding. The facts that the agreement of reference provided for a valid award by the majority of the arbitrators and that a majority of them were present at all the meetings will not make the award valid.[2] Similarly where a reference was made to three persons and the award purported to be made by four persons, it was set aside on the ground that the association of the fourth person might have influenced the decision of the others.[3] The absence of an arbitrator at some of the meetings does not, however, amount to misconduct if the act done at such meetings is not of a judicial nature, but merely ministerial in its character.[4]

As to the validity of an award made by a majority of arbitrators, *see* Note 2 to Para. 4.

(2) "If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator".[5]

Note 6.

(1) *Nand Ram* v. *Fakir Chand*, (1885) 7 All 523 (528): 1885 All W N 139; *Thammiraja* v. *Bapiraja*, (1889) 12 Mad 113 (114); *Mamidi Appayya* v. *Yedan Venkataswami*, (1918) 47 Ind Cas 597 (598): 8 Mad L W 171: 1918 Mad W N 477: 24 Mad L Tim 102; *Abu Hamid* v. *Golam*, (1917) 40 Ind Cas 422 (423): 22 Cal W N 301: 25 Cal L Jour 396; *Benode* v. *Pran Chandra*, (1911) 11 Ind Cas 898 (899): 14 Cal L Jour 143; *Nadiar Chand* v. *Gobind Chandar*, (1905) 2 Cal L Jour 61 (64); *Ram Narain* v. *Baij Nath*, (1902) 29 Cal 36 (38, 40); *Ram Guttee* v. *Thaknor Doss*, (1874) 22 Suth W R 418 (419); *Rash Beharee* v. *Doorgabur*, (1890) 14 Suth W R 211 (212); *Sreenath* v. *Raj Chunder*, (1867) 8 Suth W R 171 (172); *Ganda Mal* v. *Fatteh Ali Shah*, (1882) Pun Re No. 55; *Pandit Sankata Prasad* v. *Jagannath*, 1922 Oudh 276 (277): 9 Oudh L J 410: 26 Oudh Cas 1: 69 Ind Cas 714; *Lekha Singh* v. *Bodh Singh*, (1915) 30 Ind Cas 884 (885): 2 Oudh L J 365; *Ch Harpal Singh* v. *Ch Amir Singh*, (1898) 1 Oudh Cas 181 (182); *Babu Lal* v. *Badri Lal*, (1919) 49 Ind Cas 522 (526) Pat. See *Manphool* v. *Sahi Ram*, (1918) 43 Ind Cas 154 (155) All [All arbitrators acting—Failure of one to sign does not make award invalid]; *Abdul Rahman* v. *Shahabuddin*, (1920) 55 Ind Cas 883 (888): 1 Lah 481: 1920 Pun W R 85 [Award not signed at same time on the same day by all the arbitrators—It is not invalid]; *Debendranath* v. *Abhoy Charan*, (1883) 9 Cal 905 (907): 12 Cal Rep 525 [2 out of 5 arbitrators ceased with consent of parties—Award valid]; *Thadomal* v. *Menghraj*, 1930 Sind 190 (192): 123 Ind Cas 694 [Both arbitrators pleaders—One appearing for another in other cases—Award valid].

(2) *Abu Hamid* v. *Golam Sarwar*, (1917) 40 Ind Cas 422 (423): 22 Cal W N 301: 25 Cal L Jour 396; *Sheikh Abdulla* v. *M V R S Firm*, 1924 Rang 153 (154): 2 Bur L Jour 229: 77 Ind Cas 866; *Kalicharan Pande* v. *Gupta Nath Misra*, (1918) 45 Ind Cas 34 (35): 16 All L J 307.

(3) *Phiran* v. *Bahoran*, (1875) 7 N W P 367.

(4) *In the matter of the Arbitration Act*, 1924 Mad 274 (277): 17 Mad L W 648: 75 Ind Cas 850 [Received written statement and documents—Held award not bad]; *Brojendra Kumar Pal* v. *Purna Chandra Pal*, 1931 Cal 53 (54): 34 Cal W N 689: 129 Ind Cas 428: 58 Cal 269; *Manindra Nath* v. *Mohanunda Roy*, (1912) 13 Ind Cas 161 (165): 15 Cal L Jour 360; *Veeranasi Ramanna* v. *Killamsetti Appanna*, (1921) 60 Ind Cas 181 (182): 12 Mad L W 505.

(5) *Mt Amir Begam* v. *Syed Baduruddin Husain*, 1914 P C 105 (107): 36 All 336: 17 Oudh Cas 120: 12 All L J 537: 16 Bom L R 413: 19 Cal L Jour 494: 18 Cal W N 755: 27 Mad L Jour 181: 16 Mad L Tim 35: 1 Mad L W 1015: 1914 Mad W N 472: 1 Oudh L J 249: 23 Ind Cas 625; *Tyebhai Esubhai Thanawalla* v. *Abdul Hussein Tyebally*, 1924 Bom 149 (149): 25 Bom L R 392: 85 Ind Cas 424.

Para. 15, Note 6.

(3) The ordinary rule is that an enquiry before the arbitrator is assimilated as near as may be to the proceedings on a trial in the Courts. Therefore if the parties are not given notice of any meeting at which they should appear and represent their case or are not given a fair and reasonable opportunity to prove their case that would amount to misconduct on the part of the arbitrators.[6] But the omission to give notice of a meeting to a party who had, prior to such meeting, notified to the arbitrator his withdrawal from the submission, does not invalidate the award.[7] The arbitrators can make an *ex parte* award if the parties do not attend the hearing after receipt of sufficient notice.[8]

(4) The refusal of an arbitrator to examine witnesses produced by either party is misconduct within the meaning of this paragraph.[9] In order to impeach an award on this ground it must be shown that a witness was distinctly tendered to the arbitrator.[10] But it is not misconduct to refuse to admit evidence which was unnecessary and which would not have in any way helped or affected the decision.[11]

(5) An arbitrator ought not to hear or receive evidence, oral or documentary, from one side in the absence of the other.[12] It has, however, been held by the High Court of Madras that there is no misconduct where an opportunity was given to the

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(6) *Tyebbhai Essubhai* v. *Abdul Hussain*, 1924 Bom 149 (149): 25 Bom L R 392: 85 Ind Cas 424; *Deoki Nandan* v. *Raj Kumar*, (1889) All W N 124 (125) [Award without taking evidence and without giving opportunity to a party to prove his case—Held amounts to misconduct]; *Tulsimony* v. *Sudevi*, (1899) 3 Cal W N 361 (363); *Karam Chand* v. *Mt Jasodhan*, 1927 Lah 347 (348): 100 Ind Cas 896: *Raja Ram Punamchand* v. *Jugal Kishore Ram Richpal*, (1922) 65 Ind Cas 577 (578) Lah; *Ayyammal* v. *Naranappa Naick*, 1927 Mad W N 917; *Firm of Dhanasingh* v. *Firm of Ram Chand*, 1924 Sind 27 (28, 29): 17 Sind L R 172: 83 Ind Cas 543; *Louis Dreyfus & Co* v. *Purshottum Das Narain Das*, (1920) 56 Ind Cas 325 (328): 47 Cal 29. See *Lakshmi Narayana Tantri* v. *Ramachandra Tantri*, (1918) 45 Ind Cas 763 (764, 767): 34 Mad L Jour 71: 23 Mad L Tim 89 [In the case of a minor arbitrator cannot protect minor's interest by removing a defaulting guardian, but should adjourn proceedings for securing proper representation of minor]; *Mohendra Nath* v. *Mohilal*, (1918) 43 Ind Cas 770 (771): 27 Cal L Jour 104 [Oral notice is sufficient]; *Joshi Damodaraji* v. *Joshi Ram Nath*, (1916) 33 Ind Cas 467 (472) All [Absence of notice of a meeting at which no evidence is taken and no arguments heard does not vitiate award]; *Venkata Reddi* v. *Krishna Reddi*, 1927 Mad 1010 (1011): 106 Ind Cas 331 [Reference implying that no further evidence is to be produced—Absence of notice by arbitrators that they were prepared to receive evidence does not render award invalid];

(7) *Subraya Prathu* v. *Manjunath Bhakta*, (1906) 29 Mad 44 (45); *Nga Hla Gyaw* v. *Mi Ya Po*, (1915) 27 Ind Cas 31 (33): (1914) 2 U B R 26; 7 Bur L Tim 279; *Joshi Damodarji* v. *Joshi Ram Nath*, (1916) 33 Ind Cas 467 (472) All. See also *Nathu Mal* v. *Muhamad Shafi*, (1917) 39 Ind Cas 349 (352): 1917 Pun Re No. 12 [Notice giving date already past—Party repudiating arbitrator's authority—He cannot object to award].

(8) *J M Lang* v. *Messrs Holl and Moss*, (1915) 27 Ind Cas 526 (526): 8 Sind L R 136.

(9) *Rughoobar* v. *Naina Koer*, (1883) 12 Cal L Rep 564 (566); *Pir Baksh* v. *Nihal Singh*, (1889) Pun Re No. 58.

(10) *Manindra Nath* v. *Mohananda Ray*, (1912) 13 Ind Cas 161 (165): 15 Cal L Jour 360; *Ma Sein Mya* v. *Swami*, (1917) 37 Ind Cas 807 (809) Rang.

(11) *Louis Dreyfus & Co* v. *Araromal*, (1909) 4 Ind Cas 1151 (1152): 3 Sind L R 164; *Rajendra Nata Das* v. *Abdul Hakim Khan*, (1917) 39 Ind Cas 767 (768, 769) Cal [Arbitrator can decline to summon witnesses in the exercise of his discretion].

(12) *Curseltji* v. *Crowder*, (1894) 18 Bom 299 (311, 312); *Ramaswami Ayyar and Sons* v. *Subbier and Brothers*, 1926 Mad 1158 (1158): 24 Mad L W 482: 97 Ind Cas 478; *Hari Singh Nehal Chand* v. *Kankinarah & Co, Ltd*, 1921 Cal 657 (659): 34 Cal L Jour 39: 66 Ind Cas 389; *Sitaram Nathmal* v. *Sushil Chandra Das*, (1921) 64 Ind Cas 706 (708): 3 U P L R (All) 60. *Joshi Damodraji* v. *Joshi Ram Nath*, (1916) 33 Ind Cas 467 (472) All; *Ganga Sahai* v. *Lakhraj Singh*, (1887) 9 All 253 (264, 265); *Ganesh Narain* v. *Malida Koer*, (1911) 10 Ind Cas 450 (452): 13 Cal L Jour 399; *Abdul Hamid* v. *Mahmod Afzal*, 1927 Lah 425 (426): 8 Lah 329: 101 Ind Cas 153: 9 Lah L Jour 218: 28 Pun L R 425; *Muhammad Afzal* v. *Abdul Hamid*, 1925 Lah 570 (571): 7 Lah L Jour 468: 88 Ind Cas 161: 26 Pun L R 706; *Delhi Cloth and General Mills Co* v. *Kidari Pershad*, 1921 Lah 396 (397): 1922 Pun L R 22: 64 Ind Cas 868; *Sobharam* v.

Para. 15, Note 6.

other side of meeting and answering such evidence.[12-a] Similarly if the arbitrator takes evidence in the absence of the parties with their consent[13] or where one of the parties deliberately absents himself from the hearing[14] the award made thereafter is not bad for misconduct.

(6) It is misconduct on the part of an arbitrator when he examines no witnesses where the nature of the dispute is such that it could not be determined without evidence.[15]

(7) An arbitrator who makes private inquiries and bases his award on such information which the parties had no opportunity to check, is guilty of legal misconduct.[16] But where the parties agree to be bound by the decision of an arbitrator in whatsoever manner he might see fit to arrive thereat, the award will not be bad if based on private enquiries of the arbitrator.[17]

(8) Ordinarily, an arbitrator has no right to decide a matter referred to him on his personal knowledge and an award based on such knowledge cannot be maintained.[18] But where the submission to arbitration gives him power to decide a case upon his own personal knowledge[19] or where a particular arbitrator has been

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Ram Das, 1907 Pun Re No. 66: 1908 Pun L R 159: 1907 Pun W R 148; *Venkatasubbayye* v. *Venkataramanayya*, 1930 Mad 646 (647, 648): 126 Ind Cas 735; *Dital* v. *Dhanrajmal*, 1925 Sind 287 (288): 93 Ind Cas 840; *James Finlay & Co* v. *Gudayal Pahlajraj*, 1924 Sind 91 (95): 17 Sind L R 93: 76 Ind Cas 660 [Documents and correspondence read in the absence of one party no misconduct]; *Alagappa* v. *Chidambara*, 1931 Mad 619 (621): 1931 Mad W N 451: 133 Ind Cas 522: 34 Mad L W 507.

(12-a) *Ramasami* v. *Subbier*, 1926 Mad 1158 (1158): 24 Mad L W 482: 97 Ind Cas 478.

(13) *Hemchand Kundu* v. *Jnanendra Chundra*, 1926 Cal 116 (118): 90 Ind Cas 624; *Dial Chand* v. *Khuda Baksh*, (1910) 6 Ind Cas 963 (964): 1910 Pun W R 73. See also *Venkatasubbayya* v. *Venkataramanayya*, 1930 Mad 646 (648): 126 Ind Cas 735.

(14) *Haridas Dutta* v. *Baidya Nath Ghose*, (1917) 40 Ind Cas 646 (647): 21 Cal W N 895; *Joshi Damodarji* v. *Joshi Ram Nath*, (1916) 33 Ind Cas 467 (472) All.

(15) *Ram Chand* v. *Buta Ram*, 1931 Lah 65 (65): 130 Ind Cas 833; *Ma Sat Kyi* v. *Maung Tun Gyi*, (1897-1901) 2 U B R 4.

(16) *Daya Kishen* v. *Dharam Das*, (1907) 4 All L J 159 (159): 1907 All W N 75; *Ganga Sahai* v. *Baldeo Singh*, 1922 All 64 (65): 20 All L J 117: 65 Ind Cas 779; *Ganesh Narain Singh* v. *Malida Koer*, (1911) 10 Ind Cas 450 (452): 13 Cal L Jour 399· *Kanhye Chand* v. *Ram Chander*, (1875) 24 Suth W R 81 (82); *Ram Chandra* v. *Hans Rom*, 1931 Lah 111 (112): 131 Ind Cas 220; *Neba Ram* v. *Khota Ram*, 1928 Lah 550 (550): 110 Ind Cas 833; *Kanhaiya Lal* v. *Khairati Lal*, (1919) 49 Ind Cas 303 (304): 1919 Pun W R 9; *Ram Chand* v. *Buta Ram*, 1931 Lah 65 (65): 130 Ind Cas 833; *Abdul Halim* v. *Ismail Momin*, 1925 Pat 465 (466): 3 Pat L R (Civ) 59: 86 Ind Cas 773: 6 Pat L Tim 544; *Jagat Hari Bepin Behari Poddar* v. *Moran & Co*, (1915) 26 Ind Cas 73 (76) Cal [An arbitrator acts illegally in not disclosing to the parties the documents on which he acts]. See *Sheik Mohidin Sahib* v. *Ramaswami Chetti*, 1921 Mad 271 (272): 41 Mad L Jour 276: 14 Mad L W 394: 1921 Mad W N 509: 65 Ind Cas 676 [Such knowledge communicated to co-arbitrators in the presence of parties—Award is valid]; *Budhi Ram* v. *Chandu*, 1922 Lah 480 (480): 67 Ind Cas 866 [Inquiry made in the presence of parties—Is not objectionable]; *Mg Shwe Hpu* v. *U Min Nyun*, 1925 Rang 383 (384): 3 Rang 387: 91 Ind Cas 659 [Arbitrators not acting upon such knowledge—Award is not vitiated].

(17) *Haji Husain Baksh* v. *Firm of Lachman Das Mathura Das*, 1922 All 69 (69): 20 All L J 125: 64 Ind Cas 934; *Chandrika Datt Ram Panday* v. *Shyam Lal*, 1926 Oudh 383 (384): 3 Oudh W N 397: 94 Ind Cas 162: 29 Oudh Cas 258: 13 Oudh L J 504. See *Chintalapudi Sanyasi* v. *Chintalapudi Venkatarao*, 1923 Mad 301 (302, 304): 17 Mad L W 71: 1923 Mad W N 7: 32 Mad L Tim 32: 44 Mad L Jour 263: 73 Ind Cas 470: 47 Mad 30 [But guardian of a minor cannot so agree, though an adult can do so].

(18) *Lachmi Narain* v. *Sheo Nath Pandey*, (1920) 54 Ind Cas 443 (444): 42 All 185: 18 All L J 78: 1 U P L R (H C) 177; *Gopalan* v. *Suryanarayana*, 1926 Mad 752 (754): 50 Mad L Jour 514: 23 Mad L W 681: 1926 Mad W N 445: 95 Ind Cas 740; *R Palavesam Chettiar* v. *Narayana Ayyar*, 1925 Mad 1086 (1087): 49 Mad L Jour 115: 1925 Mad W N 503: 88 Ind Cas 660; *Bari Bahu* v. *Pratap Singh*, (1920) 57 Ind Cas 604 (605) Nag.

(19) *R Palavesam Chettiar* v. *Narayana Ayyar*, 1925 Mad 1086 (1086, 1087): 49 Mad L Jour 115: 1925 Mad W N 503: 88 Ind Cas 660; *Lachmi Narain* v. *Sheo Nath Pandey*, (1920) 54 Ind Cas 443 (444): 42 All 185: 18 All L J 78: 1 U P L R (H C) 177; *Ram Lal Ashrafi*

Para. 15, Note 6.

selected only because of his personal knowledge of the matters in dispute,[20] it is not misconduct on the part of the arbitrator to import into the consideration of the case his own personal knowledge.

(9) An arbitrator has no authority to delegate his functions to a stranger[21] except the performance of acts of a merely ministerial character.[22]

It is difficult to prescribe in general terms the precise length to which an arbitrator may go in seeking outside advice *upon matters of law*. Where he merely takes advice upon the general rules of law bearing upon the case and does not leave to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon, it cannot be said that the award is vitiated by misconduct.[23] In such cases "it would be prudent and discreet for arbitrators when they desire to put themselves on the best footing of information as to matters of law, to ask all the parties to be present when they communicate with any gentleman whom they may *see* upon that subject".[24]

(10) Where an arbitrator is indebted to one of the parties at the time of reference or becomes indebted after the reference[25] or has a personal interest in the subject-matter of the dispute[26] or where he has come to know of the facts of the case in the capacity of an advisor of one of the parties[27] and where such fact is not disclosed to the other party the award is vitiated by misconduct. But a pleader is not incompetent to be an arbitrator simply because he was engaged by one of the parties as his pleader on some former occasions.[28]

Lal v. *Mahadeo Prasad*, 1925 Oudh 741 (742): 89 Ind Cas 832; *Gudipoodi Subbayya* v. *Kotapalli Seshayya*, 1928 Mad 48 (50, 52): 105 Ind Cas 105 [Guardian of a minor can consent to arbitrator's decision on personal knowledge].

(20) *Daulatsing Bapusingh Raul* v. *Ratna Anandsingh*, 1926 Bom 527 (529): 28 Bom L R 986: 97 Ind Cas 673; *Polipillai* v. *Ammanna*, 1929 Mad 144 (145): 114 Ind Cas 367 [Arbitrators selected on account of personal knowledge—Used it only in understanding and appreciating evidence—Held award not bad]. See *Brojendra Kumar Pal* v. *Purna Chandra Pal*, 1931 Cal 53 (57): 34 Cal W N 689: 129 Ind Cas 428: 58 Cal 269; *Ruttonsey Rowji* v. *Bombay United Spinning Manufacturing Co, Ltd*, (1917) 37 Ind Cas 271 (275): 41 Bom 518: 18 Bom L R 532.

(21) *Juggobund* v. *Chand Mohan*, (1915) 31 Ind Cas 33 (34): 22 Cal L Jour 237. See *Government of Bombay* v. *Esupali Salebhai*, (1910) 5 Ind Cas 621 (621): 34 Bom 618: 12 Bom L R 34 [Arbitrator examining a witness who was asked to estimate and evaluate—Held no delegation of authority].

(22) *Buta* v. *Municipal Committee of Lahore*, (1902) 29 Cal 854 (867): 29 Ind App 168: 1902 Pun Re No. 87: 7 Cal W N 82: 4 Bom L R 673: 8 Sar 327 P C; *Municipal Committee of Lahore* v. *Buta*, (1899) Pun Re No. 65 [Affirmed in 29 Cal 854 P C on appeal].

(23) *Louis Drefus & Co* v. *Arunachalayya*, 1931 P C 289 (293): 8 Oudh W N 1066: 35 Cal W N 1287: 58 Ind App 381: 1931 All L J 1116: 33 Bom L R 1536: 54 Cal L Jour 372: 61 Mad L Jour 623: 34 Mad L W 676: 134 Ind Cas 1080 P C; *Abdul Hakim* v. *Ismail Momin*, 1925 Pat 465 (466): 3 Pat L R (Civ) 59: 86 Ind Cas 773: 6 Pat L Tim 544; *Buta* v. *Municipal Committee of Lahore*, (1902) 29 Cal 854 (867): 29 Ind App 168: 1902 Pun Re No. 87: 7 Cal W N 82: 4 Bom L R 673: 8 Sar 327 P C.

(24) *Buta* v. *Municipal Committee of Lahore*, (1902) 29 Cal 854 (867): 29 Ind App 168: 1902 Pun Re No. 87: 7 Cal W N 82: 4 Bom L R 673: 8 Sar 327 P C.

(25) *Mahomed* v. *Hakiman*, (1902) 29 Cal 278 (282): 6 Cal W N 235.

(26) *Co-operative Hindustan Bank, Ltd.* v. *Bhola Nath*, (1913) 31 Ind Cas 597 (600): 19 Cal W N 165.

(27) *Madho Mal Kishore Chand* v. *Gurdial Radha Kishen*, (1921) 63 Ind Cas 1007 (1008) Lah; *Maung Lu Gyi* v *Maung Lu Ngwe*, (1897-01) 2 U B R 13.

(28) *Rajendra Nath Das* v. *Abdul Hakim Khan*, (1917) 39 Ind Cas 767 (768) Cal.

(11) The reason is that it is the duty of the arbitrator to see that the proceedings are conducted with reasonable diligence and not doing so is a failure in his ordinary duties as an arbitrator. Where an award is made after a delay of five years, it will amount to misconduct unless the delay is properly explained.[29] But where delay in making an award is caused by the voluntary absence of one of the parties that party cannot impugn the validity of the award on the ground of delay.[30]

(12) Where the decision of an arbitrator is perverse, it amounts to misconduct on the part of the arbitrator.[31]

(13) Where one of the arbitrators is guilty of misconduct in having accepted an illegal gratification from one of the parties, the award ought to be set aside in its entirety, inasmuch as it is difficult to say how far the other arbitrators were influenced by the biassed and interested opinion of one of them.[32]

See also Note 8, *infra,* and the undermentioned cases.[33]

7. **Acquiescence in acts amounting to misconduct.**—The principles mentioned in Note 6, *ante* in relation to the various instances of misconduct must be understood subject to the qualification that the parties may agree that a reference may be conducted in a particular way.[1] It is also well settled that an objection to the irregular or improper conduct of an arbitrator may be waived by the parties either expressly or by their conduct provided the party waiving it has full knowledge of the defect.[2] This is based on the principle

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(29) *Bhogilal* v. *Chimanlal,* 1928 Bom 49 (50): 52 Bom 116: 30 Bom L R 92: 107 Ind Cas 707. See *Janki Das* v. *Tika Ram,* (1912) 18 Ind Cas 46 (49) All [Delay waived by parties objecting]; *Wali Muhammad* v. *Sohara,* (1875) Pun Re No. 41 [Delay owing merely to inattention and failure to attend on 2 or 3 successive occasions—No misconduct].

(30) *Kunj Lal* v. *Banwari Lal,* (1918) 48 Ind Cas 711 (714): 4 Pat L Jour 394.

(31) *Nga Tok* v. *Nga Kasim,* (1912) 14 Ind Cas 978 (979): 5 Bur L Tim 55; *Puresh Nath* v. *Nobin Chunder Dutt,* (1869) 12 Suth W R 93 (93): 5 Beng L R App 77 Note [Decision contrary to all the evidence which they believed].

(32) *Rahatullah Khan* v. *Ibadullah Khan,* (1913) 18 Ind Cas 92 (94, 95) Oudh. See *Khanchand* v. *Kodumal,* (1912) 15 Ind Cas 819 (821): 5 Sind L R 240.

(33) *Pandit Sankata Prasad* v. *Jagannath,* (1922) Oudh 276 (277): 9 Oudh L J 410: 26 Oudh Cas 1: 69 Ind Cas 714 [Reference of dispute as regards management—Scheme—Arbitrators appointing themselves as managers—Award is bad]; *Mt Phula* v. *Kusam Singh,* 1923 Nag 70 (71): 71 Ind Cas 413 [Reference to arbitrators to make partition—Arbitrators can make allotment subject to conditions affecting its tenure or devolution]; *Boonjad Mathoor* v. *Nathoo Shahoo,* (1878) 3 Cal 375 (379): 1 Cal L Rep 455 [Arbitrators themselves doubting the correctness of their decision—Award not valid]; *Charanji Lal* v. *Ramji Das,* (1876) Pun Re No. 5 [Reference to examine accounts—Award made without examination of accounts is no award at all]; *Khairam Hiranand* v. *Lalchand Hiranand,* 1930 Sind 103 (104, 105): 125 Ind Cas 824 [Award not deciding the real question at issue—Held vitiated by misconduct].

Note 7.

(1) *Cursetji Jehangir* v. *W Crowder,* (1894) 18 Bom 299 (312) [Such agreement may be express or implied from the conduct of the parties during the arbitration].

For such instances, see Note 6, ante.

(2) *C and I Engineering Co.* v. *Mullick Thakurdas,* 1930 Sind 79 (81, 82): 123 Ind Cas 234: 24 Sind L R 351; *Rethamalai Servai* v. *Ramaswamy Servai,* (1919) 51 Ind Cas 53 (54): 10 Mad L W 57; *Nanjappa* v. *Nanja Rao,* (1912) 16 Ind Cas 478 (482): 12 Mad L Tim 133: 23 Mad L Jour 290: (1912) Mad W N 1091; *U Gunuwa* v. *Pyinnyadippa,* 1923 Rang 187 (188): 1 Rang 15: 2 Bur L Jour 30: 74 Ind Cas 6; *Cursetjee Jehangir* v. *W Crowder,* (1894) 18 Bom 290 (312); *Ananta Lal Pakrasi* v. *Jnanada Sundary Debya,* 1930 Cal 255 (256, 257): 50 Cal L Jour 328: 125 Ind Cas 290 [Award by 4 out of 5 arbitrators—Parties affirming award and asking 3 arbitrators to complete it—Estoppel]; *Muhammad Sheikh* v. *Kankinarah Co. Ltd,* 1924 Cal 665 (666): 28 Cal W N 634: 81 Ind Cas 574 [3 arbitrators appointed—One refused to act—Change in the personnel of the arbitrators made with consent of defendants]; *Bykunth Nath* v. *Prionath,* (1874) 22 Suth W R 447 (447) [Plaintiff aware at time of reference that arbitrator is a relation of defendant]; *Ah Kin Shok* v. *Maung Ta Hin,* (1897-1901) U B R Vol II, 8; *Sukhnath Rai* v. *Nehalchand,* (1921) 59 Ind Cas 801 (804): 18 All L J 644: 2 U P L R (All) 240: 42 All 661

Para. 15, Notes 7—8.

that Courts will not permit a party to lie by or act in an indecisive manner so as to obtain the benefit of the award if it is in his favour and endeavour to set it aside if it is not.[3] Thus where one of several arbitrators is absent at some of their meetings and a party participates in subsequent proceedings without objecting to the irregularity[4] or where the arbitrators examine the plaintiff's witnesses in the absence of the parties and the defendant who is aware of this makes no protest at that time or later on[5], the party will be deemed to have waived his right to object to the award.

A stipulation in an agreement of reference precluding the parties from impeaching the validity of the award is within the mischief of S. 28 of the Indian Contract Act and will not, therefore, prevent the Court from setting aside the award on any of the grounds mentioned in this paragraph.[6] The reason is that the grounds mentioned in this paragraph "suggest the requisites of a valid agreement as well as of a valid award."[7]

8. **Acts not amounting to misconduct.**—In *Andrews* v. *Mitchell*[1] Lord Halsbury observed as follows: "We must not insist upon too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere matter of form without any interference with the substance of their dicisions." Courts will not, therefore, set aside an award for misconduct of the arbitrators unless there has been something radically wrong and vicious in the proceedings before the arbitrators.[2]

The following are some instances of acts that do not amount to misconduct:—

(1) It is not a valid objection to an award that the arbitrators have not acted in strict conformity with the rules of evidence.[3]

[Acquiescence in objection to jurisdiction]; *Ram Chand Gurdasmal* v. *Gobind Ram*, (1919) 53 Ind Cas 337 (341): 13 Sind L R 75 [Waiver—Arbitrator getting information in the absence of one party]; *Narpat Rai* v. *Devi Das*, (1912) 14 Ind Cas 371 (373): 13 Pun W R 1911 [Party closing his case and leaving it to arbitrator to call further evidence—Cannot complain of insufficient enquiry]; *Haridas Datta* v. *Bardya Nath Ghose*, (1917) 40 Ind Cas 646 (647): 21 C W N 895 [Two out of three arbitrators gave evidence—Parties aware of the possibility]; *Janendra Nath Bagchi* v. *Sures Chandra Roy*, 1928 Pat 7 (11): 6 Pat 556: 109 Ind Cas 821 [Arbitrators selected to construe a will can deviate from its terms if agreed to by legatees and executors]. See *Gunum Meah* v. *A Rahman*, 1929 Rang 166 (167): 7 Rang 136: 117 Ind Cas 574 [Signature of party may not estop him from disputing correctness]; *Alagappa* v. *Chidamboram*, 1931 Mad 619 (621): 34 Mad L W 507: 133 Ind Cas 522: 1931 Mad W N 451.

(3) *C and I Engineering Co* v. *Mullick Thakurdas*, 1930 Sind 79 (81): 123 Ind Cas 234: 24 Sind L R 351.

(4) *Ram Nath Misra* v. *Ramranjam Misar*, 1922 Cal 181 (181): 67 Ind Cas 866; *Nadir Chand Chah Bonik* v. *Gobind Chandar Shaha Bonik*, (1905) 2 Cal L Jour 61 (65).

(5) *S C T Al Alagappa Chettiar* v. *S S C T Chidambaram Chettiar*, 1931 Mad 619 (622): 1931 Mad W N 451: 133 Ind Cas 522: 34 Mad L W 507; *Maung Myin* v. *Maung Yan Aung*, (1897-1901) U B R Vol II 21; *Dayaram Pritamdas* v. *Narain Das*, 1929 Sind 200 (203): 119 Ind Cas 529.

(6) *Burla Renga Reddi* v. *Kalapalli Sithaya*, (1883) 6 Mad 368 (369, 370); *Ram Jawaya* v. *Daviditta*, (1916) 34 Ind Cas 192 (195): 107 Pun W R 1916: 117 Pun Re 1916: 70 Pun L R 1917. See *Rengiah Chetty* v. *Govindasamy Chetty*, 1922 Mad 179 (180): 15 Mad L W 160: 71 Ind Cas 266: 1921 Mad W N 793 [Can have award set aside on the ground of illegality on the face of it].

But see *Kahan Singh* v. *Mohan Lal*, (1916) 34 Ind Cas 177 (180): 44 Pun W R 1916: 56 Pun L R 1917 [Dissented from in 34 Ind Cas 192].

(7) *Burla Renga Reddi* v. *Kalapalli Sithaya*, (1883) 6 Mad 368 (370).

Note 8.

(1) (1905) App Cas 78: 74 L J K B 333: 91 L T 537 cited in 1925 Rang 383.

(2) *Shive Hpu* v. *U Min Nyun*, 1925 Rang 383 (384): 3 Rang 387: 91 Ind Cas 659.

(3) *Sappu* v. *Govindacharyar*, (1888) 11 Mad 85 (87).

Para. 15, Note 8.

Thus the honest though mistaken admission by an arbitrator of a document in violation of a rule of evidence introduced *pro hac vice* (for the occasion) would not be a ground for setting aside an award.[4] Communications between parties in the course of negotiations between them are inadmissible in evidence. This rule of law based upon grounds of public policy and convenience is as binding on arbitrators as on Courts. But if a party does not object to such evidence being received on this ground, it cannot later on be made a ground for setting aside the award.[5]

(2) If a party offers to abide by the oath of the opposite party, the arbitrator can make his award accordingly.[6]

(3) It is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceedings before him. But the absence of such notes is not a ground for setting aside the award and especially if the party objecting did not make any protest until after the awards was made.[7]

(4) Until an award is finally published the arbitrator has a right to reconsider the award he has already made.[8] But once it is published his authority is exhausted. He is *functus officio* and has no power thereafter to correct or modify the award.[9]

(5) When a cause or matter in difference is referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law and of fact.[10] Therefore, Courts will not sit as Courts of appeal to consider the correctness of an award on the merits in respect of matters of fact or even of law.[11] An error in calculation in the award,

S. N. DAR, B.A., LL.B.
Vakil High Court.
SRINAGAR (Kashmir)

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(4) *Aishabai* v. *Essaji Taj Bhai,* (1918) 19 Ind Cas 934 (937): 15 Bom L R 392: 38 Bom 60 [Reversing 17 Ind Cas 696].

(5) *Howard* v. *Wilson,* (1879) 4 Cal 231 (236): 2 Cal L Rep 488. See *Das & Co* v. *Broach Electric Supply and Development Corporation,* 1928 Bom 55 (55): 30 Bom L R 90: 108 Ind Cas 18 [Such a letter perused by arbitrator and rejected—Held no misconduct].

(6) *Bhagirath* v. *Ram Goolam,* (1882) 4 All 283 (288): 1882 All W N 34; *Waliulla* v. *Ghulam Ali,* (1875-78) 1 All 535 (539): 2 Ind Jur 468 [Per Spankie, J, contra per Pearson, J].

(7) *Mt Amir Begam* v. *Syed Badruddin,* 1914 P C 105 (107): 36 All 336: 17 Oudh Cas 120: 12 All L J 537: 16 Bom L R 413: 19 Cal L Jour 494: 18 Cal W N 755: 27 Mad L Jour 181: 16 Mad L Tim 35: 1 Mad L W 1015: 1914 Mad W N 472: 1 Oudh L J 249: 23 Ind Cas 625 [Affirming 13 Ind Cas 520 on appeal]. See *Yusuf Khan* v. *Riyasat Ali,* 1926 Oudh 307 (308): 8 Oudh W N 279: 13 Oudh L J 224: 93 Ind Cas 446: 1 Luck 139 [Pencil notes transcribed and filed—Suspicious circumstances—Held to be misconduct].

(8) *Howard* v. *Wilson,* (1879) 4 Cal 231 (235): 2 Cal L Rep 488; *Dayal Chand* v. *Khuda Baksh,* (1910) 6 Ind Cas 963 (968): 78 Pun W R 1910; *Babu Lal* v. *Badri Lal,* (1919) 49 Ind Cas 522 (527) Pat.

(9) *Ramai Ram* v. *Salig Ram,* (1911) 11 Ind Cas 481 (487): 14 Cal L Jour 188; *Amar Nath* v. *Ishar Singh,* (1917) 43 Ind Cas 350 (351): 99 Pun Re 1917: 173 Pun W R 1917; *Dutto Singh* v. *Dosad Bahadur Singh,* (1883) 9 Cal 575 (579).

(10) *Champsey Bhara Co* v. *Jivraj Baloo Spinning and Weaving & Co,* 1923 P C 66 (68): 44 Mad L Jour 706: 25 Bom L R 588: 1923 Mad W N 596: 73 Ind Cas 436: 38 Cal L Jour 130: 47 Bom 578: 50 Ind App 324: 28 Cal W N 897: 4 L R P C 99 P C.

(11) *Ghulam Khan* v. *Muhammad Hassan,* (1902) 29 Cal 167 (183): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 25 Pun Re 1902 P C; *Nizamuddin* v. *S Gulam Ahmed,* (1909) 4 Ind Cas 553 (554): 64 Pun W R 1909: 53 Pun L R 1909; *Aftab Begam* v. *Haji Abdul Majid Khan,* 1924 All 800 (800): 22 All L J 816: 81 Ind Cas 525: 5 L R (All) Civ 783; *Ramjatan* v. *Sheobalak,* (1897) 17 All W N 162 (163); *Sakrappa* v. *Shivappa,* (1910) 8 Ind Cas 647 (648): 12 Bom L R 984: 35 Bom

Para. 15, Note 8.

unless so palpable and gross as to be strong evidence of misconduct, is no ground for interference by the Court.[12] But the committing of a mistake in law and letting it be visible on the face of the award is a form of judicial misconduct.[13] . *See also* Note 6 to Para. 14.

(6) An award need not be a reasoned judicial decision and the arbitrators need not even give their reasons for their conclusion.[14]

(7) An award made by the arbitrators which merely embodies a compromise arrived at before them by the parties is not invalid.[15] The reason is that such a proceeding is as much an adjudication of the case as a decree of a Court founded on a compromise.

(8) Where the arbitrators accept a fee as remuneration for their services at the suggestion and with the consent of all the parties, such acceptance of a fee does not involve any misconduct on their part.[16]

153; *Hari Singh* v. *Kan Kinarah Co, Ltd,* 1921 Cal 657 (661): 34 Cal L Jour 39: 66 Ind Cas 389 [Award not to be set aside merely because the Court differs from the decision of the arbitrator]; *Muhammad Newaz Khan* v. *Alam Khan,* (1891) 18 Cal 414 (419): 18 Ind App 73: 70 Pun Re 1891: 6 Sar 26: 15 Ind Jur 284 P C; *Kazee Syud Naser Ali* v. *Mt Tinoo Dossia,* (1866) 6 Suth W R 95 (95); *Gooroo Churn* v. *Ramdhone,* (1867) 7 Suth W R 28 (28); *Nathu* v. *Abdul Ghani,* 1930 Lah 22 (23): 119 Ind Cas 726 [Court cannot go into the question of reasonableness of award]; *Dwarka Das* v. *Kishen Kishore,* 1921 Lah 34 (34, 35): 2 Lah 114: 3 Lah L Jour 349: 73 Pun L R 1921: 61 Ind Cas 628 [The arbitrator is not controlled in his decision by the rules of Hindu law]; *Chandan* v. *Bibi,* (1928) 75 Ind Cas 198 (Lah) [The fact that the award seemed to be an unreasonable one is no ground for setting it aside under Para. 15]; *S O T Al. Alagappa Chettiar* v. *S S C T Chidambaram Chettiar,* 1931 Mad 619 (624): 1931 Mad W N 451: 133 Ind Cas 522: 34 Mad L W 507 [Though Limitation Act is applicable to arbitration, error on a question of limitation will not make award invalid]; *Mirza Muhammad Hasan Beg* v. *Mir Shakir Beg,* 1924 Oudh 400 (402): 11 Oudh L J 142: 78 Ind Cas 878; *Badruddin Hassan* v. *Amir Begam,* (1912) 13 Ind Cas 520 (522): 14 Oudh Cas 308; *Waliullah* v. *Bhaggan,* 1925 Oudh 269 (270): 11 Oudh L J 570: 80 Ind Cas 7: 28 Oudh Cas 74: 1 Oudh W N 394: *Lal Behari Lal* v. *Ram Dayal,* (1912) 15 Ind Cas 321 (325) Oudh *Kokil Singh* v. *Ramasray Prosad,* 1924 Pat 488 (491): 3 Pat 448: 1924 Pat H C C 110: 6 Pat L Tim 122: 81 Ind Cas 994: 3 Pat L R (Civ) 52; *Ma Sein Myu* v. *Swami,* (1917) 37 Ind Cas 807 (808) Rang; *Dutton Massey & Co* v. *Jamnadas Harprasad,* 1921 Sind 51 (55): 76 Ind Cas 84: 19 Sind L R 152: *Ramji Bhoy & Co* v. *Yusufali Mahomed Ali,* 1924 Sind 151 (152): 18 Sind L R 78: 80 Ind Cas 403: *Uttamchand* v. *Mahomed,* (1920) 54 Ind Cas 285 (289): 23 Cal W N 704: 46 Cal 534: *Mohendranath Bose* v. *Nusee,* 1 Ind Jur N S 324: *Mt Janki* v. *Pusa alias Umrao,* (1901) 14 C P L R 94 (96) [An award of proprietory rights cannot be questioned on the ground that the devolution of property is opposed to Hindu law]. See *Futto* v. *Ghoolam Sultan,* (1867) Pun Re No. 47 [An award cannot be set aside on the grounl that the arbitrators were unlettered men not versed in law]; *Ganesh Singh* v. *Bhikham Singh,* 1928 Oudh 1 (7): 4 Oudh W N 1085: 107 Ind Cas 545: 3 Luck 1 [Award setting aside deed of gift on condition of donor's paying to donee compensation to the extent of benefits received by donor is valid]; *Murli Dhari* v. *Moolchand,* 1924 Oudh 54 (55): 10 Oudh L Jour 226: 73 Ind Cas 39 [Reference for partition—Arbitrators can make provision for maintenance of female members of the family].

(12) *S O T Al Alagappa Chettiar* v. *S S C T Chidambaram Chettiar,* 1931 Mad 619 (623): 1931 Mad W N 451: 133 Ind Cas 522: 34 Mad L W 507.

(13) *The Firm of Saleh Mahomed Umer Dossal* v. *Seth Nathoomal,* 1927 P C 164 (165): 53 Mad L Jour 18: 29 Bom L R 1150: 46 Cal L Jour 9. 31 Cal W N 1027: 39 Mad L Tim 61: 104 Ind Cas 476: 54 Ind App 427: 21 Sind L R 101: 55 Cal 126; *Gunnis & Co, Ltd* v. *Amanamal Tulsi Das,* 1924 Sind 75 (83, 84, 87): 17 Sind L R 133: 83 Ind Cas 353.

(14) *Nanjappa* v. *Nanja Rao,* (1912) 16 Ind Cas 478 (481): 12 Mad L Tim 133: 23 Mad L Jour 290: 1912 Mad W N 1091. See also cases cited in Note 2, Foot-note (3) of Para. 21.

(15) *Ramu Naidu* v. *Nayanappa,* 1925 Mad 56 (57): 19 Mad L W 562: 1924 Mad W N 356: 80 Ind Cas 571 [Relying on 5 All W N 259 and 12 All W N 79]; *Gobardhan* v. *Jaikishen,* (1900) 22 All 224 (228): 1900 All W N 52; *Darbari Lal* v. *Wasu Malik,* (1920) 56 Ind Cas 115 (116) Lah; *Abdul Rahman Khan* v. *Gulam Kadir Khan,* (1877) Pun Re No. 79; *Venkatakrishnamacharulu* v. *Perunderamma,* (1920) 56 Ind Cas 593 (594) Mad; *Hanu Ram* v. *Dhanna Singh,* 1928 Lah 915 (916): 110 Ind Cas 401 [Dispute between partners referred—Two partners compromising and others consenting—Arbitrators can go into the question of compromise and pass award in its terms].

(16) *Subraya* v. *Manjunath,* (1906) 29 Mad 44 (45).

Para. 15, Notes 8—11.

See also the undermentioned cases[17] and other instances mentioned in Note 6, *ante*.

9. **Evidence of arbitrator.**—An arbitrator selected by the parties comes within the general obligation of being bound to give evidence when called as a witness in proceedings to enforce or set aside an award. He may be examined upon the course of procedure which he has adopted, the material which he has utilised in arriving at his decision and as to every matter of fact with reference to the making of the award, so as to put the Court in possession of the history of the litigation up to the time of his proceeding to make the award. But a party can go no further and cannot examine him as to why and how he arrived at a particular decision and scrutinise his decision on matters within his jurisdiction and on which his decision is final.[1]

10. **"Fraudulent concealment of any matter which he ought to have disclosed".**—"In cases of arbitration where a person is appointed by two parties to exercise judicial duties, there should be *uberrima fides*[1] on the part of all the parties concerned in regard to his selection and appointment and every disclosure which might, in the least, affect the minds, of those who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made."[1-a] Thus, where the arbitrator is the retained pleader of one of the parties,[2] or is related to him[3] or is interested in the subject-matter of the dispute[4] and such fact is not disclosed by that party to the other side, the award made by the arbitrator is liable to be set aside under Clause (*b*) of this paragraph.

11. **Award made after order superseding arbitration.**—If the power of the arbitrator is revoked by the Court passing an order superseding the arbitration, "the arbitrators have no longer *seisin* of the reference, and

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(17) *Puranchand* v. *Ram Nath*, 1925 Oudh 227 (228): 11 Oudh L J 685: 84 Ind Cas 490 [Arbitrators evenly divided in .their opinion—Reference to umpire—Umpire deciding by casting lots—No misconduct]; *Nainsukh* v. *Umadai*, (1885) 7 All 273 (276): 1885 All W N 12 [Award cannot be set aside on the mere surmise that arbitrator might have been partial he being related to a party]; *S and O Nordilinger* v. *Ouandmull Mulchand*, 1924 Cal 1051 (1053): 28 Cal W N 888: 82 Ind Cas 341.

Note 9.

(1) *Mt Amir Begam* v. *Syed Badrudin Husain*, 1914 P C 105 (108): 36 All 336: 17 Oudh Cas 120: 12 All L J 537: 16 Bom L R 413: 19 Cal L Jour 404: 18 Cal W N 755: 27 Mad L Jour 181: 16 Mad L Tim 35: 1 Mad L W 1015: 1914 Mad W N 472: 1 Oudh L Jour 249: 23 Ind Cas 625 [Approving the case of *Buccleuch* v. *Metropolitan Board of Works*, (1871) 5 H L 418]; *Khub Lal* v. *Bishambhar Sahai*, 1925 All 103 (107): 22 All L J 919: 5 L R A Civ 649: 82 Ind Cas 219; *Badruddin Hasan* v. *Amir Begum*, (1912) 13 Ind Cas 520 (523): 14 Oudh Cas 308; *Dutton Massey & Co* v. *Jamnadas Harparsad*, 1924 Sind 51 (54): 76 Ind Cas 84: 19 Sind L R 152; *Tulsi Das Narsi* v. *Medam Subbanna Chetty*, (1909) 2 Ind Cas 92 (93): 19 Mad L Jour 394: 6 Mad L Tim 137 [May be examined to ascertain whether a proceeding of his is an award]. See *Nilmonee* v. *Mohima*, (1872) 17 Suth W R 516 (517) [Can be examined to prove admissions made before him in proceeding after setting aside of award].

Note 10.

(1) *i.e.*, Abundant confidence.

(1-a) *Kali Prosanno* v. *Rajani Kant*, (1898) 25 Cal 141 (144); *Ghulam Mahomed Khan* v. *Gopal Das Lal Singh*, 1933 Sind 68 (69, 70).

(2) *Kali Prosanno* v. *Rajani Kant*, (1898) 25 Cal 141 (144).

(3) *Firm, Motharam Dowlatram* v. *Firm, Mayadas Dowlatram*, 1925 Sind 150 (151, 152): 78 Ind Cas 521: 19 Sind L R 251.

(4) *Yusuf Khan* v. *Riyasat Ali*, 1926 Oudh 307 (309): 13 Oudh L J 224: 93 Ind Cas 446: 8 Oudh W N 279: 1 Luck 139.

Para. 15, Notes 11—13.

they are *functi officio* and cease to have any more power to make an award than the man in the street".[1]

Where an award was not made in time and consequently the reference to arbitration was cancelled, the Court has no power to look at the award subsequently made and base its judgment on it, as if it were the report of a commissioner.[2]

12. Award made after the expiry of the period allowed by the Court.—It has been already mentioned in Note 1, *ante* that S. 521 of the old Code after setting out the grounds on which an award could be set aside in Clauses (*a*), (*b*) and (*c*) provided that "no award shall be valid unless made within the time allowed by the Court". It was, therefore, held under that Code that an award made after the expiry of the period allowed was *null and void*, that is to say, there was *no award* on which the Court could make a decree.[1]

The effect of the alteration made in this paragraph is that an award made out of time is not *per se* a nullity, but only affords a ground or reason for *setting aside the award* if the parties so desire to assert their rights.[2] If no application is made to set aside the award on that ground or if an application is made and refused, the award becomes final.[3] As to appeals against decrees based on awards made out of time *see* notes to Para. 16.

13. "Being otherwise invalid".—S. 521 of the old Code did not contain the words "or being otherwise invalid." It was held under that Code that an objection to an award could not be taken under S. 521 on the ground that the award was invalid for any reason other than those mentioned in that section.[1] The effect of the change made in this paragraph is that an objection to an award on the ground that it is invalid for any cause whatever must be taken in the Court in which the award is filed and if no objection is there taken or if it is made and disallowed, the award becomes final and cannot be challenged subsequently.[2] *See also* notes to Para. 16.

Note 11.

[1] *Ibrahim Ali* v. *Mohsin Ali*, (1896) 18 All 422 (427): 1896 All W N 137.

[2] *Raghunath Rai* v. *Ahmad*, 1922 Lah 194 (195): 4 Lah L Jour 48.

Note 12.

[1] *Raja Har Narain Singh* v. *Chaudrain Bagwant Kuar*, (1891) 13 All 300 (305): 18 Ind App 55: 6 Sar 14: 15 Ind Jur 283 P C; *Gauri Sankar* v. *Babban Lal*, (1892) 14 All 347 (348): 1892 All W N 20; *Ghuha Mal* v. *Hari Ram*, (1886) 8 All 548: 1886 All W N 179; *Behari Das* v. *Kallian Das*, (1886) 8 All 543 (544): 1886 All W N 179; *Lachman Das* v. *Apparkash*, (1908) 30 All 169 (171): 1908 All W N 59: 5 All L J 144; *Bhugwan Das* v. *Nanda Lal*, (1886) 12 Cal 173 (178).

[2] *Shib Kristo Dawand Co* v. *Satish Chandra Dutt*, (1913) 18 Ind Cas 69 (70): 39 Cal 822; *Kahan Singh* v. *Mohan Lal*, (1916) 34 Ind Cas 177 (178): 56 Pun L R 1917: 44 Pun W R 1916; *Patto Kumari* v. *Upendra Nath*, (1919) 50 Ind Cas 52 (53): 4 Pat L Jour 265 The following cases decided without adverting to the alterations are it is submitted erroneous; *Digambari Bewa* v. *Joy Narain Das*, (1912) 16 Ind Cas 223 (224): 16 Cal L Jour 573; *Zarif* v. *Gharib Ullah*, (1920) 55 Ind Cas 221 (221) Lah.

[3] *Kahan Singh* v. *Mohan Lal*, (1916) 34 Ind Cas 177 (178): 56 Pun L R 1917: 44 Pun W R 1916; *Patto Kumari* v. *Upendra Nath*, (1919) 50 Ind Cas 52 (53): 4 Pat L Jour 265.

Note 13.

[1] *Lutawan Kubar* v. *Lachiya*, (1913) 21 Ind Cas 989 (992): 36 All 69: 12 All L J 57; *Lal Mohan Pal* v. *Surya Kumar Das*, (1906) 11 Cal W N 1152 (1153); *Ram Jiwan* v. *Nawal Singh*, (1908) 5 All L J 644 (646): 4 Mad L Tim 400: 1908 All W N 242; *Tellapragada Suryanarayana* v. *Tellapragada Sarabaya*, (1911) 9 Ind Cas 173 (178): 21 Mad L Jour 263: (1911) 1 Mad W N 151: 9 Mad L Tim 251.

[But see *Joy Prokash Lal* v. *Sheo Golam Singh*, (1885) 11 Cal 37 (41); *Lekhraj Singh* v. *Dulhma Kuar*, (1882) 4 All 302 (305)].

[2] *Mahomed Valli Asmal* v *Valli Asmal*, 1924 Bom 324 (325): 26 Bom L R 171: 79 Ind Cas 723; *Latawan* v. *Lachiya*, (1913) 21 Ind Cas 989 (991, 992): 36 All 69: 12 All L J 57; *Suraj*

Para. 15, Note 13.

An award made otherwise than in accordance with the authority conferred by the order upon the arbitrators is an award which is "otherwise invalid" and which may accordingly be set aside by the Court under this paragraph.[3] Thus where the arbitrators treat a person who is not a party to the suit which has been referred to them, as a party to it and decide disputes between parties to the suit or any of them and such person, the arbitrators exceed their jurisdiction and the award is invalid within the meaning of this paragraph.[4] Similarly where the arbitrators go beyond the scope of the submission and decide matters outside the scope of the suit, the Court will be justified in setting aside the award as invalid.[5] It has been held in the undermentioned case[6] that such an award cannot be treated partly as one made on a reference through Court and partly as an award by private agreement. But where simultaneously with the order of reference, the parties agree to refer to the same arbitrators matters outside the suit and separate awards are made and it appears that the view of the arbitrators in the latter award could not have influenced their minds in deciding the former, the award is not vitiated.[7]

There is a conflict of opinion on the question whether an award can be challenged under this paragraph on the ground that the *order of reference* is itself invalid. The High Court of Calcutta has held that the words "being otherwise invalid" in Clause (*c*) of sub-S. (1) of this paragraph refer to the invalidity of the kind mentioned in the preceding sentences of the said clauses and that, therefore, a ground of objection which challenges the validity of the order of reference is not a ground which may be put forward under this paragraph.[8] The High Court of Allahabad while expressing conflicting opinions as to whether the words should be construed *ejusdem generis* with those previously stated,[9] has held that an objection as to the validity of the reference is not an objection within this paragraph[10] But the High Court of

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Singh v. *Phul Kumari,* 1926 All 202 (203): 23 All L J 997: 90 Ind Cas 904: 48 All 226; *Madan Mohan Singh* v. *Narain Singh,* 1929 All 521 (524): 1929 All L J 540: 117 Ind Cas 861: *Sri Kishen Rochumal* v. *Relumal Pariomal,* (1916) 34 I C 845 (847): 9 Sind L R 183; *Baldeo Sahai* v. *Abdur Rahim,* 1932 Oudh 156 (158): 9 Oudh W N 191: 137 Ind Cas 151; *Emnabai* v. *Fakir Mahomed,* 1922 Sind 1 (3): 15 Sind L R 165: 65 Ind Cas 50; *Alim, son of Dadu* v. *Moledino,* (1913) 19 Ind Cas 848 (351, 352): 6 Sind L R 168; *Raoji* v. *Ratansi,* 1930 Bom 431 (438): 32 Bom L R 389: 126 Ind Cas 305: 54 Bom 696 [Objections to the validity of the award—A separate suit for that purpose will not lie—The remedy lies under Para. 15 (1) (*c*)].

(3) *Ram Protap Chamaria* v. *Durga Prosad Chamaria,* 1925 P C 293 (296): 49 Mad L Jour 812: 3 Oudh W N 127: 24 All L J 13: 43 Cal L Jour 14: 27 Pun L R 35: 1926 Mad W N 96: 8 Pat L R 330: 92 Ind Cas 633: 28 Bom L R 217: 53 Ind App 1: 53 Cal 258 P C.

(4) *Lila Ram* v. *Bal Chand,* 1927 Sind 193 (194) 101 Ind Cas 802.

(5) *Ram Pratap Chamria* v. *Durgo Prasad Chamria,* 1924 Cal 567 (570, 574): 28 Cal W N 424: 83 Ind Cas 300; *Firm of Mahomed Ali A Karimji and Sons* v. *Charat Singh Bud Singh,* 1925 Sind 51 (52): 80 Ind Cas 596; *Mohomed Mumtaz Ali* v. *Farhat Ali,* (1901) 23 All 394 (404, 405): 28 Ind App 190: 5 Cal W N 881: 8 Sar 85 P C; *Mt Guneshi* v. *Rambux,* (1893) 6 C P L R 95 (99).

(6) *Ram Pratap* v. *Durga Prasad,* 1924 Cal 567 (573): 28 Cal W N 424: 83 Ind Cas 300.

(7) *Jatindra Nath* v. *Manindra Nath,* 1927 Cal 52 (54): 44 Cal L Jour 224: 98 Ind Cas 803. See also *Narayanaswami Ayyangar* v. *Tippayye,* 1926 Mad 366 (366): 23 Mad L W 382: 1926 Mad W N 1: 92 Ind Cas 847 [Arbitrators acting beyond scope of reference and giving award on a matter to which all parties agreed—Award on this part is enforceable by suit].

(8) *Durga Charan* v. *Ganga Dhar,* 1931 Cal 109 (110): 34 Cal W N 813: 130 Ind Cas 137; *Golnur Bibi* v. *Sheik Abdus Samad,* 1931 Cal 211 (216, 218): 52 Cal L Jour 298: 35 Cal W N 238: 130 Ind Cas 209: 58 Cal 628.

(9) *Kanhaya Lal* v. *Jagannath Prasad Hanuman,* 1921 All 16 (17): 43 All 305: 19 All L J 33: 60 Ind Cas 857 [Must not be construed *ejusdem generis*]. *Shyam Lal* v. *Parshottam Das,* (1920) 58 Ind Cas 585 (589): 42 All 277: 18 All L J 241 [Must be construed *ejusdem generis*].

(10) *Mahadeo Prasad* v. *Badri Das Ram Sarup,* 1928 All 740 (743): 26 All L J 1009:

Para. 15, Notes 13—15.

Lahore has held that the doctrine of *ejusdem generis* cannot be invoked to restrict the full and natural meaning of the phrase "or being otherwise invalid" and that an award can be challenged on the ground that the reference is invalid as not having been agreed to by all the parties.[11]

The High Court of Madras has also held that the words are not *ejusdem generis* with the other cases mentioned in this paragraph, but are meant to include all cases of invalidity on grounds other than those mentioned and that, therefore, an award is invalid if a minor who is a party to the arbitration is not properly represented in the proceedings.[12]

14. Appeal.—No appeal lies from an order overruling objections to an award.[1] Nor does an appeal lie from an order setting aside an award under this paragraph[2] except in the case provided for in S. 104, sub-S. (1), Clause (*a*).

Where a Court sets aside an award under this paragraph and thereafter decides the suit on the merits, the Court of appeal can, on appeal from the decree in the suit, inquire into the propriety or otherwise of the order setting aside the award.[3] *See* S. 105, *ante*. But where an order superseding an award is confirmed in appeal in a case coming under S. 104, Clause (*a*), the Court hearing the appeal from the decree in the suit is precluded from re-opening the question of supersession of the award.[4]

It has been held by the High Court of Calcutta that an order made by a Judge of the High Court, in the exercise of original jurisdiction, refusing to set aside an award is a "judgment" within the meaning of Clause 15 of the Letters Patent and that an appeal lies therefrom to the High Court in its appellate jurisdiction.[5] *See* notes to S. 104.

15. Revision.—No revision lies to the High Court under S. 115, against the order of the lower Court refusing to set aside an award on any

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110 Ind Cas 881: 50 All 955; *Gopal Das* v *Baij Nath*, 1926 All 238 (239): 24 All L J 235: 91 Ind Cas 930: 48 All 239; *Kanhaiya Lal* v. *Jagannath Prasad Hanuman Prasad*, 1921 All 16 (17): 43 All 305: 19 All L J 33: 60 Ind Cas 857. [But see *Hari Sankar* v. *Mt Ram Pyari*, 1923 All 502 (503): 21 All L J 326: 45 All 441: 4 L R A (Civ) 543: 74 Ind Cas 834].

(11) *Rala Ram Walaiti Ram* v. *Bansi Lal Jagan Nath*, 1932 Lah 239 (241): 33 Pun L R 163: 136 Ind Cas 11: 13 Lah 528.

(12) *Lakshminarayana* v. *Ramachandran Tantri*, (1918) 45 Ind Cas 763 (765): 34 Mad L Jour 71: 23 Mad L Tim 89. See also *Kanatala Venkata Krishnama Charulu* v. *Kandala Perundevamma*, (1920) 56 Ind Cas 593 (594) Mad.

Note 14.

(1) *Narpat Rai* v. *Debi Das*, (1911) 9 Ind Cas 385 (385): 1 Pun L R 1911: 12 Pun W R 1911.

(2) *Behari Lal* .v *Khan Chand*, (1918) 47 Ind Cas 171 (173): 154 Pun W R 1918; *Munshi Masinul Azam* v. *Golzar Ahammad*, 1925 Cal 924 (925): 29 Cal W N 795: 95 Ind Cas 778.

(3) *Rudra Prasad Pande* v. *Mathura Prasad Pande*, 1925 All 566 (567): 23 All L J 656: 6 L R A (Civ) 459: 89 Ind Cas 173: 47 All 916; *Ram Autar* v. *Deoki*, (1915) 29 Ind Cas 411 (412): 37 All 456: 13 All L J 658; *Ram Jiwan* v. *Nawal Singh*, (1908) 5 All L J 644 (647): 4 Mad L Tim 400: 1908 All W N 242; *Ambica* v. *Nadyar*, (1883) 11 Cal 172 (174); *Contra Mothoora Nath* v. *Brindaban*, (1870) 14 Suth W R 327 (327); *Harbhajan Singh* v. *Mewa Singh*, 1928 Lah 753 (754): 110 Ind Cas 748; *Sher Jang* v. *Maihun*, 1881 Pun Re No. 72; *Juma* v. *Mubarak Khan*, (1912) 15 Ind Cas 62 (63): 97 Pun Re 1912: 106 Pun W R 1912: 133 Pun L R 1912; *Achuthayya* v. *Thimmayya*, (1908) 31 Mad 345 (346): 3 Mad L Tim 315: 18 Mad L Jour 228; *Bhagwan Din Singh* v. *Fakir Singh*, (1913) 20 Ind Cas 773 (775): 16 Oudh Cas 233; *Radha Kant* v. *Jaladhar*, (1917) 37 Ind Cas 844 (845) Pat; *Naranjan Singh* v. *Gujri*, (1912) 15 Ind Cas 928 (930): 236 Pun L R 1912. See *Moti* v. *Utma*, (1876) Pun Re No. 117 [Acquiescence in proceedings after setting aside award—Order cannot be challenged in appeal under S. 105]. [But see *Ganga Prasad* v. *Kura*, (1906) 28 All 408 (410): 3 All L J 168: 1906 All W N 64].

(4) *Shone Thakur* v. *Chandeshawar Jha*, (1920) 55 Ind Cas 1 (2): 2 U P L R (Pat) 57.

(5) *Toolsee Money Dasi* v. *Sudevi Dasi*, (1898) 26 Cal 361 (368, 378, 380): 3 Cal W N 347; *Howard* v. *Wilson*, 4 Cal 281 (284): 2 Cal L Rep 488.

Para. 15. Note 15.

of the grounds mentioned in this Paragraph merely because the lower Court has proceeded on an erroneous view.[1] Nor is an order setting aside an award under this Paragraph open to revision.[2] The reason is that the order is not the decision of a "case" within the meaning of S. 115; and, moreover, the applicant has got another remedy of challenging the order in an appeal against the decree in the suit if ultimately the suit is decided against him. *See* Note 14, *ante.* But where the ground for revision is the misinterpretation by the Court of the agreement of reference[3] or where an award is set aside on very inadequate grounds[4] or where the Court refuses to hear a valid objection properly raised before it,[5] the order is open to revision under S. 115.

The High Court of Allahabad has held in the undermentioned case[6] that where an award is set aside on the ground that the reference to arbitration ought not to have been made, the order setting aside the award is without jurisdiction and that therefore a revision lies to the High Court.

Para. 16.

Judgment to be according to award.

P. 16. [S. 522.] (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired[3], proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.

[1877—S. 522; 1859—S. 325.]

Note 15.

(1) *Narapat Rai* v. *Devi Das,* (1911) 9 Ind Cas 385 (385): 1 Pun L R 1911: 12 Pun W R 1911; *Bibi Patto Kumari* v. *Upendra Nath Ghosh,* (1919) 50 Ind Cas 52 (57): 4 Pat L Jour 265.

[But see *Jairam Singh* v. *Basheshar Nath,* 1929 Lah 369 (370): 111 Ind Cas 145].

(2) *Shah Muhammad* v. *Rahimullah,* 1925 All 458 (458): 47 All 121: 6 L R All (Civ) 22: 85 Ind Cas 502; *Rudra Prasad* v. *Mathura Prasad,* 1925 All 566 (567): 23 All L J 656: 6 L R All (Civ) 459: 89 Ind Cas 173: 47 All 916; *Ganga Sahai* v. *Baldeo Singh,* 1922 All 64 (65): 20 All L J 117: 65 Ind Cas 779; *Babu Ram Lal* v. *Behari Singh,* 1924 All 761 (761): 5 L R All (Civ) 367: 87 Ind Cas 371; *Chattar Singh* v. *Lekhraj,* (1883) 5 All 293 (294): 1883 All W N 39; *Nasarwanji Hormusji* v. *Jamshetji,* 1932 Bom 232 (233): 34 Bom L R 376: 138 Ind Cas 215; *Chimanbhai* v. *Keshavalal,* 1928 Bom 402 (402): 25 Bom L R 443: 73 Ind Cas 464: 47 Bom 721; *Damodar* v. *Raghunath,* (1902) 26 Bom 551 (552): 4 Bom L R 267; *Kali Charan Sirdar* v. *Sarat Chunder Chowdhury,* (1903) 30 Cal 397 (401): 7 Cal W N 545; *Fatteullah* v. *Abdul Rahim,* 1926 Lah 191 (192): 26 Pun L R 253: 91 Ind Cas 10; *Ram Jawaya Mal* v. *Devi Ditta Mal,* (1916) 34 Ind Cas 192 (195): 117 Pun Re 1916: 70 Pun L R 1917: 107 Pun W R 1916; *Ganga Prasad* v. *Ram Narain,* 1929 Oudh 493 (494): 6 Oudh W N 813.

(3) *Neba Ram* v. *Khota Ram,* 1928 Lah 550 (551): 110 Ind Cas 833 [In this case Court considered that reference gave power to arbitrator to decide upon private enquiry while as a matter of fact it did not so provide]. See *Haji Husain Baksh* v. *Firm of Lachman Das Mathura Das,* 1922 All 69 (69): 20 All L J 125: 64 Ind Cas 934.

(4) *Abdul Karim* v. *Muhammad Hussain,* (1916) 32 Ind Cas 345 (345): 2 Oudh L J 495.

(5) *Gobind Singh* v. *Bhirgu Nath,* 1924 All 788 (789): 46 All 686: 22 All L J 676: 5 L R All (Civ) 465: 82 Ind Cas 16.

(6) *Kanhaiya Lal* v. *Jagan Nath Prasad Hanuman Prasad,* 1921 All 16 (18): 43 All 305: 19 All L J 33: 60 Ind Cas 857.

Synopsis.

1. Legislative changes.
2. Pronounce judgment according to the award.
3. "After the time for making such application has expired."
4. Finality of decree in accordance with the award.
5. Finality of decrees not in accordance with the award.
6. Appeal against decree based upon invalid award.
7. Judgment without hearing objections to award—Appeal if lies against decree.
8. Second appeal.
9. Revision.
10. Binding effect of award.
11. Enforcement of the award.
12. Suit to set aside award.
13. Court acting as arbitrator.
14. Valuer and arbitrator.

Decree based upon a judgment pronounced in contravention of this paragraph, before the period for filing objections—Whether appealable. See Note 4, Pts. (7) to (16).

Decree in accordance with award submitted after remittal—Whether appealable. See Para. 14, ante, Note 9, Pt. (4).

Decree on award in the absence of the defendant—Whether an ex parte decree. See Note 2, Pt. (3).

"No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award." See Note 5, Pt. (1).

Objection to validity of award—Whether entertainable in appeal for the first time. See Note 6, F.-N. (1).

1. Legislative changes.—

1. The words "or if the award has been submitted to it in the form of a special case, according to its own opinion on such case" which occurred after the word "award" at the end of sub-S. (1) have been omitted. S. 104, Cl. (*b*) now gives a right of appeal against an order on an award stated in the form of a special case.[1] *See also* Notes to Para. 11.
2. The words "and shall be enforced in manner provided in this Code for the execution of decrees" which occurred in S. 522 of the old Code after the word 'followed' in sub-S. (2) have been omitted.

2. Pronounce judgment according to the award.—Where the Court sees no ground to remit the award under Para. 14 and where no application has been made to set aside the award or where such application has been refused, the Court has no option but to pronounce judgment according to the award.[1] Where, however, any portion of the award deals with matters *outside the scope of the suit*, the Court should not embody such portion of the award in its decree.[2]

It is not necessary that the judgment should be pronounced in the presence of the parties. Where, therefore, the defendant does not file any application to set aside the award, and the Court thereupon pronounces judgment in accordance with the award as it is bound to do, the decree which follows thereon is not an *ex parte* decree even though the defendant is absent at the time the decree is passed.[3] Where an application to set aside such

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Schedule II, Para. 16—Note 1.

(1) See Statements of Objects and Reasons.

Note 2.

(1) *Roshanlal* v. *Bridhichand*, 1924 Pat 603 (604): 1924 Pat H C C 170: 3 Pat 839: 83 Ind Cas 26: 6 Pat L Tim 212; *Gobind Singh* v. *Bhirgunath Singh*, 1924 All 788 (789): 46 All 686: 22 All L J 676: 5 L R All (Civ) 465: 82 Ind Cas 16; *Luchmee Narain* v. *Pyle*, (1870) 2 N-W P 150.

(2) *Kalavakolanu Seetamma* v. *Poodin Narayanamurthy*, (1920) 57 Ind Cas 982 (984): 38 Mad L Jour 470.

(3) *Roshan Lal* v. *Firm of Bridhi Chand*, 1924 Pat 603 (604): 1924 Pat H C C 170: 3 Pat 839: 83 Ind Cas 26: 6 Pat L Tim 212. See also *Sidhu Ram* v. *Gamun*, 1900 Pun Re No. 98: 1901 Pun L R 10.

Para. 16, Notes 2—4.

a decree is refused the order is not appealable under O. 43, R. 1, Cl. (*d*).[4]

Where an application to set aside an award is dismissed for default, an application to restore the same is maintainable notwithstanding that a decree is passed in the meanwhile.[5]

3. **"After the time for making such application has expired."**—An application to set aside an award must, under Art. 158 of the Limitation Act[1] be made within ten days of the time when notice of the filing of the award is "given" to the parties.[2] A notice is "given" to the parties where the parties actually *receive* the same.[3] A mere direction to issue notice is not equivalent to the "giving" of notice within the meaning of the article.[4] S. 5 of the Limitation Act does not apply to such applications and the Court cannot excuse the delay in the presentation thereof.[5] S. 12 of the Limitation Act will, however, apply, and, in computing the period of ten days, the time requisite for obtaining a copy of the award can be deducted.[6]

4. **Finality of decree in accordance with the award.**—An award on a reference made through the intervention of the Court becomes final where the Court sees no cause to make a remittal under Para. 14 and where no application has been made to set aside the award under Para. 15 or where such application has been refused. Objections relating to matters antecedent and leading up to the award, cannot, therefore, be raised after the award becomes final. In fact the Court is *bound* to pronounce judgment in accordance with the award and pass a decree following it.[1] In order to give effect to the general principle of finality of awards,[2] it is declared by sub-Para. (2) of this Paragraph, that no appeal shall lie from "such decree", *i.e.*, a decree *following* a judgment which is in *accordance* with the award.[3] Where, there-

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(4) *Roshan Lal* v. *Firm of Bridhi Chand*, 1924 Pat 603 (604): 1924 Pat H C C 170: 3 Pat 839: 83 Ind Cas 26: 6 Pat L Tim 212.

(5) *Makundram* v. *Naubat Singh*, (1920) 57 Ind Cas 200 (201): 18 All L J 756: 2 U P L R (All) 253.

Note 3.

(1) As amended by Act XVIII of 1919.

(2) **Same view held even before Act XVIII of 1919**; *Sahib Rai* v. *Chail Ram*, (1915) 28 Ind Cas 427 (427): 1915 Pun L R 96: 1915 Pun W R 30; *Sheo Prakash* v. *Sriram*, 1921 All 63 (63): 19 All L J 404: 63 Ind Cas 399; *Sitaram* v. *Rupram*, (1917) 42 Ind Cas 266 (268): 13 Nag L R 172, (Do).

The following cases are no longer law in view of Act XVIII of 1918; *Sova Chand* v. *Hurry Bux*, (1919) 53 Ind Cas 46 (47): 46 Cal 721: 23 Cal W N 280; *Jawahar Singh* v. *Mehr Singh*, (1916) 34 Ind Cas 250 (251): 1916 Pun W R 14; *Nobin Kally* v. *Ambica*, (1901) 5 Cal W N 813 (815).

(3) *Sitaram* v. *Rupram*, (1917) 42 Ind Cas 266 (267): 13 Nag L R 172; *Muhammad Tahsin Khan* v. *Seth Basant Rai*, 1930 All 477 (478): 1930 All L J 1166: 126 Ind Cas 14 [Question left open].

(4) *Mohammad Tahsin Khan* v. *Seth Basant Rai*, 1930 All 477 (477): 1930 All L J 1166: 126 Ind Cas 14.

(5) *Devi Ditta* v. *Babu Ram*, 1927 Lah 273 (274): 100 Ind Cas 955: 8 Lah 274: 28 Pun L R 441; *Surya Narain Jha* v. *Banwari Jha*, (1912) 17 Ind Cas 7 (8): 18 Cal W N 626: 18 Cal L Jour 35; *Sitaram* v. *Rupram*, (1917) 42 Ind Cas 266 (267): 13 Nag L R 172.

(6) *Das* v. *Dayalal and Sons*, 1933 Rang 38 (38): 142 Ind Cas 835; *Najmuddin Ahmad* v. *Albert Puch*, (1907) 29 All 584 (586): 4 All L J 450: 1907 All W N 184; *Sovachand* v. *Hurry Bux*, (1919) 53 Ind Cas 46 (47): 46 Cal 721: 23 Cal W N 280.

[But see *Kalianbarthi* v. *Rochanbai*, (1915) 27 Ind Cas 371 (373): 8 Sind L R 190.]

Note 4.

(1) See Note 2 above.

(2) *Ghulam Khan* v. *Muhammad Hassan*, (1902) 29 Cal 167 (183): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 1902 Pun Re No. 25 P C.

(3) *Ghulam Khan* v. *Muhammad Hassan*, (1902) 29 Cal 167 (185): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 1902 Pun Re No. 25 P C; *Joy Mungal Singh* v. *Mohun Ram*, (1875) 23 Suth W R 429 (431) P C; *Kulsum Fatma* v. *Ali Akbar*, (1917) 39 Ind Cas 730 (734): 39 All 401: 15 All L J 452: *Kamta Prasad* v. *Jodha Singh*, (1910) 7 Ind Cas 99 (99): 7 All L J 890; *Muhammad Fakharuddin* v. *Murlidhar*, (1910) 5 Ind Cas 621 (621) All; *Mangal Sein* v. *Gobind Ram*, 1886 All W N 151 (151); *Deo Narain Rai* v. *Jairi Rai*, 1885 All W N 259 (259); *Bhagirathi* v. *Ram Ghulam*, (1882) 4 All 283 (285, 288): 1882 All W N 34; *Jagamandar Das* v. *Piari Lal*, 1881 All W N 17 (18); *Harananad Naskar* v. *Doyal Chan Naskar*,

Para. 16, Note 4.

fore, a decree is in *accordance* with the award no appeal will lie against it on the ground that the Court has erroneously remitted[4] or refused to remit[5] the award under Para. 14 or on the ground that the arbitrators were guilty of misconduct.[6]

But the prohibition as to appeal will apply only where the decree, though in accordance with the award, follows upon a judgment "so pronounced", *i.e.*, pronounced after the expiry of the period of limitation for making an application under Para. 15. It has accordingly been held by the High Courts of Allahabad,[7] Calcutta[8] and Rangoon[9] and by the Chief Court of Punjab[10] that where a decree is passed *before* the expiry of such period, an appeal is not barred by this Paragraph. Conflicting views have been expressed by the

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(1905) 2 Cal L Jour 142 (143); *Shama Sundaram* v. *Abdul Latif*, (1900) 27 Cal 61 (64): 4 Cal W N 92; *Wazir Mahton* v. *Lalit Singh*, (1881) 7 Cal 166 (169): 8 Cal L Rep 505; *Protub Chunder* v. *Huromonee*, (1875) 24 Suth W R 188 (189); *Surboree* v. *Anadya*, (1873) 20 Suth W R 226 (226): 12 Beng L R App 10; *Huro Sunduree Debee* v. *Sreedhur Bhuttacharjee*, (1872) 17 Suth W R 352 (352): 12 Beng L R 488 Note; *Gour Chander* v. *Sodoy Chunder*, (1872) 17 Suth W R 30 (31); *Ghulab Khatun* v. *Chauduri*, (1916) 32 Ind Cas 250 (250): 1915 Pun Re No. 99: 1915 Pun W R 207; *Ram Narain Ram* v. *Patti Ram Tewary*, (1916) 34 Ind Cas 105 (105): 1 Pat L Jour 90: 2 Pat L W 411; *Dial Chand* v. *Khuda Baksh*, (1910) 6 Ind Cas 963 (963): 1910 Pun W R 73; *Sita Ram* v. *Dhani Ram*, 1903 Pun Re No. 92: 35 Pun L R 1904; *Panna Lal* v. *Mt Soman*, 1902 Pun Re No. 89: 1902 Pun L R 120 F B; *Venkatachalam* v. *Ramanathan Chetty*, 1922 Mad 429 (430): 15 Mad L W 111: 31 Mad L T 52: 70 Ind Cas 410: 1921 Mad W N 423; *Yella Hanumayya* v. *Mullangi Chinna Doddappa*, (1915) 29 Ind Cas 512 (512) Mad; *Siva Prasad* v. *Lachman Pershad*, (1918) 46 Ind Cas 785 (786) Nag; *Mt Chet Kunwar* v. *Puttu Singh*, (1915) 27 Ind Cas 424 (425): 17 Oudh Cas 386: 2 Oudh L J 129; *Bholanath Roy* v. *Bata Krishna Roy*, 1927 Pat 135 (139): 1926 Pat H C C 161: 7 Pat L Tim 739: 95 Ind Cas 321; *Sagar Mull* v. *Hira Maharaj*, 1926 Pat 164 (165): 1925 Pat H C C 324: 91 Ind Cas 799: 7 Pat L Tim 264; *Kharagnath Misra* v. *Nakeheddi Jha*, (1916) 35 Ind Cas 914 (914) Pat; *Khudiram* v. *Chandicharan*, (1916) 35 Ind Cas 358 (362): 1 Pat L Jour 306: 2 Pat L W 377; *Alim son of Dadu* v. *Moledino*, (1913) 19 Ind Cas 348 (351): 6 Sind L R 168; *Vythinatha Ayyar* v. *Vythilinga Mudaliar*, (1915) 31 Ind Cas 206 (207, 208): 2 Mad L W 960: 18 Mad L Tim 374: 1915 Mad W N 847

(4) *Subbia Ayyar* v. *Subramania*, (1909) 31 Mad 479 (481): 18 Mad L Jour 485: 4 Mad L Tim 328.

(5) *Kirpa Ram* v. *Laljit*, 1892 All W N 151 (152); *Ram Bhajan* v. *Udit*, (1913) 19 Ind Cas 405 (405) Cal; *Sarboree Kanto Buttacharjee* v. *Anadya Kanto Buttacharjee*, (1873) 20 Suth W R 226 (226): 12 Beng L R App 10; *Sant Singh* v. *Jiwan Singh*, 1905 Pun Re No. 41: 63 Pun L R 1905: 70 Pun W R 1905.

(6) *Ghulam Khan* v. *Muhammad Hassan*, (1902) 29 Cal 167 (185): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 25 Pun Re 1902 P C; *Hansraj* v. *Sunder Lal*, (1908) 35 Cal 648 (659, 660): 12 Cal W N 585: 7 Cal L Jour 520: 138 Pun L R 1908: 80 Pun Re 1908: 99 Pun W R 1908: 18 Mad L Jour 266: 4 Mad L Tim 25: 14 Bur L R 146: 35 Ind App 88: 10 Bom L R 681; *Bihari Lal* v. *Chunni Lal*, (1907) 29 All 457 (462): 1907 All W N 117: 4 All L J 455 F B; *Ramdhan Singh* v. *Karan Singh*, (1890) 18 All 414 (417); *Bacha Pande* v. *Ganesh Pande*, 1902 All W N 195 (196); *Muhammad Ismail* v. *Imam*, (1888) 8 All W N 131 (131); *Walji Mathuradas* v. *Ebji Umersey*, (1905) 29 Bom 285 (290): 6 Bom L R 1132; *Ran Bhajan* v. *Udit*, (1913) 19 Ind Cas 405 (405) Cal; *Haranand* v. *Doyal Chand*, (1905) 2 Cal L Jour 142 (143); *Dabendra Nath* v. *Sarbamangola*, (1904) 8 Cal W N 916 (918); *Sreenath* v. *Rajchunder*, (1862) 8 Suth W R 171 (172); *Ramanoogra Chobey* v. *Mt Partmoorta Chobyan*, (1875) 7 Suth W R 205 (205); *Hansraj* v. *Ganga Ram*, 1902 Pun Re No. 88: 119 Pun L R 1902 F B; *Banarsi Das* v. *Ramkrishnan Das*, 1889 Pun Re No. 167; *Khilu Ram* v. *Jiwan Singh*, 1889 Pun Re No. 55; *Dera Singh* v. *Ganda Singh*, 1883 Pun Re No. 17; *Nambi Ayyangar* v. *Yajnanarayana Somayajial*, (1902) 12 Mad L Jour 431 (432); *Krishnan Chetty* v. *Muthu Palaniandi Vacha Makali Thevar*, (1899) 22 Mad 172 (174, 175); *Kombi* v. *Pangi*, (1898) 21 Mad 405 (406); *Ramireddy* v. *Mummaredi*, (1869) 5 Mad H C R 404 (405); *Sampat* v. *Kisan*, 1929 Nag 264 (265): 119 Ind Cas 694; *Sumitra* v. *Ganesha*, (1912) 16 Ind Cas 595 (595) Oudh; *Jagan Nath* v. *Gajadhar*, (1902) 5 Oudh Cas 13 (16); *Maung Tun Lin* v. *Maung Tun Win*, 1929 Rang 225 (226): 7 Rang 269: 119 Ind Cas 212.

(7) *Baijnath* v. *Narain Prasad*, 1927 All 614 (615): 102 Ind Cas 608: 25 All L J 787; *Najumud-din Ahmad* v. *Albert Puech*, (1907) 29 All 584 (586): 4 All L J 450: 1907 All W N 184; *Ibrahim Ali* v. *Mohsin Ali*, (1896) 18 All 422 (427): 1896 All W N 137; *Pokkar Pershad* v. *Panchum*, (1870) 2 N W P H C 235; *Nem Chand* v. *Dungar Mal*, (1882) All W N 76 (77). See *Bankey Lal* v. *Chotey Miyan*, 1931 All 453 (454): 1931 All L J 442: 133 Ind Cas 31: 53 All 669 [Irregularity is covered by S. 99].

(8) *Gunga Narain* v. *Ram Chand*, (1873) 20 Suth W R 311 (311): 12 Beng L R 48.

(9) *U Ba Thein* v. *U Po Mya*, 1930 Rang 307 (307): 128 Ind Cas 847.

[But see *Achaber Pande* v. *Kuldip Singh*, 1925 Rang 103 (103): 76 Ind Cas 307 (Decision of a single Judge—No authorities referred to).]

(10) *Hurdeo* v. *Thana*, 1882 Pun Re No. 48.

[But see *Kanhia Lal* v. *Narain Singh*, (1915) 31 Ind Cas 700 (701): 11 Pun W R 1916: 28 Pun Re 1916 (The observation is, however, a casual and not a considered one).]

High Court of Madras, one case holding that an appeal does lie,[11] others holding that it does not[12] and a third class of cases holding that a *revision* will lie in such cases, thus impliedly, negativing the existence of a right of appeal.[13] According to the High Court of Bombay no appeal will lie in such cases but a revision may lie.[14] The Judicial Commissioner's Courts of Oudh[15] and Sind[16] have also held that the High Court can interfere in revision in such a case. It is submitted that the view that an appeal lies is correct.

Suppose now that the parties accept the award filed in Court and agree that a decree may be passed in terms of the award; has the Court power to pass the decree without waiting for the expiry of the period prescribed by Art. 158 of the Limitation Act? The Chief Court of Punjab[17] and the Judicial Commissioner's Court of Nagpur[18] have held that the decree so passed is valid, the reason being that it is, in fact, a decree by *consent* of parties. The High Court of Madras[19] and the Judicial Commissioner's Court of Sind[20] have, on the other hand, held that such a procedure is without jurisdiction and that the Court has no power to pass a decree even if an application to set aside the award has been disposed of before that time. It is submitted that the former view is correct. The object of waiting till the expiry of the limitation period is only to enable the parties to come in with their objections to the award, if any, and where such parties themselves agree not to object, there is no reason why the Court should wait till the expiry of the period before pronouncing judgment.

5. **Finality of decrees not in accordance with the award.**—An appeal will lie from a decree based on an award where it is in *excess* of the award or is *not in accordance* with the award.[1] Thus, where the decree allows payment

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(11) *Chengalraya Chetty* v. *Raghava Ramanuja Doss*, (1919) 52 Ind Cas 569 (572): 37 Mad L Jour 100. See also *Subbayya* v. *Papayya*, 1929 Mad 789 (790) [High Court interfered in appeal].

(12) *Monji* v. *Maliyakil*, (1878) 3 Mad 59 (60): 5 Ind Jur 396.

(13) *Velu Pillai* v. *Appasami Pandaram*, (1911) 9 Ind Cas 197 (198): 9 Mad L Tim 301: 21 Mad L Jour 444: (1911) 1 Mad W N 141; *Rangian* v. *Govindaswami*, 1922 Mad 179 (179, 180): 15 Mad L W 160: 71 Ind Cas 266: 1921 Mad W N 793; *Surapparaju* v. *Narayan Raju*, (1912) 17 Ind Cas 431 (431): 1912 Mad W N 1232: 12 Mad L Tim 608 [Doubtful if appeal lies].

(14) *Ravjibhai* v. *Dahyabhai Zaverbhai Patel*, 1921 Bom 32 (32): 45 Bom 832: 22 Bom L R 1454: 59 Ind Cas 811.

(15) *Mani Ram* v. *Ram Asray*, 1921 Oudh 148 (148): 24 Oudh Cas 234: 64 Ind Cas 890: 8 Oudh L J 626.

(16) *Srikishin Rochumal* v. *Relumal Pariomal*, (1916) 34 Ind Cas 845 (847): 9 Sind L R 183.

(17) *Ghulam Mustafa* v. *Halima*, (1918) 31 Ind Cas 298 (301): 176 Pun W R 1913: 310 Pun L R 1913; *Sohamari Bai* v. *Chattaram*, (1914) 23 Ind Cas 591 (592): 27 Pun W R 1914: 69 Pun L R 1914.

(18) *Pandurang* v. *Amrit Rao*, 1931 Nag 112 (113): 27 Nag L R 240: 134 Ind Cas 282. See also *Phiran* v. *Bahavan*, (1875) 7 N W P 367 [Party not estopped by mere silence at time of decree].

(19) *Rangia Chetty* v. *Oovindaswami Chetty*, 1922 Mad 179 (179, 180): 15 Mad L W 160: 71 Ind Cas 266: 1921 Mad W N 793 [Dissenting from *obiter dicta* in 21 Ind Cas 308].

(20) *Srikishin* v. *Reluomal Pariomal*, (1916) 34 Ind Cas 845 (848) 9 Sind L R 183.

Note 5.

(1) *Deb Narain* v. *Rajmonee*, (1865) 3 Suth W R 168 (169); *Ram Bhujan* v. *Sree Kishen*, (1869) 11 Suth W R 140 (141): 2 Beng L R A C 260; *Amalak Shah* v. *Charanlas*, (1912) 17 Ind Cas 684 (686): 16 Pun W R 1913: 52 Pun Re 1913: 14 Pun L R 1912 Sup [Court dismissing suit, ignoring award, on ground that no civil suit lies, decree is appealable]; *Musst Condi Bai* v. *Thakar Das*, 1896 Pun Re No. 60; *Kala Singh* v. *Dhanno Singh*, 1883 Pun Re No. 47; *Purna Ohandra* v. *Kunja Behari*, (1918) 46 Ind Cas 477 (478): 28 Cal L Jour 275 [Decree setting forth two awards by the same arbitrator, one modifying the other is now one in accordance with the award]; *Devat Ram* v. *Lachhu Mal*, 1930 Lah 477 (478): 31 Pun L R 811: 127 Ind Cas 865 [*Held* to be in accordance with award]; *Guran Ditta* v. *Pokhar Ram*, 1927 Lah 362 (364): 9 Lah L Jour 569: 104 Ind Cas 202: 8 Lah 693 [Persons not parties to award raising objections—Decree on award showing them as parties—They having submitted to the proceedings cannot appeal on ground of decree being in excess of award]; *Sadak Ali* v. *Imdad Ali*, (1881) 3 All 286 (291); *Ghasita Mal* v. *Jamiyat Rai*, (1912) 14 Ind Cas 284 (285): 1912 Pun L R 118: 1912 Pun W R 120 [Revision does not lie].

of the amount due by instalments[2] or interest[3] or costs[4] not granted by the award, the decree is not in accordance with the award and an appeal will, therefore, lie. An appeal will lie also where a decree is based partly on an award and partly on the Court's findings.[5] But the mere fact that the *judgment* is in excess of the award will not give a right of appeal if the decree is in *accordance* with the award.[6]

When an award is modified under Para. 12, *ante,* the only award according to which judgment can be pronounced is the modified award. Hence an appeal will not lie against a decree based on a modified award, though it may not be in accordance with the original award.[7] The contrary view taken in the undermentioned cases[8] is, it is submitted, not sound on principle.

Where an appeal lies against a decree which is in excess of or not in accordance with the award, the appellant is not entitled to address the Court on all points which were raised before the lower Court. His appeal would lie only in so far as the decree and the award differ[9] and his attack must be confined to the legality of the decree as compared with the award.[10]

6. Appeal against decree based upon invalid award.—Under the old Code prior to the decision of the Judicial Committee in *Ghulam Khan* v. *Muhammad Hassan,*[1] it was held that S. 522, presupposed a valid and legal award and that, therefore, an appeal lay against a decree based upon an invalid award.[1-a] Thus it was held that an appeal lay in the following cases:—

(1) Where the reference to arbitration was impungned on the ground that some of the parties had not consented thereto.[2]

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[2] *Jawahar Singh* v. *Mul Raj,* (1886) 8 All 449 (451): 1886 All W N 210.

[3] *Mohun Lal* v. *Joy Narain,* (1875) 23 Suth W R 105 105).

[4] *Chuni* v. *Dhan Devi,* (1909) 4 Ind Cas 1042 (1042): 97 Pun L R 1909: 111 Pun W R 1909.

[Compare *Devat Ram* v. *Lachhu Mal,* 1930 Lah 477 (478): 31 Pun L R 81: 127 Ind Cas 865].

[5] *Tursi Ram* v. *Basdeo,* 1926 All 567 (569): 24 All L J 705: 96 Ind Cas 531.

[6] *Bepin Behari Sen* v. *Krishna Behari Sen,* (1908) 8 Cal L Jour 475 (477).

[7] *Mazhar Ali* v. *Fateh Din,* 1930 Lah 219 (220): 120 Ind Cas 673: 31 Pun L R 337; *Nilmoni Pal* v. *Dakshineswar Pal,* 1932 Cal 713 (713): 138 Ind Cas 848: 36 Cal W N 1069 [Decree not appealable even though grounds of appeal were directed against order modifying award. But the appeal may be converted into appeal from order modifying award under S. 104]; *Nanakchand* v. *Ram Kishen,* 1933 Lah 139 (139): 141 Ind Cas 72: 34 Pun L R 34; *Kalu* v. *Khair Din,* (1906) Pun Re No. 13: 38 Pun L R 1906: 45 Pun W R 1906.

[8] *Jawahar Singh* v. *Mulraj,* (1886) 8 All 449 (452): 1886 All W N 210; *Ram Sarup* v. *Bindra Prasad,* (1909) 1 Ind Cas 328 (329): 12 Oudh Cas 23.

[9] *Bepin Behary Sen* v. *Krishna Behary Sen,* (1908) 8 Cal L Jour 475 (477).

[10] See case cited in foot-note (4) to Note 15 of Para. 21.

Note 6.

[1] 29 Cal 167: 29 Ind App 51: 6 Cal W N 226: 12 Mad L Jour 77: 4 Bom L R 161: 25 Pun Re 1902: 8 Sar 154 P C.

[1-a] *Lachman Das* v. *Brijpal,* (1884) 6 All 174 (177): 1884 All W N 16: 8 Ind Jur 448; *Hafizullah* v. *Rahimatulla,* (1903) All W N 159 160; *Muhammad Abid* v. *Muhammad Asghar,* (1886) 8 All 64 (66): 1886 All W N 2; *Debendra Nath Shaw* v. *Aubhoy Churn Bagchi,* (1883) 9 Cas 905 (906): 12 Cal L Rep 525; *Atma Ram* v. *Jamita,* 1888 Pun Re No. 134; *Venkayya* v. *Venkatappayya,* (1892) 15 Mad 348 (348, 349); *Suppu* v. *Govindacharyar,* (1888) 11 Mad 85 (86); *Jagan . Nath* v. *Gajadhar,* (1900) 5 Oudh Cas 13 (16); *Sheopal Kuer* v. *Bhaya Tara Bakhsh Singh,* (1899) 2 Oudh Cas 355 (359); *Alim* v. *Moledioно,* (1913) 19 Ind Cas 348 (351): 6 Sind L R 168. See also cases cited in foot-notes 2 to 7, infra. See *Bidyadhur Panda* v. *Nalu Behara,* (1899) 4 Cal W N xlvii [Objection taken in appeal for the first time—Not allowed].

[But see *Pugardin Ravuthan* v. *Moidin Ravuthan,* (1883) 6 Mad 414 (416) [But revision lies]; *Elahee Buksh* v. *Hajoo,* (1870) 14 Suth W R 33 (33): 5 Beng L R App 75.]

[2] *Shib Lal* v. *Chaturbhuj,* (1909) 31 All 450 (452): 6 All L J 496: 2 Ind Cas 363: *Ahmad* v. *Mt Bhagbari,* (1883) Pun Re No. 170; *Chelo Mul* v. *Mahoomull,* 1882 Pun Re No. 4 F B; *Hussan Ali* v. *Ghulam Mustaja Shah,* (1881) Pun Re No. 33; *Indur* v. *Kandadai,* (1908) 26 Mad 47 (48): 12 Mad L Jour 396.

(2) Where the award was made out of time.[3]

(3) Where the genuineness of the award was disputed.[4]

(4) Where the fact that the arbitrator was the retained pleader of the plaintiff was not disclosed to the defendant.[5]

(5) Where one of the arbitrators had not concurred in the award.[6]

(6) Where one of the arbitrators signed the award after the same had been filed in Court.[7]

In the Privy Council decision mentioned above[8] where the award was challenged on the ground that the minor defendant's guardian had agreed to the reference without the leave of the Court and also on the ground of misconduct of the arbitrators, their Lordships held that no appeal lay against a decree based on the award and observed as follows:—"Their Lordships would be doing violence to the plain language and the obvious intention of the Code, if they were to hold that an appeal lies from a decree pronounced under S. 522, except in so far as the decree may be in excess of or not in accordance with the award."

As has been already seen in Note 13 to Para. 15, the introduction of the words "or being otherwise invalid" in that Paragraph, makes it clear that the intention of the legislature is that objections to the award on the ground of its invalidity must be decided by the Court making the reference and that an appeal against the decree, on such ground is incompetent.[9]

It has been held by the High Court of Calcutta that this Paragraph contemplates an award made in a case where there is a *valid reference* and that, therefore, where the validity of the reference is itself attacked an appeal against the decree is not barred.[10] But the High Courts of Allahabad,[11]

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(3) *Lachman Das* v. *Abparkash*, (1908) 30 All 169 (171): 1908 All W N 59: 5 All L J 144; *Chuha Mal* v. *Hari Ram*, (1886) 8 All 548 (550): 1886 All W N 179; *Kewal Lodhi* v. *Baijnath*, (1906) 2 Nag L R 81 (83).

(4) *Sham Lal* v. *Misri Kunwar*, (1907) 29 All 426 (428): 1907 All W N 115: 4 All L J 458 (n).

(5) *Kali Prosanna* v. *Rajani Kant*, (1898) 25 Cal 141 (143, 145).

(6) *Nandram* v. *Nemchand*, (1893) 17 Bom 357 (361).

(7) *Ramesh Chandra* v. *Karunamoy*, (1906) 33 Cal 498 (501).

(8) *Ghulam Khan* v. *Muhammad Hassan*, (1902) 29 Cal 167 (185): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 25 Pun Re 1902 P C; *Cases* under the Code of 1882 following 29 Cal 167 P C; *Chairman of the Purnea Municipality* v. *Siva Sankar Ram*, (1906) 33 Cal 899 (902, 903); *Chinatamoni Aditya* v. *Haladhar Maiti*, (1905) 2 Cal L Jour 153 (159): 10 Cal W N 601; *Kanakku Nagalinga* v. *Nagalinga*, (1909) 32 Mad 510 (511): 19 Mad L Jour 480: 6 Mad L Tim 176: 4 Ind Cas 871; *Tellapragada Subianarayana* v. *Tella Pragada Sarabayya*, (1911) 9 Ind Cas 173 (179, 180): (1911) 1 Mad W N 151: 21 Mad L Jour 268: 9 Mad L Tim 25 F B.

[But see *Benode Lal* v. *Pran Chandra*, (1911) 11 Ind Cas 898 (899): 14 Cal L Jour 148.]

(9) *Lutawan* v. *Lachiya*, (1913) 21 Ind Cas 989 (991): 12 All L J 57: 36 All 69; *Narain Das* v. *Ram Prasad*, (1912) 14 Ind Cas 455 (455): 9 All L J 258; *Shib Kristo* v. *Satish Chandra*, (1913) 18 Ind Cas 69 (70): 39 Cal 822; *Surya Narain* v. *Banwari Jha*, (1912) 17 Ind Cas 7 (8): 18 Cal L Jour 35: 18 Cal W N 626; *Uttam* v. *Kakoo*, 1930 Notes 12 F: 132 Ind Cas 180; *Yella Hanumayya* v. *Mullangi Chinna, Doddappa*, (1915) 29 Ind Cas 512 (512) Mad; *Batcha Sahib* v. *Abdul Gunny*, (1913) 21 Ind Cas 308 (309): 14 Mad L Tim 314: 25 Mad L Jour 507: 1914 Mad W N 142: 38 Mad 256; *Nidamurthi Krishnamurthi* v. *Garpiparthi Ganapathi Lingam*, (1914) 25 Ind Cas 583 (584): 1914 Mad W N 865: *Vythinatha Ayyar* v. *Vythilinga Mudaliar*, (1915) 31 Ind Cas 206 (207, 208): 18 Mad L Tim 374: 2 Mad L W 960: 1915 Mad W N 847 (Tyabji, J); *Khudiram Mahto* v. *Chandi Charan*, (1916) 35 Ind Cas 358 (362): 1 Pat L Jour 306: 2 Pat L W 877; *Alim* v. *Moledino*, (1913) 19 Ind Cas 348 (351): 6 Sind L R 168; *Harnam Singh* v. *Harnam Singh*, (1910) 8 Ind Cas 222 (223): 27 Pun L R 1910: 144 Pun W R 1910.

(10) *Srimati Golnur Bibi* v. *Sheikh Abdus Samad*, 1931 Cal 211 (213, 219): 52 Cal L Jour 298: 35 Cal W N 238: 130 Ind Cas 209: 58 Cal 628; *Durga Charan* v. *Ganga Dhar*, 1931 Cal 109 (110, 111): 34 Cal W N 813: 130 Ind Cas 157; *Dwarka Nath* v. *Fanindra*, (1919) 49 Ind Cas 262 (263) Cal; *Girjanath Roy Chowdhury* v. *Kanai Lal Mitra*, (1918) 43 Ind Cas 169 (172): 27 Cal L Jour 339; *Parsidh Narain Singh* v *Ghanshyam Narain*, (1905) 9 Cal W N 873 (874); *Joy Prokash* v. *Sheo Golam*, (1885) 11

Para. 16,
Notes
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Bombay[12] and Lahore[13] and the Chief Court of Oudh[14] have taken the contrary view. The decisions of the Judicial Commissioner's Court of Nagpur[15] are conflicting. It is submitted that the correctness of the Calcutta view is open to question in view of the decision of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan.*[15-a]

It has been held by the High Court of Lahore that the rule prohibiting an appeal against a decree based upon an award does not apply to a case where the Court has no jurisdiction to entertain the suit.[16] The High Court of Madras has, on the other hand, held that the remedy in such a case is by way of revision.[17] It is submitted that the Lahore view is not correct. A right of appeal is expressly negatived by this Paragraph except in the circumstances specified and the general principle is that unless a right of appeal is given by statute, it does not exist.

7. Judgment without hearing objections to award—Appeal if lies against decree.—It has been held by the High Court of Allahabad that where a decree is passed in terms of an award without considering the objections raised against it, the award is not in conformity with the provisions of sub-Para. (1), and cannot form the basis of an unappealable decree and that, therefore, an appeal lies against decree passed on such award.[1] The High Courts of Calcutta,[2] Madras[3] and Rangoon[4] and the Chief Court of Punjab[5] have, on the other hand, in such cases interfered by way of *revision.* The Allahabad view cannot, it is submitted, be accepted as correct.

Where a decree based upon an award is attacked on the ground that a sufficient opportunity was not given to a party to substantiate his objections

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Cal 37 (41); *Saturjit Pertap* v. *Dulhin Gulab Korr,* (1897) 24 Cal 469 (471, 472); *T Wang* v *Sona Wangidi,* 1925 Cal 812 (814): 52 Cal 559: 42 Cal L Jour 26: 29 Cal W N 886: 87 Ind Cas 633.

(11) *Hari Shankar* v. *Ram Piyari,* 1923 All 502 (503): 21 All L J 826: 45 All 441: 4 L R (All) Civ 543: 74 Ind Cas 834.

(12) *Mahomed Valli Asmal* v. *Valli Asmal,* 1924 Bom 324 (325): 26 Bom L R 171: 79 Ind Cas 723.

[But see *Ravjibai Kashibai* v. *Dahyabhai Zaverbhai,* 1921 Bom 32 (32): 45 Bom 832: 59 Ind Cas 811: 22 Bom L R 1454 (obiter)].

(13) *Sat Bharai* v. *Jamiat Rai,* 1933 Lah 426 (427): 14 Lah 165: 34 Pun L R 393; *Firm, Rala Ram Walaiti Ram* v. *Firm, Bansi Lal Jaggan Nath,* 1932 Lah 239 (242): 33 Pun L R 163: 136 Ind Cas 11: 13 Lah 528; *Mt Wiran Wali* v. *Hira Nand,* 1931 Lah 126 (127): 32 Pun L R 44: 131 Ind Cas 348: 12 Lah 408: *Uttam* v. *Kakoo,* (1931) 132 Ind Cas 180 (181): 12 Lah L Jour 89: 1930 Notes 12-f; *Balkishan* v. *Sohan Singh,* 1929 Lah 476 (477): 116 Ind Cas 559: 10 Lah 871: 31 Pun L R 165; *Guran Ditta* v. *Pokhar Ram,* 1927 Lah 362 (363): 9 Lah L Jour 569: 104 Ind Cas 202: 8 Lah 693.

[But see *Kanhia Lal* v. *Narain Singh,* (1915) 31 Ind Cas 700 (701, 702): 11 Pun W R 1916: 28 Pun Re 1916 (obiter).]

(14) *Baldeo Sahai* v. *Abdur Rahim,* 1932 Oudh 156 (158): 9 Oudh W N 191: 137 Ind Cas 151.

(15) *Hussain Bhai Bhora* v. *Bansilal,* 1924 Nag 338 (340): 79 Ind Cas 48 [Appeal lies]; *Siva Prasad* v. *Lachman Prasad,* (1918) 46 Ind Cas 785 (786) Nag [No appeal lies].

(15-a) 29 Cal 167: 29 Ind App 51: 6 Cal W N 226: 12 Mad L Jour 77: 4 Bom L R 161: 25 Pun Re 1902: 8 Sar 154 P C.

(16) *Ladha Ram* v. *Rallaram,* 1928 Lah 730 (730, 731): 10 Lah L Jour 242: 112 Ind Cas 262.

(17) *Vydinatha* v. *Subramanya,* (1885) 8 Mad 235 (235, 236) [Decree on award under S. 522 in suit beyond the pecuniary jurisdiction of the Court—Decree set aside in revision].

Note 7.

(1) *Sahdeo Singh* v. *Melhu Singh,* 1927 All 120 (121): 24 All L J 1036: 98 Ind Cas 993: 49 All 178; *Ram Manohar* v. *Lal Behari,* (1889) 9 All W N 15 (16); *Ibrahim Ali* v. *Mohsin Ali,* (1896) 18 All 422 (428, 429): 1896 All W N 137 F B.

(2) *Juggobundun* v. *Chand Mohan,* (1915) 31 Ind Cas 33 (34): 22 Cal L Jour 237.

(3) *Ratnam* v. *Kolandai Ramaswami,* (1915) 31 Ind Cas 536 (536): 2 Mad L W 1115.

(4) *Das* v. *Dayalal and Sons,* 1933 Rang 38 (38): 142 Ind Cas 835 [No appeal lies].

(5) *Sahib Rai* v. *Chait Ram,* (1915) 28 Ind Cas 427 (427): 80 Pun W R 1915: 96 Pun L R 1915.

[But see *Mt Fatteh* v. *Fattoo,* 1882 Pun Re No. 184.]

Para. 16.
Notes
7—9.

to the award, it has been held by the High Courts of Calcutta and Lahore that the Court acts with material irregularity in the exercise of its jurisdiction and that the decree may be set aside in revision.[6] The High Court of Rangoon has, however, held that an *appeal* lies in such a case.[7] It is submitted that this view of the Rangoon High Court cannot be accepted as correct.

8. **Second appeal.**—Where a decree is passed in accordance with an award and an appeal is wrongly entertained against it and the decree is set aside in appeal, does a second appeal lie against the decree of the Lower Appellate Court? The High Courts of Allahabad, Madras and Patna and the Judicial Commissioner's Court of Nagpur have held that a second appeal lies, the reason being that the decree of the Lower Appellate Court is not one in accordance with the award.[1] But the High Court of Calcutta[2] and the Chief Court of Punjab[3] have interfered, in such cases, by way of revision.

Where a Court of first instance wrongly refuses to pass a decree in accordance with an award and a Court of Appeal reverses the decree of the first Court and passes a decree in accordance with the award, such a decree is, according to the High Courts of Allahabad and Calcutta and the Chief Court of Oudh, open to second appeal.[4] The reason given is that the provision in sub-S. (2) of this Paragraph applies only where a decree has been pronounced in accordance with the award by the *Court making the reference.* But the Chief Court of Punjab has held that the decree of the lower appellate Court is entitled to the same finality as that of the first Court and that a second appeal will not lie.[5]

9. **Revision.**—Sub-section (2) of this Paragraph only prohibits an appeal from a decree based upon an award. But as observed by their Lordships of the Privy Council in *Ghulam Khan* v. *Mahomed Hassan,* I. L. R. 29 Cal. 167, "in the case of an award revision would be more objectionable than an appeal" and hence an application for revision against a decree in accordance with an award does not lie merely on the ground of the erroneous decision of

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(6) *Betana* v. *Kedar Nath,* (1917) 37 Ind Cas 400 (401): 3 Oudh L J 583; *Bhagat Darbari Ram* v. *Bhikha Ram,* 1921 Lah 249 (250): 3 Lah L Jour 487: 20 Pun L R 1922: 64 Ind Cas 394.

(7) *Dawoodji and Son* v. *Sherwan,* 1925 Rang 238 (239): 4 Bur L Jour 76: 88 Ind Cas 609.

Note 8.

(1) *Lutawan* v. *Lachya,* (1913) 21 Ind Cas 989 (991): 12 All L J 57: 36 All 69; *Narain Das* v. *Ram Prasad,* (1912) 14 Ind Cas 455 (455): 9 All L J 258; *Krishnan* v. *Muthu,* (1899) 22 Mad 172 (173); *Nidamarthi* v. *Thammanna,* (1903) 26 Mad 76 (77); *Sagar Mull* v. *Hira Maharaj,* 1926 Pat 164 (165): 1925 Pat H C C 324: 91 Ind Cas 799: 7 Pat L Tim 264; *Siva Prasad* v. *Lachman Prasad,* (1918) 46 Ind Cas 785 (786) Nag.

(2) *Baikanta Nath* v. *Sitanath,* (1911) 9 Ind Cas 296 (297): 38 Cal 421; *Ganga Charan Roy* v. *Sasti Mandal,* (1902) 6 Cal W N 614 (615); *Sheikh Elahee Buksh* v. *Shaik Hajoo,* (1870) 14 Suth W R 33 (33): 5 Beng L R App 75.

[But see *Haranand Naskar* v. *Doyalchand,* (1905) 2 Cal L Jour 142 (148).]

(3) *Dialchand* v. *Khuda Bakhsh,* (1910) 6 Ind Cas 963 (964): 73 Pun W R 1910 [Appellate Court's interference even with consent is *ultra vires*]; *Hari Singh* v. *Allah Baksh,* (1916) 38 Ind Cas 769 (771): 115 Pun Re 1916.

(4) *Ganga Prasad* v. *Kura,* (1906) 28 All 408 (410) 3 All L J 168: 1906 All W N 64; *Kalyan Das* v. *Pyare Lal,* (1907) All W N 110 (110): 4 All L J 256; *Abdul Taher* v. *Azmut Bibi,* (1905) 2 Cal L Jour 80 (86); *Chintamoni Aditya* v. *Haladhar Maiti,* (1905) 2 Cal L Jour 153 (162): 10 Cal W N 601; *Shyama Charan* v. *Prolhad,* (1901) 8 Cal W N 390 (393, 394); *Rughoobar* v. *Maina Koer,*, (1883) 12 Cal L Rep 564 (565), *Poreshnath* v. *Nobin Chunder,* (1870) 12 Suth W R 93 (93): 5 Beng L R App 77 Note; *Ganesh Singh* v. *Bhikham Singh,* 1928 Oudh 1 (3): 4 Oudh W N 1085: 107 Ind Cas 345: 3 Luck 1 F B.

[But see *Naurang Singh* v. *Sadapal Singh,* (1888) 10 All 8 (11, 12): 1887 All W N 240.]

(5) *Bahar Baksh* v. *Inayat Ali,* (1904) Pun Re No. 89: 26 Pun L R 1905; *Nawab* v. *Ahmad Khan,* (1890) Pun Re No. 26; *Amolak Ram* v. *Charan Das,* (1912) 17 Ind Cas 684 (686): 16 Pun W R 1913: 52 Pun Re 1913: 14 Pun L R 1912 Sup.

Para. 16, Note 9.

the lower Court in respect of any of the grounds of objections falling under Paras. 14 and 15, *ante*.[1] But where the action of the *Court* with reference to the arbitration proceedings is attacked on any of the grounds mentioned in S. 115, *ante*, the High Court can revise a decree based upon an award.[2] Thus where a Court passes a decree on an award without giving notice of the filing of the award to the parties as required by Para. 10, *ante*, it acts with material irregularity and revision lies against the decree.[3] A decree passed without giving a party an opportunity to substantiate his objections by improperly refusing his application for adjournment is vitiated by material irregularity and is open to revision.[4] But where the lower Court has refused an adjournment in the judicial exercise of its discretion, the High Court cannot interfere in revision.[5] Where the Court compels an unwilling arbitrator to decide the

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Note 9.

(1) *Ghulam Khan* v. *Muhammad Hassan*, (1902) 29 Cal 167 (186): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 25 Pun Re 1902 P C; *Ajaz Ali* v. *Mt Zohra*, 1932 All 76 (76): 134 Ind Cas 30: 1931 All L J 906; *Prabhu Dayal* v. *Munshi Lal*, 1927 All 573 (574): 100 Ind Cas 76; *Jai Mangal Chand* v. *Ganpat Chand*, 1925 All 541 (542): 6 L R All (Civ) 156: 86 Ind Cas 942; *Dwitiar Chand Mandub* v. *Dharanidhar Mandal*, 1929 Cal 831 (832); *Nanakchand* v. *Ram Kishen*, 1933 Lah 139 (140): 141 Ind Cas 72: 34 Pun L R 34; *Gobind Lal* v. *Darbari Lal Devi*, 1929 Lah 688 (688): 11 Lah L Jour 275: 119 Ind Cas 721; *Mt Wiran Wali* v. *Hira Nand*, 1931 Lah 126 (127): 32 Pun L R 44: 131 Ind Cas 348: 12 Lah 408; *Parma Dat* v. *Bipju*, (1916) 35 Ind Cas 887 (888): 78 Pun Re 1916: 124 Pun W R 1916: 40 Pun L R 1917; *Golab Khaton* v. *Chaudhri*, (1916) 32 Ind Cas 250 (251): 99 Pun Re 1915: 207 Pun W R 1915; *Sita Ram* v. *Dhani Ram*, 1903 Pun Re No. 92: 35 Pun L R 1904; *Hansraj* v. *Ganga Ram*, 1902 Pun Re No. 88: 119 Pun L R 1902: *Pir Bakhsh* v. *Nihal Singh*, (1889) Pun Re No. 58; *Venkatachalam* v. *Ramanathan Chetty*, 1922 Mad 429 (430): 15 Mad L W 111: 31 Mad L Tim 52: 70 Ind Cas 410: 1921 Mad W N 423; *Simson* v. *Venkata Gopala*, (1886) 9 Mad 475 (476); *Krishna Behari* v. *Mohamad Ismal*, 1933 Oudh 327 (327); *Puranchand* v. *Romnath*, 1925 Oudh 227 (228): 11 Oudh L J 685: 84 Ind Cas 490; *Mirza Mahomed Hasan Beg* v. *Mir Shakir Beg*, 1924 Oudh 499 (460): 11 Oudh L J 142: 78 Ind Cas 878; *Sheo Paltan* v. *Sukhdeo Singh*, 1923 Oudh 235 (235): 26 Oudh Cas 107: 74 Ind Cas 401; *Bholanath Roy* v. *Bata Krishna Roy*, 1927 Pat 135 (140): 1926 Pat H C C 161: 7 Pat L Tim 739: 95 Ind Cas 321; *Putto Kumar* v. *Upendro Nath*, (1919) 50 Ind Cas 52 (57): 4 Pat L Jour 265; *Emnabai* v. *Fakir Mahomed*, 1922 Sind 1 (3): 15 Sind L R 165: 65 Ind Cas 50; *Debirul Din* v. *Amina Bibi*, 1925 Cal 475 (476): 78 Ind Cas 335 [Reference on behalf of minor without leave of Court—Court holding reference valid —No review lies].

[But see *Rama Swami* v. *Venkatarama*, 1926 Mad 201 (204): 49 Mad L Jour 528: 91 Ind Cas 745 [Arbitrators deciding matters not referred—Court not remitting but passing decree —Revision lies]; *Brojendra Kumar* v. *Purna Chandra Pal*, 1931 Cal 53 (57): 34 Cal W N 689: 129 Ind Cas 428: 58 Cal 169 [Erroneous decision by Court as to misconduct of arbitrator— Revision lies].

(2) *Aramanai Rajagopala* v. *Aramanai Rangaswami*, (1915) 31 Ind Cas 458 (459) Mad; *Govind Singh* v. *Bhirgu Nath*, 1924 All 788 (789): 46 All 686: 22 All L J 676; 5 L R All (Civ) 465: 82 Ind Cas 16; *Bhikalal Girdhardas* v. *Acharat Lal Lallubhai*, 1925 Bom 341 (341): 28 Bom L R 411: 94 Ind Cas 681: 50 Bom 461; *Merali* v. *Sheriff*, (1911) 12 Ind Cas 687 (688): 13 Bom L R 1017: 36 Bom 105; *Debir-ud-din* v. *Amina Bibi*, 1925 Cal 475 (475): 78 Ind Cas 335; *Delhi Cloth and General Mills Co* v. *Kidari Pershad*, 1921 Lah 396 (396): 22 Pun L R 1922: 64 Ind Cas 363 [Misconception of evidence on the part of the Court on the question of misconduct is not a ground for revision]; *Ram Narain Ram* v. *Patti Ram Tewary*, (1916) 34 Ind Cas 105 (105): 1 Pat L Jour 90: 2 Pat L W 411; *Sita Ram* v. *Dhani Ram*, 1903 Pun Re No. 92: 35 Pun L R 1904; *Panna Lal* v. *Musst Soman*, (1902) Pun Re No. 89: 120 Pun L R 1902 F B; *Girdhari Lal* v. *Imrat Mul*, (1878) Pun Re No. 39 [Reference in small cause suit—decree in terms of award—Revision lies] *Srikishen* v. *Relumal Pariomal*, (1916) 34 Ind Cas 845 (848): 9 Sind L R 183 [Court passing decree on award without considering if it was beneficial to minor party—Revision lies]. High Court should use revisional powers very sparingly. See *Mohidin* v. *Ramaswami*, 1921 Mad 271 (271): 41 Mad L Jour 276: 14 Mad L W 394: 1921 Mad W N 509: 65 Ind Cas 676; *Venkata Jagga Rao* v. *Pilla Ranganayakalu*, 1928 Mad 48 (50): 105 Ind Cas 105; *Kanhia Lal* v. *Narain Singh*, (1916) 31 Ind Cas 700 (701): 11 Pun W R 1916: 28 Pun Re 1916. See *Dwittar Chand Mandal* v. *Dharanidhar Mandal*, 1929 Cal 831 (832) [New point cannot be raised in revision]; *Parmadat* v. *Bippin*, (1916) 35 Ind Cas 887 (888): 1916 Pun Re No. 78: 1916 Pun W R 124: 1917 Pun L R 40; *Devakinandan* v. *Raj Kumar*, (1889) 9 All W N 124 (125).

(3) *Chatarbhuj Das* v. *Ganesh Ram*, (1898) 20 All 474 (475): 1898 All W N 132; *Gopi Nath* v. *Haresh Chandra*, (1921) 63 Ind Cas 243 (243) Cal; *Rangaswami* v. *Muthuswami*, (1888) 11 Mad 144 (144, 145); *Sohan Lal* v. *Munna Lal Marvari*, 1921 Oudh 154 (154): 24 Oudh Cas 263: 8 Oudh L J 280: 62 Ind Cas 849.

(4) *Durga Baksh* v. *Fateh Bahadur*, (1916) 33 Ind Cas 30 (31): 14 All L J 425; *Ranjit Chandra* v. *Bissay Ram*, 1926 Cal 1018 (1019): 94 Ind Cas 115.

(5) *Ganga Sahi* v. *Karim Baksh*, 1926 Lah 584 (585): 96 Ind Cas 108; *Batch Sahib* v. *Abdul Gunny*, (1913) 21 Ind Cas 308 (310): 14 Mad L Tim 314: 25 Mad L Jour 507: 1914 Mad W N 142: 38 Mad 256; *Kharganath Misra* v. *Nakcheddi Jha*, (1916) 35 Ind Cas 914 (915) Pat.

Para. 16, Notes 9—11.

matter referred to him, a decree passed upon such an award may be set aside in revision.[6]

It has been already discussed in Note 6, *ante*, whether an appeal lies against a decree based upon an award where the reference to arbitration is itself impugned as being invalid. The High Court of Allahabad has held that such a decree is open to revision on the ground of its being without jurisdiction.[7] But according to the High Court of Lahore and the Chief Court of Oudh no revision lies in such a case.[8]

See also Notes 3, 5, 6 and 7, *supra*.

10. **Binding effect of award.**—A judgment and decree passed in accordance with an award may constitute *res judicata* as much as a judgment and decree which result from the decision of the Court after the matter has been fought to the end.[1] A valid award operates to merge and extinguish all claims covered by the submission and is binding on the parties to the reference even though it has not been made a rule of Court under this Paragraph.[2]

An award does not become ineffectual or invalid as between the parties to the reference, merely because other parties to the suit have not joined in the reference.[3]

A person, who is a stranger to the reference is neither bound by[4] nor can enforce[5] the award.

11. **Enforcement of the award.**—The only way of enforcing an award made in a reference through Court is to have a decree passed in accordance with it under this Paragraph.[1] Where a decree is passed in terms of an award, the award can be enforced only by way of execution of the decree and no separate suit will lie therefor.[2] Nor will a suit lie to enforce an award which was declared void by the Court in proceedings under Para. 17.[3]

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(6) *Basdeo Mal* v. *Kanhaiya Lal*, 1921 All 361 (362): 43 All 101: 59 Ind Cas 667: 18 All L J 952.

(7) *Tej Singh* v. *Ghasi Ram*, 1927 All 563 (563): 25 All L J 606: 102 Ind Cas 236: 49 All 812; *Gopal Das* v. *Baij Nath*, 1926 All 238 (239): 24 All L J 235: 91 Ind Cas 930: 48 All 239.

[But see *Ajodhya Prasad* v. *Badarul Husain*, (1917) 41 Ind Cas 357 (360): 15 All L J 427: 39 All 489.]

(8) *Sat Bharai* v. *Jamiat Rai*, 1933 Lah 426 (427): 14 Lah 165: 34 Pun L R 393; *Ghulab Khatun* v. *Chaudhri*, (1916) 32 Ind Cas 250 (250): 99 Pun Re 1915: 207 Pun W R 1915 [Reference on behalf of minor without leave of Court—No revision because remedy by suit to set aside decree is available]; *Baldeo Sahai* v. *Abdur Rahim*, 1932 Oudh 156 (158): 9 Oudh W N 191: 137 Ind Cas 151.

Note 10.

(1) *Vyankatesh* v. *Sakharam*, (1897) 21 Bom 465 (467); *Wazeer Mahton* v. *Chuni Singh*, (1881) 7 Cal 727 (729): 9 Cal L Rep 377; *Gopal Chunder* v. *Brojendro*, (1880) 5 Cal L Rep 338 (340): *Girdhari Chanbe* v. *Rambaran Misir*, (1916) 32 Ind Cas 761 (762): 14 All L J 85 [Award in mutation proceedings is not *res judicata* on a question of title and possession]. See also *Har Prasad* v. *Raghubar Dayal*, 1924 All 62 (62, 63): 45 All 628: 21 All L J 541: 4 L R (A) Civ 553: 74 Ind Cas 817.

(2) *Bhikari Das* v. *Gobind Ram*, 1892 All W N 238 (238); *Mulchand* v. *Utamchand*, (1913) 20 Ind Cas 185 (188): 156 Pun W R 1913: 275 Pun L R 1913. See *Kalavakolanu Seethamma* v. *Narayanamurthi*, (1920) 57 Ind Cas 982 (984): 38 Mad L Jour 470 [Portion of award dealing with matters outside scope of suit and as such incapable of being basis of decree under this para.—Still it is binding on the parties]. See *Khan Chand* v. *Kodumal*, 15 Ind Cas 819 (821): 5 Sind L R 240.

(3) *Dharnidhar* v. *Sakharan*, 1921 Nag 176 (178): 71 Ind Cas 860 [Especially when it has been acted upon].

(4) *Hira Singh* v. *Ganga Sahai*, (1884) 6 All 322 (328): 11 Ind App 20: 4 Sar 491 (P C).

(5) *Srinivasa* v. *Sitamma*, (1909) 4 Ind Cas 1114 (1114): 5 Mad L Tim 199.

Note 11.

(1) *Kalavakolanu Seetamma* v. *Narayanamurti*, (1920) 57 Ind Cas 982 (984): 38 Mad L Jour 470.

(2) *Sasi Sekhareswar* v. *Lalit Mohan*, 1925 P C 34 (35): 52 Ind App 79: 52 Cal 314: 86 Ind Cas 245: 48 Mad L Jour 20: 6 L R P C 23: 27 Bom L R 166: 21 Mad L W 286: 29 Cal W N 633: 23 All L J 717 (P C).

(3) *Miran Bakhsh* v. *Chiragh Din*, 1907 Pun Re No 19: 46 Pun L R 1907: 134 Pun W R 1907.

Para. 16, Notes 12—14.

12. **Suit to set aside award.**—Where an application to set aside an award is refused and a decree is passed in accordance with it, no suit will lie thereafter to set aside the award.[1] But a minor can sue to set aside a decree against him based on award on the ground that the reference to arbitration was made without obtaining the leave of the Court as required by O. 32, R. 7.[2]

13. **Court acting as arbitrator.**—It has been already seen in Note 22 to Para. 1, *ante*, that a consent by the parties to abide by the decision of the Court is not such a reference to arbitration as is contemplated by this Schedule. The decision of the Court, in such a case, however, operates as a consent decree and is, therefore, not appealable.[1] In the undermentioned cases[2] it has been held that such a decision is in the nature of an arbitrator's award and hence is not appealable. It is respectfully submitted that though the actual decision in the said cases is right, the reasoning on which they proceed is not correct.

Where the parties agree not to let in evidence but that the Court may make a local inspection, the decision of the Court in the suit is neither a consent decree nor an award and is therefore, appealable.[3]

14. **Valuer and arbitrator.**—It has been already seen in Note 10 to Para. 1 that a reference to arbitration implies the existence of some matter in difference which has actually arisen at the time of the reference. Thus, where the intention of the parties is that the person to whom the matter is referred should hold an inquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, the case is one of arbitration. But where a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, the case is not one of arbitration.[1] No judgment could, therefore, be given under this Paragraph on the basis of the valuator's decision.[2]

Illustrations.

1. *R* filed a suit against *C* for injunction and damages for encroachment upon her property. In the suit a consent order was made that *C* was to purchase *R's* interest in the property at a price to be settled by certain referees. The referees settled the price and the lower Court gave judgment under this paragraph in favour of *R* treating the said valuation as an award. It was held by the appellate Court that the referees were valuators rather than

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Note 12.

[1] *Shwe Hpan* v. *Ma Chit Nyein,* (1920) 56 Ind Cas 677 (678) Rang: 13 Bur L Tim 34: 10 L B R 106.

[2] *Davuluru Vijayaramayya* v. *Davuluru Venkatasubba Rao,* (1916) 32 Ind Cas 881 (889, 890): 39 Mad 853: 30 Mad L Jour 465.

Note 13.

[1] *Chinna* v. *Venkataswami,* (1919) 51 Ind Cas 827 (827, 828): 42 Mad 625: 36 Mad L Jour 291: 1919 Mad W N 221: 25 Mad L Tim 397 [Same principle applies even if reference is made to presiding Judge and another person jointly]; *Chengalraya Chetty* v. *Raghava Ramanuja Dass,* (1919) 52 Ind Cas 569 (571): 37 Mad L Jour 100.

[2] *Baijnath* v. *Dhani Ram,* 1929 All 577 (577): 1929 All L J 1024: 51 All 886· 117 Ind Cas 107; *Syed Zain* v. *Kalabhai,* (1899) 23 Bom 752 (755): 1 Bom L R 366; *Baikanta Nath* v. *Sita Nath,* (1911) 9 Ind Cas 296 (297): 38 Cal 421 [Court cannot review such a decision]; *Nidamarthi Mukkanti* v. *Thamana Ramayya,* (1903) 26 Mad 76 (77); *Sambu* v. *Mt Paiki,* 1925 Nag 463 (464): 21 Nag L R 84: 90 Ind Cas 550.

[But *see* In re *Nimmagada Peda Nagynna,* (1915) 26 Ind Cas 355 (355, 356) Mad [Award of Court is itself a decree and objections to award must be taken by way of appeal from the decree].

[3] *Md Ishaq* v. *Balmakund Lal,* 1929 All 116 (117): 118 Ind Cas 762.

Note 14.

[1] *Macnaghten* v. *Rameshwar,* (1903) 30 Cal 831 (842); *Chooney Money Dossee* v. *Ram Kinkur Dutt,* (1901) 28 Cal 155 (163): 5 Cal W N 242.

[2] *Chooneymoney Dossee* v. *Ramkinkur,* (1901) 28 Cal 155 (163): 5 Cal W N 242.

Para. 16, Note 14.

arbitrators and, therefore, the lower Court could not give judgment under this paragraph.(3)

2. Where an agreement to lease contained a clause that at the expiration of the period of lease, the lessor should take over all the buildings then standing on the property at a value to be fixed by certain persons, it was held that the valuation made by such persons was not an award within the meaning of Para. 20 and could not, therefore, be filed in Court.(4)

ORDER OF REFERENCE OR AGREEMENTS TO REFER.

Para. 17.

Application to file in Court agreement to refer to arbitration.

P. 17. [S. 523.] (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit[8] between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(4) Where no sufficient cause is shown,[9] the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement[10] or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator.

[1877—S. 523; 1859—S. 326.]

Synopsis.

1. Legislative changes.
2. Scope and applicability of the paragraph.
3. Agreement to refer matters in a pending litigation.
4. Agreement to refer future differences to arbitration.
5. Agreement must relate to matters within Court's jurisdiction.
6. Agreement relating to appointment of Muttawali.
7. Agreement to refer must be in writing.

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(3) *Chooneymoney* v. *Ram Kinkar*, (1901) 28 Cal 155 (163): 5 Cal W N 242.

(4) *Macnaghten* v. *Rameshwar*, (1903) 30 Cal 831.

8. **"Shall be numbered and registered as a suit"—See Note 12 to Para. 20, infra.**
9. **"Where no sufficient cause is shown."**
    10. **Arbitrator appointed in accordance with the provisions of the agreement.**
    11. **Death or refusal of arbitrator to act.**
    12. **Revocation of reference to arbitrator.**
    13. **Court cannot appoint an umpire.**
14. **Abatement of proceedings before arbitrator on death of party.**
15. **Appeal.**
16. **Revision.**

Paragraph whether applicable to cases under Arbitration Act. See Note 2.

1. Legislative changes:—

1. The words "of any person *named* in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates'' which occurred after the words "shall be referred to arbitration'' in the corresponding section of the old Code have been omitted in Cl. 1 of this Paragraph.

2. Clause 4 of this Paragraph replaces the following words which occurred in the old Code:—''If no sufficient cause be shown, the Court *may* cause the agreement to be filed, and shall make an order of reference thereon, and may also nominate the arbitrator when he is not *named* therein and the parties cannot agree as to the nomination.''

It was held under the old Code that an agreement in which the arbitrator was not named could not be filed under S. 523.[1] Under the present Code, in view of the aforementioned changes, it is not necessary that the arbitrator should be named in the agreement.[2]

2. Scope and applicability of the Paragraph.—This and Paras. 18 and 19, *infra,* deal with the second class of cases of arbitration referred to by the Judicial Committee in *Ghulam Khan* v. *Muhammad Hassan,* (I.L.R. 29 Cal. 167 P. C.), *viz.,* to references to arbitration *without having recourse to litigation.*

The provisions of this Paragraph apply only to cases where in pursuance of the agreement to refer, the arbitrators have not functioned and made their award. Where the award has actually been delivered, the proper course is to take proceedings under Para. 20 to enforce the award.[1] Similarly, where an application is filed under this Paragraph but before it is disposed of, the arbitrators deliver their award, the application is rendered infructuous, and the remedy of the parties is to apply under Para. 20.[2] A mere *filing* of an application under this Paragraph does not oust the jurisdiction of the arbitrator to give his award.[3]

Arbitration in a pending suit stands on a different footing from an agreement made out of Court to refer a dispute to arbitration. In a pending suit the authority of the arbitrator is derived from the order of the Court

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Schedule II, Para. 17—Note 1.

(1) *Fazulbhoi Mehrali Chinoy* v. *The Bombay and Persia Steam Navigation Co, Ltd,* (1896) 20 Bom 232 (237).

(2) *Dreyfus & Co* v. *Gurditta Mal,* (1911) 9 Ind Cas 655 (657): 35 Pun Re 1911: 85 Pun L R 1911: 70 Pun W R 1911.

Note 2.

(1) *Ram Ugrah Pande* v. *Achraj Nath Pande,* (1915) 31 Ind Cas 899 (901): 38 All 85: 13 All L J 1115; *Allahdin* v. *Badsha Begam,* (1918) 45 Ind Cas 647 (648): 90 Pun W R 1918.

(2) *Parbati* v. *Durga Devi,* 1928 Lah 170 (172): 108 Ind Cas 186.

(3) *Sheo Narain* v. *Bala Rao,* 1932 All 348 (350): 1932 All L J 831: 137 Ind Cas 198.

making the reference, and if this order is defective there is no proper reference and consequently there can be no legal award. On the other hand in a private reference it is the *agreement* entered into between the parties which confers jurisdiction on the arbitrators to deal with the dispute. In such a case if proceedings are taken under this Paragraph and a reference secured under Cl. 4 thereof, it is not this reference which constitutes the arbitrator as a private tribunal. It is merely the machinery by which the tribunal already constituted by the agreement of parties is made to function.[4]

The provisions of this Paragraph are *permissive* and do not oblige a party to apply under this Paragraph.[5] It is open to a party to the agreement to file a suit in Court notwithstanding the agreement and the only remedy of the other party if he wishes to stand by the agreement is to apply under Para. 18, *infra,* (for further discussion, see Para. 18). The provisions of this and the following two Paragraphs do not apply to cases governed by the Indian Arbitration Act, 1899. (*See* S. 3 of the Indian Arbitration Act, 1899 and S. 89 of the Code). *See also* the following cases.[6]

If in conciliation proceedings under Chapter 6 of the Dekkhan Agriculturists' Relief Act, XVII of 1879, the parties agree to refer the matter in dispute to arbitration, the conciliator appointed under that Chapter must, under S. 45 of the Act, forward the agreement to the Court having jurisdiction in the matter and the Court must thereupon proceed in the manner provided by this Paragraph and Paragraph 19, *infra.*

3. **Agreement to refer matters in a pending litigation.**—The provisions of this Paragraph cover only cases where parties, without *recourse to litigation,* agree to refer their differences to arbitration.[1] If parties to a litigation who desire to refer their differences to arbitration, desire to avail themselves of the provisions of this Schedule, they can do so only under Paras. 1 to 16 thereof.[2] In other words, an agreement to refer made by the parties to a litigation without the intervention of the Court cannot be recognised under this Schedule[3] and cannot be filed under this Paragraph as if it was an agreement to refer without recourse to litigation.[4] If an award has been passed on

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(4) *Mt Parbati* v. *Mt Durga Devi,* 1928 Lah 170 (173): 108 Ind Cas 186.

(5) *Basaoo* v. *Jagannath,* 1931 Oudh 127 (129): 8 Oudh W N 71: 131 Ind Cas 443; *Ma Kyaw* v. *Ma Thwe,* (1897-1901) 2 U B R 286 [Held suit not barred].

(6) *Kunthi Ammal* v. *Sarangapani Chetty,* 1931 Mad 170 (171): 33 Mad L W 60: 54 Mad 198: 130 Ind Cas 668: 60 Mad L Jour 498; *Protap Chander Dey* v. *Tulsey Das Dey,* (1902) 29 Cal 793 (795); *Attock Oil Co, Ltd* v. *Abdul Majid,* (1929 Lah 246 (246): 118 Ind Cas 588.

Note 3.

(1) *Venkatachalam Reddi* v. *Rangiah Reddi,* (1911) 12 Ind Cas 872 (375): 36 Mad 858: 10 Mad L Tim 248: (1911) 2 Mad W N 249: 21 Mad L Jour 990.

(2) *Chanbasappa Gurushantappa* v. *Baslingappa Gokurnya Hiremath,* 1927 Bom 565 (581): 29 Bom L R 1254: 105 Ind Cas 516: 51 Bom 908 F B.

(3) *Official Receiver* v. *Tirathdas Mewaram,* 1927 Sind 66 (72): 97 Ind Cas 821; *Haji Umar* v. *Shivaldas,* 1921 Sind 65 (67, 68): 16 Sind L R 174: 81 Ind Cas 658.

(4) *Dinkar Rai* v. *Yeshwantrai,* 1930 Bom 98 (104): 31 Bom L R 1408: 124 Ind Cas 119: 54 Bom 197; *Tincowry Dey* v. *Fakir Chand Dey,* (1903) 30 Cal 218 (228): 7 Cal W N 180; *Vyankatesh Mahadev* v. *Ramachandra Krishna,* (1915) 27 Ind Cas 46 (47, 48): 38 Bom 687: 16 Bom L R 653 [It cannot be recognised at all]; *Deomal* v. *Kanoomai Jothmal,* 1926 Sind 5 (6): 89 Ind Cas 335. See also *Budha* v. *Jiaku,* 1882 Pun Re No. 130. **The following decisions under the old Code which took a contrary view, it is submitted, are not correct in law in** view of 29 Cal 167 P C; *Sheo Dat* v. *Sheo Shankar,* (1905) 27 All 53 (56): 1 All L J 398: 1904 All W N 160; *Sheo Shankar Singh* v. *Sheo Dat,* 1904 All W N 9 (10); *Harivalbdas* v. *Utamchand,* (1879-80) 4 Bom 1 (4): 4 Ind Jur 410.

Para. 17, Notes 3—6.

such a reference it cannot be made the basis of a proceeding under Para. 20.[5] As to whether such an agreement can be recognised, independent of this Schedule, as an adjustment of the suit under O. 23, R. 3, there is a conflict of opinion for which *see* Note 9 to O. 23, R. 3, *ante*.[5-a]

Where, however, after an agreement to refer was entered into in a pending suit, the suit itself was *withdrawn* an application filed under this Paragraph subsequent to such withdrawal is not incompetent and an award made in pursuance of the same is valid.[6] So also an agreement to refer relating to matters *not involved in the suit* is perfectly valid, though entered into pending suit. Thus where during the pendency of probate proceedings the parties agreed to refer to arbitration the question of the division of the estate, and the agreement left untouched the powers of the Court to issue probate, and the arbitrators also did not deal with that question, it was held that the agreement and the award thereon were valid.[7]

4. **Agreement to refer future differences to arbitration.**—*See* Notes 2 and 10 to Para. 1, *ante*.

5. **Agreement must relate to matters within Court's jurisdiction.**—Before an application can be filed under this Paragraph it is essential that the agreement to refer should relate to matters which the Court is competent to try and has *jurisdiction* to pass a final decree upon. Thus, where an agreement relates to the partition of revenue paying land, it cannot be filed under this Paragraph as the civil Court has no jurisdiction to partition the revenue.[1] Where an agreement relates to matters partly within and partly beyond the jurisdiction of the Court it has been held that the Court cannot strike out that portion of the agreement beyond its jurisdiction in order to give itself jurisdiction unless the parties agree to this being done with a view to the Court proceeding under this Paragraph.[2]

6. **Agreement relating to appointment of Muttawalli.**—The succession to the trusteeship of a public trust or charity is a matter affecting the public interests and a dispute regarding it cannot be referred to arbitration.[1] It has been held by the High Court of Madras that an agreement to refer to arbitration, even if relating to a public office is not necessarily unlawful or

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(5) *Dhan Singh* v. *Kahn Singh*, (1912) 15 Ind Cas 140 (143): 115 Pun Re 1912: 6 Pun L R 1912 (Sup): 191 Pun W R 1912.

(5-a) See also *Payarelal* v. *Chanaram*, 1925 Nag 203 (203): 83 Ind Cas 22 [Arbitration—Pending suit—Submission otherwise than through Court—Is not illegal].

(6) *Lal Chand* v. *Sei Ram*, 1930 Lah 1066 (1067): 12 Lah L Jour 24: 122 Ind Cas 237: 31 Pun L R 445; *Kokil Singh* v. *Chaudhury*, 1924 Pat 488 (490, 491): 3 Pat 443: 1924 Pat H C C 110: 6 Pat L Tim 122: 81 Ind Cas 994: 3 Pat L R Civ 52.

(7) *Shankar* v. *Ramchandra*, 1923 Bom 365 (366): 25 Bom L R 437: 73 Ind Cas 415.

Note 5.

(1) *Jwala Shah* v. *Nihal Chand*, (1917) 42 Ind Cas 261 (261): 91 Pun L R 1917: 166 Pun W R 1917. *See also* Note 5 to Para. 21, *infra*.

(2) *Partab Singh* v. *Devi Singh*, 1883 Pun Re No. 5; *Fazl Din* v. *Shah Nawaz*, (1914) 22 Ind Cas 381 (383): 46 Pun L R 1914: 55 Pun W R 1914.

[But see *Asa Nand* v. *Ganesha Ram*, 1930 Lah 836 (838): 122 Ind Cas 724: 11 Lah 470: 31 Pun L R 789: 12 Lah L Jour 297 [Distinguishing on facts 1883 Pun Re No. 5 and 22 Ind Cas 381—Mr. Justice Jai Lal also doubted the correctness of the above two decisions].

Note 6.

(1) *Muhammad Kabirulhuq* v. *Hassamddin Muhammad*, (1917) 38 Ind Cas 296 (297): 1 Pat L W 260: 1917 Pat H C C 93; *Mahomed Ibrahim Khan* v. *Ahmad Said Khan*, (1910) 6 Ind Cas 219 (223): 7 All L J 761: 32 All 503; See also *Soudamini Ghose* v. *Gopal Chandra Ghose*, (1915) 28 Ind Cas 557 (559): 29 Cal W N 948: 21 Cal L Jour 278 [Executor or administrator cannot make a reference contradicting a will]; *Janandra Nath Mukerjee* v. *Jitandra Nath Mukerjee*, 1928 Cal 275 (276): 32 Cal W N 108: 107 Ind Cas 70, (Do).

opposed to public policy but must be scrutinised by the Court for the purpose of ascertaining whether it is in violation of the trusts of the institution or affects adversely the interests of the public.[2]

7. **Agreement to refer must be in writing.**—It is essential that the agreement to refer should be in *writing* before it can be *filed* under this Paragraph.[1]

8. **Shall be numbered and registered as a suit.**—*See* Note 12 to Para. 20, *infra.*

9. "**Where no sufficient cause is shown.**"—Agreements to refer to arbitration stand on the same footing as all other lawful agreements by which the parties are bound to the terms of what they have agreed to, and from which *i.e.*, the agreement to refer they cannot retire,unless the scope and object of the agreement cannot be executed, or unless it be shown that manifest injustice will be the consequence of binding the parties to the contract.[1] Where therefore no "sufficient cause"[1-a] is shown against the agreement, this Paragraph provides that the agreement shall be ordered to be filed. All grounds on which a contract will be voidable such as fraud, misrepresentation, etc., which will enable a party to avoid a contract or which renders a contract unenforceable against a party will constitute "sufficient cause" against filing the agreement under this Paragraph. Thus where the agreement to refer is shown to be vitiated by fraud or mistake[2] or by misrepresentation[3] or is not consented to by all the parties[4] the Court will decline to file the agreement. Similarly, where an agreement to refer is entered into by the *de facto* guardian of a Mahomedan minor it cannot be filed under this Paragraph as such guardian has no authority in law to act for the minor.[5] So also where the conduct of the parties shows that they have abandoned and cancelled the agreement to refer, the Court will refuse to order the same to be filed.[6] An agreement, the submission under which has been revoked for good cause cannot be filed under this Paragraph.[7]

10. "**Arbitrator appointed in accordance with the provisions of the agreement.**"—A submission to arbitration must be strictly construed as it deprives the party to the submission, of the right, which he has under the common law, to have the dispute to which the submission relates decided by a Court of law.[1] The jurisdiction of the Court to order a reference under this

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(2) *Ve N K R M A Venkatachalam Chettiar* v. *Ve N K Rm A Ramanathan Chettiar*, 1922 Mad 429 (432): 16 Mad L W 111: 31 Mad L Tim 52: 70 Ind Cas 410: 1921 Mad W N 423.

Note 7.

(1) *Tincowry Dey* v. *Fakir Chand Dey*, (1903) 30 Cal 218 (228): 7 Cal W N 180.

Note 9.

(1) *Pestonjee Nussurwanjee* v. *Manookjee*, (1867-69) 12 Moo Ind App 112 (130, 131): 10 Suth W R 51: 1 Ind Jur N S 69: 2 Suth 164: 2 Sar 390: 8 Mad H C R 183.

(1-a) *Sri Ram* v. *Sorabji*, (1921) 3 Lah L Jour 276 (278, 279) [Agreement of reference providing for appointment of new arbitrator in case the arbitrator originally appointed refuses to act—Resignation of such arbitrator is not "sufficient cause" for not filing the agreement].

(2) *Mt Dasoba* v. *Bari Bohu*, (1890) 3 C P L R 89 (92).

(3) *Ganesh Das* v. *Keshadas*, (1917) 50 Ind Cas 637 (640) Lah; *Ram Rattan* v. *Busakha Mal*, (1893) Pun Re No. 49.

(4) *Nga Tha Zan* v. *Nga Kayan Kaing*, (1917) 38 Ind Cas 577 (578): 9 Bur L Tim 253.

(5) *Mohsinuddin Ahmed* v. *Khabiruddin Ahmed*, (1920) 57 Ind Cas 945 (947): 47 Cal 713: 26 Cal W N 246: 1921 Cal 818.

(6) *Madho Kashinath* v. *Sambashiva*, (1920) 54 Ind Cas 126 (127) Nag.

(7) *Coley* v. *V A Da Costa*, (1890) 17 Cal 200 (207, 208).

Note 10.

(1) *Tarachand* v. *Parsram*, 1930 Sind 202 (203): 123 Ind Cas 696.

Para 17.
Notes
10—11.

Paragraph is derived from the agreement of the parties and the Court must refer, in accordance with the terms of the agreement.[2] If it fails to do so it acts with material irregularity in the exercise of its jurisdiction.[3] Thus, where the agreement is to refer to the arbitration of two European merchants of Karachi, the Court has no power under this Paragraph to order a reference to an Indian merchant of Amritsar.[4] Where according to the terms of an agreement to refer, an umpire should be appointed from out of seven persons named, the Court cannot appoint as an umpire, a person who is not one of the seven persons so named.[4-a] Similarly, where the agreement is to refer to three arbitrators, the Court has no jurisdiction to add a direction that in case of disagreement among them, the opinion of the majority should prevail. There can be no implied agreement in such cases to be bound by the decision of the majority.[5]

An order under the last portion of Para. 4, *ante,* directing a party to nominate an arbitrator, cannot be passed before the agreement is actually filed under the earlier portion.[6]

11. Death or refusal of arbitrator to act.—Where an arbitrator dies or refuses to act subsequent to the agreement to refer and the agreement does not contain any provision for such a contingency, has the Court power to appoint a new arbitrator? There are two provisions in this schedule empowering the Court to appoint an arbitrator:—

(*a*) Under Cl. 4 of this Paragraph where the agreement does not contain any provision for the appointment of arbitrators and the parties cannot agree thereto.

(*b*) Under Para. 5 of this schedule read with Para. 19, *infra.*

As to the power of the Court to make an appointment under Cl. 4 of this Paragraph the High Court of Allahabad[1] has expressed the view that the expression "if there is no such provision and the parties cannot agree" covers also a case where there has been a provision for a particular arbitrator who is either dead or has retired. If he has died or refuses to act it is as though there where no provisions. But this opinion is merely an *obiter dictum* and the High Court of Bombay[2] has dissented from this view and has held that Cl. 4 is not open to such a construction.

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(2) *Narayanappa* v. *Ramachandrappa,* 1931 Mad 28 (33): 1930 Mad W N 1028: 82 Mad L W 905: 129 Ind Cas 638: 60 Mad L Jour 676: 54 Mad 469; *O D Barracho* v. *A D Souza,* (1871-74): 7 Mad H C R 72 (76). See also *Satish Chandra* v. *Pali Ram,* 1921 Pat 161 (162): 6 Pat L Jour 287: 1921 Pat H C C 170: 2 Pat L Tim 277: 61 Ind Cas 890 [Court cannot refer again, on the first reference proving abortive, on its own motion].

(3) *Drefus and Co* v. *Gurudilta Mal,* (1911) 9 Ind Cas 655 (657): 35 Pun Re 1911: 85 Pun L R 1911: 70 Pun W R 1911.

(4) *Drefus & Co* v. *Gurditta Mal,* (1911) 9 Ind Cas 655 (657): 35 Pun Re 1911: 85 Pun L R. 1911: 70 Pun W R 1911.

(4-a) *O D Barracho* v. *A D Souza,* (1871-74) 7 Mad H C R 72 (76).

(5) *Ramayya* v. *Bapayya,* 1926 Mad 1183 (1184): 51 Mad L Jour 440: 24 Mad L W 884: 97 Ind Cas 824.

(6) *Shib Dial* v. *Ali Baksh and Sons,* 1926 Lah 505 (505): 94 Ind Cas 483.

Note 11.

(1) *Fazl Ilahi* v. *Prag Narain,* 1922 All 133 (133): 20 All L J 327: 44 All 523: 67 Ind Cas 739.

But see *Ahmad Noor Khan* v. *Abdul Rahiman Khan,* (1920) 54 Ind Cas 366 (367): 42 All 191: 18 All L J 76.

(2) *Vishwas Balwant Davaie* v. *Bhalchandra Ganesh Thakar,* 1931 Bom 529 (531): 33 Bom L R 1022: 134 Ind Cas 733.

As to the power of the Court to proceed under Para. 5 and make an appointment it must be noted that that Paragraph applies to agreements without recourse to litigation only by virtue of Para. 19 by which the provisions of Para. 5 can be applied by the Court "only so far as they are *consistent with the agreement*". There is a diversity of judicial opinion in the application of Para. 5 and in order to understand and appreciate the decisions they may be considered under two heads, *viz.*:—

(1) Where the death or refusal of the arbitrator takes place subsequent to the agreement but before it is filed into Court under this Paragraph.

(2) Where such death or refusal takes place subsequent to the filing under Cl. 4.

In cases falling under the first head, it has been held by the High Courts of Calcutta[3] and Madras[4] and the Chief Courts of Punjab[5] and Lower Burma[6] that the agreement becomes incapable of performance on the death or refusal of the arbitrator and that the Court cannot order such agreement to be filed under this Paragraph. Thus, where an agreement is to refer to the arbitration of three specified persons, and one of them dies pending arbitration proceedings, the Court cannot order the agreement to be filed under this Paragraph and direct the remaining arbitrators to act or appoint a new arbitrator in his place as it will not be consistent with the provisions of the agreement to do so.[7] The High Court of Allahabad[8] has, on the other hand, held that where an arbitrator refuses to act pending arbitration proceedings, the Court can, on a subsequent application under this Paragraph appoint a new arbitrator. The decision proceeds on the view that a party acquiescing in the arbitrators commencing proceedings should be deemed to have waived his right to object to the opposite party obtaining later on an order of reference under this Paragraph.

In cases falling under the second head, the power of the Court to appoint a new arbitrator has been assumed in the following cases.[9] But it is conceived that even in such cases the power of the Court to make a new appointment should be consistent with the terms of the agreement.

12. Revocation of reference to arbitrator.—Under the common law of England, a party to a submission might at any time before the award was made, revoke the authority of the arbitrator, the reason being that the arbitrator was, in contemplation of law merely an agent appointed by the parties to decide the matter in dispute between them and his authority was therefore revocable by either of his principals.[1] This has not been followed in this country.[2] As pointed out by the Privy Council in *Pestonjee* v. *Manockjee & Co.*, 12 Moo. Ind. App. 112, at p. 130, no party to an agreement to refer to arbitration can, after a reference has been made, revoke the submission unless for *good cause* and a mere arbitrary revocation of the authority is not permitted.[3] The following have been held to be "sufficient cause" for revoking a submission to arbitration:—

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[3] *Brooke* v. *Surdyal*, (1874) 12 Beng L R App 13. See also *Narendra Nath* v. *Haran Chandra*, 1926 Cal 730 (731, 732): 43 Cal L Jour 292: 94 Ind Cas 177.

[4] *Narayanappa* v. *Ramachandrappa*, 1931 Mad 28 (31, 32): 1930 Mad W N 1028: 32 Mad L W 905: 129 Ind Cas 638: 60 Mad L Jour 676: 54 Mad 469; *Gaitum Bi* v. *Nabi Saheb*, (1912) 17 Ind Cas 389 (390): 24 Mad L Jour 15: 1912 Mad W N 957: 12 Mad L Tim 346.

[5] *Mohan Lal* v. *Damodar Das*, (1918) 44 Ind Cas 866 (868): 71 Pun Re 1918; *Sri Ram* v. *Sorabji*, (1919) 51 Ind Cas 636 (637): 155 Pun Re 1919: 55 Pun W R 1919. [But where there is a distinct provision authorising a party to appoint another arbitrator, it does not become incapable of performance].

[6] *Ma Ba U* v. *Maung Pe San*, (1917) 42 Ind Cas 911 (911): 11 Bur L Tim 160.

[7] *Narayanappa* v. *Ramachandrappa*, 1931 Mad 28 (31, 32): 1930 Mad W N 1028: 32 Mad L W 905: 129 Ind Cas 638: 60 Mad L Jour 676: 54 Mad 469.

[8] *Bhagwan Das* v. *Gurdayal*, 1921 All 188 (190): 19 All L J 823: 64 Ind Cas 459; *Fazol Ilahi* v. *Prag Narain*, 1922 All 133 (133): 20 All L J 827: 44 All 523: 67 Ind Cas 739.

[9] *Hafiz Zahur Ahmad* v. *Taslimunnissa*, 1926 All 55 (56): 23 All L J 891: 6 L R A Civ 575: 89 Ind Cas 404: 48 All 27; *Vishwas Balwant Davare* v. *Bhalchandra Ganesh Thakur*, 1931 Bom 529 (531): 33 Bom L R 1022: 134 Ind Cas 738; *Rahat Ullah Khan* v. *Ibad Ullah Khan*, (1917) 40 Ind Cas 38 (39): 4 Oudh L J 131.

(1) the fact that the arbitrator is colluding with the opposite party.[4]

(2) the fact that the arbitrator is discovered to have been acting as a mukhtear for one of the parties without remuneration or to be indebted to such party.[5]

(3) unreasonable delay in the conduct of the proceedings before the arbitrators, not caused by the party seeking to revoke the submission.[6]

(4) relationship of the arbitrator to one of the parties, unknown to the other.[7]

The following do not constitute "sufficient cause" for revocation of a submission:—

(1) Delay in the conduct of the proceedings, where such delay is caused by the very party seeking to revoke.[8]

(2) The fact that one of the arbitrators figured as a witness for the prosecution in a security proceeding against the party seeking to revoke.[9]

(3) The fact that the arbitrator is entering into foreign matters and that a minor is likely to be interested in the arbitration and that he would not be bound by it.[10]

13. **Court cannot appoint an umpire.**—Where the agreement to refer does not contain any provision for appointing an umpire in case of difference

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Note 12.

(1) *Halsbury's Laws of England*, Vol 1, page 448.

(2) *Satyanarayana* v. *Venkatarangayya*, (1904) 27 Mad 112 (115): 13 Mad L Jour 311.

(3) *Pestonjee* v. *Manokjee*, (1867) 12 Moo Ind App 112 (130): 10 Suth W R 51: 1 Ind Jur N S 69: 2 Suth 164: 2 Sar 390: 3 Mad H C R 183 P C; *Nagasami* v. *Rangaswami*, (1885) 8 Mad H C 46 (55); *Perumalla* v. *Perumalla*, (1904) 27 Mad 112 (115): 13 Mad L Jour 311; In re, *Vappu Rowther*, (1914) 22 Ind Cas 548 (548): 1914 Mad W N 52; *Sultan Muhammad* v. *Sheo Prasad*, (1898) 20 All 145 (148): 1897 All W N 227; *Sheo Narain* v. *Bala Rao*, 1932 All 348 (349): 1932 All L J 331: 137 Ind Cas 198; *Ablakshee Koer* v. *Oodun Singh*, (1871) 15 Suth W R 331 (331): 7 Beng L R 14; *Kellie* v. *Fraser*, (1877) 2 Cal 445 (463, 464): 2 Ind Jur 101; *Peer Buksh* v. *Jumal*, 1870 Pun Re No 80; *Nathumal* v. *Muhammad Shafi*, (1917) 39 Ind Cas 349 (352): 12 Pun Re 1917; *Raza Ali* v. *Fida Ali*, (1901) 4 Oudh Cas 17 (21).

(4) *Bansidhar* v. *Sital Prasad*, (1907) 29 All 13 (14): 3 All L J 613.

(5) *Mahomed Wahiduddin* v. *Hakiman*, (1902) 29 Cal 278 (282): 6 Cal W N 235.

(6) *Cooley* v. *Da Costa*, (1890) 17 Cal 200 (208).

(7) *Ghulam Mahomed Khan* v. *Gopaldas Lalsingh*, 1933 Sind 68 (69, 70).

(8) *Kunj Lal* v. *Banwari Lal*, (1918) 48 Ind Cas 711 (714): 4 Pat L Jour 394.

(9) *Sheo Narain* v. *Bala Rao*, 1932 All 348 (349): 1932 All L J 331: 137 Ind Cas 198.

(10) *Ram Coomar* v. *Kalachand*, (1874) 21 Suth W R 395 (396).

Para. 17, Notes 13—16.

between the arbitrators, the Court cannot appoint an umpire under this Paragraph.[1]

14. **Abatement of proceedings before arbitrator on death of party.**—*See* Note 17 to Para. 1.

15. **Appeal.**—An order under this paragraph filing or refusing to file an agreement is appealable under S. 104, sub-S. (1), Cl. (*d*).[1] But a *decree* passed in terms of the award made in pursuance of a reference under this Paragraph is not appealable.[2] Nor does an appeal lie against an order revoking the reference to arbitration.[3]

16. **Revision.**—The omission of the Court to register and number the application as a suit is an irregularity. But if the irregularity is acquiesced in by the parties, it does not affect the merits of the case and affords no ground for interference in revision.[1]

Para. 18.

Stay of suit where there is an agreement to refer to arbitration.

P. **18.** [*New*] Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit[2] against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary

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Note 13.

(1) *Muhammad Abid* v. *Muhammad Asghar*, (1886) 8 All 64 (66): 1886 All W N 2; *Begam Bibi* v. *Ghulam Ghous*, 1882 Pun Re No. 191. See also *Vishwas Balwant Devare* v. *Bhalchandra Ganesh Thakar*, 1931 Bom 529 (531, 532): 33 Bom L R 1022: 134 Ind Cas 733 [Court appointing umpire as sole arbitrator—Held not justified].

Note 15.

(1) *Venkatachalam Reddi* v. *Rungiah Reddi*, (1911) 12 Ind Cas 372 (374): 36 Mad 353: 10 Mad L Tim 248: (1911) 2 Mad W N 249: 21 Mad L Jour 990; *Nichalchand* v. *Jai Ram Das*, 1931 Lah 673 (674): 32 Pun L R 464: 132 Ind Cas 218 [Application dismissed on the ground that Court has no jurisdiction—Held appealable]; *Khalka Baksh Singh* v. *Suambar Singh*, (1908) 11 Oudh Cas 116 (118). See also *Ram Jawagamal* v. *Devi Ditta Mal*, (1916) 34 Ind Cas 192 (196): 1916 Pun Re No 117: 1917 Pun L R 70: 1916 Pun W R 107 [Order setting aside award on a reference under this para for mis-conduct does not fall under S 104, Cl (*d*) or (*f*), but as the proceedings are in the nature of suit, the order is a decree and appealable]. As for decisions under the old Code which held that the order amounted to a decree see the following: *Magata* v. *Bhagvan*, (1899) 22 Mad 299 (300): 9 Mad L Jour 10; *Sadik Ali* v. *Imdad Ali*, (1881) 3 All 286 (291); *Janki Tewari* v. *Gayan Tewari*, (1881) 3 All 427 (431, 432): 1881 All W N 4; *Narpat Rai* v. *Devi Das*, 1907 Pun Re No 126: 1907 Pun W R 86: 1908 Pun L R 50. The following decisions held a contrary view that the order was not a decree. *Daya Nand* v. *Bakhstawar Singh*, (1883) 5 All 333 (336, 337): 1883 All W N 56 F B; *Bugwan* v. *Purmeshree*, (1880) 5 N W H C 179; *Sayad Zain* v. *Kalabai*, (1899) 23 Bom 752 (755): 1 Bom L R 366; *Petonjee Nusserwunjee* v. *Manekjee & Co*, (1866-67) 3 Mad H C R 183 (183): 12 Moo Ind App 112: 10 Suth W R 51: 1 Ind Jur (N S) 69: 2 Suther 164: 2 Sar 390.

(2) *Tallapragada Suryanarayana Rao* v. *Tallapragada Sarabaya*, (1911) 9 Ind Cas 173 (179, 180): 21 Mad L Jour 263: (1911) 1 Mad W N 151: 9 Mad L Tim 251; *Wali Mahomed* v. *Bahawal Baksh*, (1913) 21 Ind Cas 925 (926): 28 Pun Re 1914: 14 Pun L R 1914: 20 Pun W R 1914; *Jagan Nath* v. *Nanak Chand*, (1913) 16 Ind Cas 996 (997): 9 Pun Re 1913: 248 Pun L R 1913; *Tehla Mal* v. *Dhana Mal*, (1921) 60 Ind Cas 590 (590) Lah.

(3) *Zahur Ahmad* v. *Taslimunnissa*, 1926 All 55 (56): 23 All L J 891: 6 L R A Civ 575: 89 Ind Cas 404: 48 All 27.

Note 16.

(1) *Wali Muhammad* v. *Bahawal Baksh*, (1913) 21 Ind Cas 925 (926): 28 Pun Re 1914: 14 Pun L R 1914: 20 Pun W R 1914.

to the proper conduct of the arbitration, may make an order staying the suit.

[*Cf.* Indian Arbitration Act, S. 19.]

Synopsis.

1. Scope and object of the Paragraph..
2. "Where any party . . . . institutes any suit."
3. Application for stay of suit must be made at the earliest opportunity.
4. Effect of award made subsequent to suit in pursuance of agreement to refer before suit.
5. Sufficient cause—Burden of proof.
6. Direction of Court to stay suit.
7. Dispute as to agreement to refer—Validity of agreement.
8. Removal of stay order.
9. Appeal.
10. Presidency Small Cause Court's power to stay.

At the earliest possible opportunity and in all cases where issues are settled at or before such settlement. See Note 3.
"May make an order staying the suit." See Note 6.
Procedure by Court where arbitration is impracticable. See Note 8.
Procedure in case of denial of agreement. See Note 7, Pt. (3).
Sufficient reason—Instances. See Para. 17, Note 9, Pts. (2) to (6).

1. **Scope and object of the paragraph.**—This paragraph must be read with S. 28 of the Contract Act, 1872, S. 21 of the Specific Relief Act, 1877, and Para. 22 of this Schedule. The general rule as declared by S. 28 of the Contract Act is that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of the contract by the usual legal proceedings in ordinary tribunals is void. An agreement to refer *future* disputes or an agreement *in writing* to refer *existing* disputes to arbitration has been declared by the said section to be an exception to the general rule. Such agreements are therefore valid and binding on the parties. They are, however, not specifically enforceable (S. 21 of the Specific Relief Act, 1877). But if a party to the agreement sues in respect of the matter agreed to be referred to arbitration, the Court may stay the suit under this Paragraph and thus enable the defendant to apply under Para. 17 to carry on the arbitration proceedings as under the agreement. Before the present Code, the existence of such an agreement could be pleaded as a bar to the suit[1] under S. 21 of the Specific Relief Act. That action, so far as it enabled such a plea in bar to be raised, has now been declared by Para. 22, *infra*, to be not applicable to cases governed by this Schedule.[1-a]

Schedule II, Para. 18—Note 1.

(1) For cases under S 21, Specific Relief Act see the following:—*Sheo Dat* v. *Sheo Shankar*, (1905) 27 All 53 (55, 56): 1 All L J 398: 1904 All W N 160; *Sheoamber* v. *Deodat*, (1887) 9 All 168 (170): 1887 All W N 13; *Tahal* v. *Bisheshar*, (1886) 8 All 57 (61): 1885 All W N 331: 10 Ind Jur 232; *Saliq Ram* v. *Jhunna Koer*, (1882) 4 All 546 (548): 1882 All W N 135: 7 Ind Jur 275; *Shib Lal* v. *Hira Lal*, 1888 All W N 133 (133); *Adhibai* v. *Gurusandas Nathu*, (1887) 11 Bom 199 (214); *Koegler* v. *The Oorina Oil Company*, (1875-76) 1 Cal 42 (50, 51); *Koomud Chunder* v. *Chunder Kant*, (1889) 5 Cal 498 (500): 5 Cal L Rep 284; *Crisp* v. *Adlard*, (1896) 23 Cal 956 (957) [*Held*, the argument rendered inoperative owing to lapse of time]. *Duraisamy Padayachi* v. *Vaidaylinga*, (1917) 41 Ind Cas 581 (582): 33 Mad L Jour 46; *Ram Kumar* v. *Jagmohan*, (1911) 9 Ind Cas 80 (82): 33 All 315: 8 All L J 66; *Jeorakhum Lall* v. *Muttra Pershad*, (1869) 1 N W P H C 252; *Aghore Nath* v. *Calcutta Tramway Co*, (1885) 11 Cal 232 (235) [*Held*, contract not illegal under S. 28, Contract Act]. See also *Atma Rai* v. *Sheobaran*, 1882 All W N 58 (58) [Where nothing was done under the agreement held agreement no bar to suit]; *Raza Ali* v. *Fida Ali*, (1899) 4 Oudh Cas 17 (20); *Fakir* v. *Jai Mal*, 1891 Pun Re No 50.

(1-a) *Abdullah* v. *Safiullah*, (1921) 64 Ind Cas 204 (205) Cal; *Ma Yon* v. *Maung Kiya Gaing*, (1916) 35 Ind Cas 710 (711): 9 Bur L Tim 98.

Para. 18. Notes 1—4.

The object of this Paragraph is to provide against the contumacious conduct of a plaintiff who had agreed to refer a particular matter to arbitration but wants to resile from it; but the *discretion* is in the Court to stay the suit or not, the paramount idea being that a tribunal constituted by the parties should not come in conflict or usurp the function of the tribunal which the Sovereign has provided.[2]

2. **"Where any party .. institutes any suit."**—This para. is restricted to cases in which a suit is instituted *after* an agreement to refer to arbitration has been entered into. An agreement to refer, entered into *pending* suit, does not oust the jurisdiction of the Court; nor can it afford a valid ground for staying the suit under this Paragraph.[1]

3. **Application for stay of suit must be made at the earliest opportunity.**—The power vested in the Court to stay a suit under this Paragraph is *discretionary* and can be exercised only on an application made for that purpose at or before the settlement of issues,[1] *cf.* the provisions of S. 19 of the Indian Arbitration Act which require that the application should be made at any time after appearance and before filing a written statement or taking any other steps in the proceedings.

4. **Effect of award made subsequent to suit in pursuance of agreement to refer before suit.**—Where no application for stay is made within proper time or an application is made and dismissed the award made subsequently and pending the suit is invalid. When once the suit is filed, the jurisdiction of the arbitrators ceases, and they become *functus officio.*[1] The leading case on the point is the decision in *Doleman and Sons* v. *Orsett Corporation,* [(1912) 3 K. B. 257] which has been quoted with approval and followed by the High Courts in India. Moulton, L. J., in delivering the judgment in that case observed as follows:—"The law will not enforce the specific performance of an agreement to refer to arbitration, but if duly appealed to, it has the power in its discretion, to refuse to a party the alternative of having the dispute settled by a Court of Law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action or if the defendant has abstained from asking it to do so, the Court has *seisin* of the dispute and it is by its decision and by its decision alone, that the rights of the parties are settled. It follows that, in the latter case, the private tribunal, if it has ever come into existence, is *functus officio* unless the

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(2) *Appavu* v. *Seeni,* (1917) 42 Ind Cas 514 (515): 41 Mad 115: 33 Mad L Jour 177: 6 Mad L W 243.

Note 2.

(1) *Vyankatesh Mahadev* v. *Ramachandra Krishna,* (1915) 27 Ind Cas 46 (47, 48): 38 Bom 687: 16 Bom L R 653; *Dhan Singh* v. *Khan Singh,* (1912) 15 Ind Cas 140 (145, 146): 115 Pun Re 1912: 6 Pun L R 1912 (Sup): 191 Pun W R 1912. See also *Peruri* v. *Gullapadi,* (1909) 4 Ind Cas 183 (183): 34 Bom 372: 11 Bom L R 1060 [Cases under S 19 of the Arbitration Act].

Note 3.

(1) *Bhagwan Das* v. *Shiv Lal,* (1914) 22 Ind Cas 811 (812): 92 Pun Re 1913: 109 Pun L R 1914. See also *Kureeshi and Sons* v. *Soomar Haji,* 1921 Sind 202 (204): 15 Sind L R 88.

Note 4.

(1) *Ram Prosad Surajmal* v. *Mohan Lal Lachminarain,* 1921 Cal 770: 33 Cal L Jour 67: 60 Ind Cas 895 [*Citing Doleman* v. *Orsett Corporation,* (1912) 3 K B 257]; *Sarat Chander Sen* v. *Raj Kumar Mookerjee,* 1923 Cal 135 (138): 35 Cal L Jour 482: 26 Cal W N 967: 69 Ind Cas 863; *Firm Jainarain* v. *Firm Narain Das,* 1922 Lah 369 (371): 3 Lah 296: 69 Ind Cas 583 [Following Doleman's case]; *Appavu* v. *Seeni,* (1917) 42 Ind Cas 514 (515): 41 Mad 115: 33 Mad L Jour 177: 6 Mad L W 243 [Following Doleman's case]; *Pardanani and Co* v. *John Batt and Co, Ltd,* 1926 Sind 86 (88): 95 Ind Cas 481 [Following (1912) 3 K B 257]; *Zainab* v. *Budhana,* 1922 Oudh 158 (159, 160): 25 Oudh Cas 63: 68 Ind Cas 235. See, however, *Chiman Lal* v. *Phoolchand,* 1922 All 48 (49): 44 All 292: 20 All L J 128: 65 Ind Cas 795 [Case arising under S. 19, Arbitration Act].

Para. 18, Notes 4—6.

parties agree *de novo* that the dispute shall be tried by arbitration and that the action itself shall be referred. There cannot be two tribunals, each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision".

But in order to apply the doctrine that an award made pending suit is invalid, the following conditions must be fulfilled:—

(1) The person instituting the suit must be a party to the agreement to refer.

(2) The party wishing to stay the suit must have the right to apply to the Court to stay it.

(3) The subject-matter of the dispute must be the same before the arbitrator and the Court.[2]

The validity of the *agreement* entered into prior to the suit is not, however, affected by the institution of the suit and it is only the subsequent *award* that is invalid. Hence it has been held by the High Court of Calcutta that though an award is made subsequent to suit, the Court can nevertheless stay the suit in order to enable the defendant to have the invalid award set aside (under Paras. 20 and 21) and thereafter recommence the arbitration proceedings. Otherwise, a party to the agreement can nullify the entire arbitration proceedings by filing a suit at the last moment when the award is about to be delivered without giving the opponent any time to obtain a stay of the suit.[3]

5. **Sufficient cause—Burden of proof.**—It is for the plaintiff to show that there is sufficient cause as to why the matter should not be referred to arbitration in accordance with the agreement. The burden is not upon the defendant to show that no such cause exists.[1] (As to what is sufficient cause *see* Note 9 to Para. 17, *supra.*)

6. **Discretion of Court to stay suit.**—The defendant is not entitled as of *right* to a stay of the suit under this Paragraph. The granting of stay is in the *discretion* of the Court.[1] The Court will, however, exercise the discretion ordinarily in favour of the stay, for, as observed by Lord Selbourne in *Willesford* v. *Watson*.[2] "If parties choose to determine for themselves, that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament, (that is, the Common Law Procedure Act, 1854, S. 11, which corresponds to Para. 18 of the Civil Procedure Code) was passed a *prima facie* duty is cast upon the Courts to act upon such an agreement".

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(2) *Firm of Harja Rai Arjan Das* v. *Tek Chand*, 1927 Lah 465 (468): 101 Ind Cas 786; *Jai Narain Babu Lal* v. *Narain*, 1922 Lah 369 (371): 3 Lah 296: 69 Ind Cas 583 [Subject-matter should be identical].

(3) *Sarat Chandra Sen* v. *Rajkumar Mookerjee*, 1923 Cal 135 (138): 35 Cal L Jour 482: 26 Cal W N 967: 69 Ind Cas 863. See also *Jokiram Kaya* v. *Ghanesham Das*, 1921 Cal 244 (245): 25 Cal W N 62: 61 Ind Cas 380 [Case under S 19, Arbitration Act].

Note 5.

(1) *Ganesh Das Ishar Das* v. *Durga Dat Jagannath*, 1922 Lah 97 (97): 2 Lah 19: 3 Lah L Jour 61: 69 Pun L R 1921: 60 Ind Cas 776; *Volkart Brothers* v. *Fateh Muhammad*, (1921) 61 Ind Cas 322 (323): 3 U P L R (Lah) 48; *Dina Bandhu Jana* v. *Durga Prasad Jana*, (1919) 51 Ind Cas 80 (82, 83): 46 Cal 1041: 23 Cal W N 716: 29 Cal L Jour 399; *The Singaram Coal Syndicate, Ltd* v. *Balmukund Marwari*, 1931 Cal 772 (774): 35 Cal W N 514: 53 Cal L Jour 321: 58 Cal 1107: 134 Ind Cas 529.

Note 6.

(1) *Appavu Rowther* v. *Seeni Rowther*, (1917) 42 Ind Cas 514 (515): 41 Mad 115: 33 Mad L Jour 177: 6 Mad L W 243; *Premchand* v. *Mithaboy & Co*, 1933 Bom 202 (204): 35 Bom L R 287.

(2) 42 L J Ch 447, referred to in 51 Ind Cas 80 (82).

7 **Dispute as to agreement to refer—Validity of agreement.**—The Court can stay a suit under this Paragraph only when there is a *subsisting* agreement to refer to arbitration. Where the agreement has become void and inoperative, as for instance, by the death of the arbitrator specified in the agreement, it can afford no valid ground for granting stay under this Paragraph.[1] Similarly where the agreement has been revoked for sufficient cause or is otherwise invalid in law (as where it is vitiated by fraud or mistake), the Court will decline to grant stay.[2]

Where the parties dispute the agreement, the Court should decide as to the truth and validity of the agreement before it proceeds to grant or refuse a stay under this Paragraph.[3] Where the parties have entered into a fresh agreement which materially alters the original agreement containing the arbitration clause, the existence of the original agreement cannot be urged as a ground for stay. But if the fresh agreement merely amounts to an extension of time for the performance of the original contract, it has not the effect of superseding the same so as to invalidate the arbitration clause.[4] Where a contract contains several clauses of which the arbitration clause is one, the Court is not *a fortiori* bound to stay the suit. Thus, where a seller files a suit upon certain accepted but unpaid bills and there is a clause in the indent by which the buyer is bound to accept and pay at maturity the bills drawn by the seller notwithstanding any objection that the buyer may have regarding any variations in the terms of the indent, the buyer is not entitled to rely on a clause in the indent agreeing to refer the dispute to arbitration. Such a suit is governed by S. 32 of the Negotiable Instruments Act and the Court should not stay the suit under this Paragraph.[5]

In the undermentioned cases[6] it has been held that where a suit is filed impeaching the very agreement containing the arbitration clause, the Court can order a stay of the arbitration proceedings.

8. **Removal of stay order.**—Where after a stay is granted under this Paragraph one of the arbitrators refuses to act[1] or the defendant neglects to take steps to proceed with the arbitration[2] the plaintiff is entitled to apply for a removal of the order for stay. The Court cannot, however, proceed with the suit without vacating the stay order.

9. **Appeal.**—An appeal lies from an order under this Paragraph staying or refusing to stay the suit (*vide* S. 104 Sub-S. (1), Cl. (*e*). But an order

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Note 7.

[1] *Narayanappa* v. *Ramachandrappa*, 1931 Mad 28 (32, 33): 1930 Mad W N 1028: 32 Mad L W 905: 129 Ind Cas 688: 60 Mad L Jour 676: 54 Mad 469; *Gaffum Bi* v. *Nabi Saheb*, (1912) 17 Ind Cas 389 (390): 12 Mad L Tim 346: 1912 Mad W N 957: 24 Mad L Jour 15.

[2] *See* cases cited in Notes 9 and 12 to paragraph 17, *ante*.

[3] *Firm, Sheo Prasad Radha Kishen* v. *Indore Malwa United Mills*, (1917) 39 Ind Cas 508 (512): 65 Pun W R 1917: 62 Pun Re 1917.

[4] *Lachminarain* v. *Hoare Miller and Co.* (1918) 21 Ind Cas 217 (219): 17 Cal W N 1098: 41 Cal 35.

[5] *Radha Bihari Diwan Singh* v. *G B Alexander*, 1922 Lah 353 (358): 66 Ind Cas 48: 2 Lah 335: 118 Pun L R 1921.

[6] *Gajanand Maskara* v. *Taleb Jalaludin*, (1918) 46 Ind Cas 173 (174): 22 Cal W N 535. See also *Baij Nath* v. *Mansakrai Panna Lall*, (1919) 49 Ind Cas 988 (990): 23 Cal W N 258 [In this case stay refused].

Note 8.

[1] *Laxman* v. *Manjunath*, 1921 Bom 458 (458): 45 Bom 1181: 23 Bom L R 511: 64 Ind Cas 289. See also *Shasimukhi Debi* v. *Parbati Sunker Roy*, (1919) 50 Ind Cas 879 (880): 23 Cal W N 293.

[2] *Sheo Babu* v. *Udit Narain*, (1914) 24 Ind Cas 490 (491): 12 All L J 757.

Para. 18, Notes 9—10.

of a revenue Court staying or refusing to stay a suit under this Paragraph is not a decree within the meaning of S. 177 of the Agra Tenancy Act and no appeal lies against such an order to the civil Court.[1]

10. **Presidency Small Cause Court's power to stay.**—According to the High Court of Bombay[1] the Presidency Small Cause Court has power to stay the suit under this Paragraph as well as under S. 19 of the Indian Arbitration Act. The High Court of Calcutta[2] has, however, held that the High Court can stay under this Paragraph the suit pending before the Presidency Small Cause Court, but has left open the question whether the Small Cause Court has also concurrent power to grant stay.

Para. 19, Notes 1—4.

Provisions applicable to proceedings under para. 17.

P. **19.** [S. 524.] The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon.

[1877—S. 524; 1859—S. 326.]

Synopsis.

1. Scope and applicability of the Para.
2. "So far as they are consistent with any agreement filed under Para. 17"—See Note 11 to Para. 17, ante.
3. Power of Court to remit or set aside award.
4. Appeal—See Note 15 to Para. 17, ante.

1. **Scope and applicability of the Paragraph.**—This Paragraph empowers the Court to apply the provisions of Paras. 1 to 16 to proceedings under Para. 17, *so far as they are consistent with the agreement to refer*. But in order to so apply those provisions it is essential that the agreement should be actually *filed* under Para. 17.[1]

2. **So far as they are consistent with any agreement filed under Para. 17.**"—*See* Note 11, Para. 17, *ante* and Note 7, Para. 15, *ante*.

3. **Power of Court to remit or set aside award.**—*See* Paras. 14 and 15, *ante* and the undermentioned cases.[1]

4. **Appeal.**—*See* Note 15 to Para. 17, *ante*.

Note 9.

(1) *Kirpa Debi* v. *Ram Chander*, (1918) 43 Ind Cas 531 (532): 16 All L J 281: 40 All 219.

Note 10.

(1) *Tatya Rowji* v. *Hathibhai*, 1928 Bom 275 (277): 30 Bom L R 661: 52 Bom 420: 111 Ind Cas 641; *Babubhai Tansukhlal* v. *Madhavji Govindji & Co*, 1931 Bom 343 (344): 33 Bom L R 759: 55 Bom 503: 134 Ind Cas 705 [Following 1928 Bom 275]. See also *Premchand* v. *Mithaboy & Co*, 1933 Bom 202 (205): 35 Bom L R 287 [Presidency Small Cause Courts Act, S 38. Trial Judge refusing stay for referring to arbitration—Evidence led and decree passed—Full Court cannot interfere and order stay].

[But see *Ralli Brothers* v. *Noor Muhammad*, (1907) 31 Bom 236 (241): 8 Bom L R 955].

(2) *Radhakissan Chanuba* v. *Bombay Co, Ltd*, 1930 Cal 51 (52): 56 Cal 755: 33 Cal W N 888: 121 Ind Cas 574.

Schedule II, Para. 19—Note 1.

(1) *Dwarka Prasad* v. *Dipchand Parsram*, (1918) 44 Ind Cas 866 (868): 71 Pun Re 1918; *Maba* v. *Maung Po Son*, (1917) 42 Ind Cas 911 (911): 11 Bur L Tim 160.

Note 3.

(1) *Burla Ranga Reddi* v. *Kalapalli Suhaya*, (1883) 6 Mad 368 (369, 370) [The award may be set aside for misconduct of the arbitrators]; *Sheo Karam* v. *Malada Singh*, (1913) 19 Ind Cas 374 (375): 6 Sind L R 146 [A mere declaratory award is incomplete and should be remitted to arbitrators for completion].

ARBITRATION WITHOUT THE INTERVENTION OF A COURT.

Filing award in matter referred to arbitration without intervention of Court.

P. 20. [S. 525.] (1) Where any matter has been referred to arbitration[6] without the intervention of a Court, and an award has been made thereon, any person interested in the award[9] may apply to any Court having jurisdiction over the subject-matter of the award[10] that the award be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit[12] between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties[13] to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

[1877—S. 525; 1859—S. 327.]

Synopsis.

1. Legislative changes.
2. Awards made on arbitration without the intervention of a Court.
3. Scope of the Paragraph.
4. Regular suit to enforce the award.
5. Award made pending suit—See Note 9 to O. 23, R. 3, ante. See also Para. 10, ante.
6. "Where any matter has been referred to arbitration"—See Para. 21, infra.
    7. Award determining matters not referred—See Para. 21, infra.
    8. Whether part of award may be filed—See Para. 21, infra.
9. "Any person interested in the award."
10. Jurisdiction over the subject-matter of the award.
    11. Small Cause Court.
12. "Shall be numbered and registered as a suit."
13. Notice to parties.
    14. Lost award—See Note 8 to Para. 21, infra.
    15. Decision of majority.
    16. Parties to reference.
17. Court-fee.
18. Limitation.

Court to which application under this Paragraph should be made. See Notes 10 and 11.

1. Legislative changes:—

The words "any Court having jurisdiction over the subject-matter of the award" have been substituted for the words "Court of the lowest grade having jurisdiction over the matter to which the award relates". *See* Note 10, *infra*.

2. Awards made on arbitration without the intervention of a Court.— A reference to arbitration out of Court originates in a submission which is an agreement between the parties to be bound by the adjudication of their differences or disputes by an arbitrator appointed with their consent.[1-a] On the reference the arbitrator makes an award or an adjudication of the respective

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Schedule II, Para. 20—Note 2.

[1-a] Halsbury's Laws of England, Vol. I, p. 439.

Para. 20, Note 2.

rights of the parties. In order to constitute an award, therefore, the following elements are essential:—

(1) There must be a difference or dispute between the parties.[1-b]

(2) There must be a submission to arbitration and a reference thereon to an arbitrator appointed by the parties.

(3) There must be an award by the arbitrator on the points referred to him.

As between the parties to the submission, a *valid* award is a final adjudication of the disputes between them embraced in the submission, and is conclusive upon the merits of the controversy submitted.[1] It operates, therefore, to merge and extinguish all claims embraced in the submission, and, after an award is made, the submission and award furnish the only basis by which the rights of the parties can be determined and constitute a bar to any action on the original rights of the parties. It is not necessary for the *validity* of the award that it should be filed or enforced in a Court of law.[2] But if it is desired to *enforce* the rights created by the award through the Court, the award has to be converted into a *judgment of Court* on which a decree may be made.[2-a] For this purpose a party in whose favour an award has been made has two course open to him:—

(*i*) He may proceed by an application under this Paragraph. *See* Note 3.

(*ii*) He may file a regular suit to enforce the award. *See* Note 4.

[1-b] *Macnaghten* v. *Rameshwar Singh*, (1903) 30 Cal 831 (839). See also Note 10 to Para. 1 *ante*.

[1] *Bhajahari Saha Bankya* v. *Behary Lal Basak*, (1906) 33 Cal 881 (888): 4 Cal Jour 162; *Baidyanath Chatterjee* v. *Panchanami Dasi*, 1924 Cal 72 (73): 37 Cal L Jour 542: 28 Cal W N 140; 72 Ind Cas 128; *Lal Das* v. *Bai Lala*, (1909) 1 Ind Cas 105 (105, 106): 11 Bom L R 20: 5 Mad L Tim 226; *Bhan Rao* v. *Radhabai*, (1909) 33 Bom 401 (403, 404): 2 Ind Cas 431: 11 Bom L R 406; *Swami Rao* v. *Channappa*, 1927 Bom 237 (238): 29 Bom L R 301: 101 Ind Cas 398 [But where award does not replace, but merely defines and ascertains original rights, a suit on original rights not barred]; *Rani Bhagoti* v. *Ram Chandan*, (1885) 11 Cal 386 (388, 392): 12 Ind App 67: 9 Ind Jur 320: 4 Sar 624 P C; *Amar Nath* v. *Ishar Singh*, (1918) 43 Ind Cas 350 (351): 99 Pun Re 1917: 173 Pun W R 1917; *Narasayya* v. *Ramabadra*, (1892) 15 Mad 474 (476); *Krishna Panda* v. *Balaram*, (1896) 19 Mad 290 (291); *Alam Khan* v. *Muhammad Nawaz Khan*, 1888 Pun Re No 32; *Hassan Ali* v. *Hoshdar Ali*, 1890 Pun Re No 113; *R M A R Firm* v. *M R M S Firm*, (1914) 25 Ind Cas 220 (221): 7 Bur L Tim 308; *Ma Hla Ye* v. *Maung Tung Maung*, (1920) 57 Ind Cas 894 (895): (1920) 8 U B R 210 [A suit may be filed on the award, and in the alternative, if the award is found to be invalid, a prayer may be added for adjudication on the merits]. .

[*Nathumal* v. *Muh Shafi*, (1917) 39 Ind Cas 349 (351): 12 Pun Re 1917; *Shamasuddin Chirajh Din* v. *Muhammad Hussain*, (1916) 33 Ind Cas 494 (494, 495): 68 Pun W R 1916.]

Ma Yon v. *Maung Kya Gaing*, (1916) 35 Ind Cas 710 (711): 9 Bur L Tim 98 [It is however open to the plaintiff to impugn the validity of award, and if he succeeds in proving the award to be invalid, an adjudication on the original rights may be made]. See also *Appavu Rowther* v. *Seeni Rowther*, (1917) 41 Mad 115 (117): 33 Mad L Jour 177: 42 Ind Cas 514: 6 Mad L W 243; *Amir Bibi* v. *Arokiam*, (1918) 34 Ind L Jour 184 (186, 192): 45 Ind Cas 813; *Ganpat* v. *Ramkrishna Puri*, (1910) 5 Ind Cas 425 (426): 6 Nag L R 1; *Bhikhari Das* v. *Gobind Ram*, 1892 All W N 238 (238). See also *Kotchand Balchand* v. *Kishinchand*, 1924 Sind 23 (24): 17 Sind L R 178: 83 Ind Cas 548; *Khan Chand* v. *Kadumal*, (1912) 15 Ind Cas 819 (821): 5 Sind L R 240.

[2] *Muhammad Nivaz* v. *Alam Khan*, (1891) 18 Cal 414 (418): 18 Ind App 73: 70 Pun Re 1891: 6 Sar 26: 15 Ind Jur 284 P C; *Siwan Rai* v. *Lachmi Singh*, 1927 All 783 (784): 100 Ind Cas 762; *Parmeshiri* v. *Lachmin*, 1884 All W N 148 (148); *Indul* v. *Matabadal*, 1883 All W N 237 (237); *Bhikari* v. *Gobind*, (1892) 12 All W N 238 (238); *Mohesh Chunder* v. *Buloram*, (1866) 6 Suth W R 94 (95); *Nur Singh* v. *Puttoo*, (1873) 20 Suth W R 420 (420); *Thakur Sheo Narain* v. *Thakur Bishunath*, (1904) 7 Oudh Cas 369 (370); *Amarnath* v. *Ishar Singh*, (1918) 43 Ind Cas 350 (351): 1917 Pun Re No. 99: 1917 Pun W R 173.

[2-a] *Sashti Charan* v. *Tarak Chandra*, (1871) 8 Beng L R 315 (325): 15 Suth W R 9 F B; *Husanama* v. *Linganna*, (1895) 18 Mad 423 (428). See also *Ghulam Khan* v. *Muhammad Hasan*, (1902) 29 Cal 167 (182, 183, 184): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 25 Pun Re 1902 P C; *Arunchala* v. *Louis Dreyfus & Co.* 1928 Mad 107 (115): 39 Mad L Tim 563: 27 Mad L W 267: 1928 Mad W N 132: 107 Ind Cas 793.

3. Scope of the Paragraph.—This Paragraph provides for a summary procedure for filing in Courts awards made on arbitration without the intervention of a Court.[1] The procedure is, however, optional[2] and does not preclude the party from bringing a regular suit to enforce the rights created by the award.[3] (*See* Note 4, *infra.*) The inquiry under this Paragraph is limited to the conditions specified in Para. 21. (*See* Note 2 to Para. 21, *infra.*) While, in a regular suit to enforce the award, it is open to the defendant to attack the award on all possible grounds.[4]

As to whether a proceeding under this Paragraph is *res judicata* in a subsequent suit to enforce or set aside the award, *see* Note 27 to S. 11, *ante*. A refusal to file the award under this Paragraph does not amount to a *decree*, and therefore does not render the award void or otherwise unenforceable, as against the parties to the award, but leaves the award to have its ordinary legal validity,[5] unless the validity of the award as an award was directly and substantially in issue in such proceeding.[6]

4. Regular suit to enforce the award.—Apart from the procedure under this Paragraph, a regular suit may be brought to enforce the rights under the award. (*See* Form No. 10, Appendix A to Sch. 1.) It has been held by the High Court of Calcutta that a suit to enforce the terms of the award is in essence one for specific performance of the award[1] and must be brought within three years of the date of the award under Art. 113 of the Limitation Act.[1-a] But it has been held by the High Courts of Madras[2] and Allahabad[3] that the question whether a suit to enforce an award is a suit for specific performance of the award would depend upon the nature and purport of the award, and the period of limitation for the suit would also depend upon the nature and purport of the award. It is submitted that the latter view is correct. Where the award directs the performance of a duty or condition and

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Note 3.

[1] *Krishna Iyer* v. *V N Subbarama Iyer*, 1932 Mad 462 (465): 1982 Mad W N 234: 62 Mad L Jour 550: 86 Mad L W 565: 55 Mad 689: 139 Ind Cas 877.

[2] *Parmeshiri* v. *Lachmin*, 1884 All W N 148 (149); *Harakh Ram Jani* v. *Lakshimi Ram Jani*, 1921 All 384 (386): 43 All 108: 60 Ind Cas 626; *Siwan Rai* v. *Lachmi Singh*, 1927 All 733 (734): 100 Ind Cas 762; *Subbaraya* v. *Sadasiva*, (1897) 20 Mad 490 (491, 492); *Basnoo* v. *Jagannath*, 1931 Oudh 127 (129): 8 Oudh W N 71: 131 Ind Cas 443; *Thakur Sheo Narain Singh* v. *Thakur Bishunath Singh*, (1904) 7 Oudh Cas 369 (370); *Maung Pu* v. *U De Wainda*, (1892-96) 2 U B R 11; *Maung Kyan Pon* v. *Maung Yan Nyein*, (1897-1901) 2 U B R 10.

[3] *Harakh Ram Jani* v. *Lakshimi Ram Jani*, 1921 All 384 (386): 43 All 108: 60 Ind Cas 384; *Pragdass* v. *Girdhardass*, (1902) 26 Bom 76 (80); *Wazir Ali* v. *Sheikh Mukyar*, (1910) 5 Ind Cas 597 (598): 11 Pun W R 1910: 34 Pun Re 1910; *Nakhu Mal* v. *Muhammad Shafi*, (1917) 39 Ind Cas 349 (351): 12 Pun Re 1917; *Dharm Das* v. *Ajudhia Pershad*, 1882 Pun Re No. 77; *Palaniappa* v. *Rayappa*, (1868-69) 4 Mad H C R 119 (120); *Gopi Reddi* v. *Mahanandi Reddi*, (1892) 15 Mad 99 (100): 1 Mad L Jour 591; *Krishna Iyer* v. *V N Subbarama Iyer*, 1932 Mad 462 (465): 1932 Mad W N 234: 62 Mad L Jour 550: 35 Mad L W 565: 55 Mad 689: 139 Ind Cas 877; *Ponnamma* v. *Marampudi Kotamma*, 1932 Mad 745 (747): 139 Ind Cas 355: 36 Mad L W 486: 63 Mad L Jour 610: 1932 Mad W N 988; *Muthukaruppa Kone* v. *Veerabhadra Kone*, (1915) 29 Ind Cas 49 (50): 2 Mad L W 820: 17 Mad L Tim 241; *Ma Hla Win* v. *Maung Shwe Yau*, (1897-1901) 2 U B R 293.

[4] *Raghunath Das Ram Sarup* v. *Sulzer Burderer & Co*, 1926 Lah 125 (127): 7 Lah 42: 7 Lah L Jour 611: 92 Ind Cas 712: 27 Pun L R 287.

[5] *Kirkwood* alias *Ma Thein* v. *Maung Sein*, 1925 P C 216 (219): 89 Ind Cas 773: 52 Ind App 265: 6 L R P C 160: 30 C W N 529: 5 Rang 186 P C.

[6] *Md Newaz Khan* v. *Alam Khan*, (1891) 18 Cal 414 (418, 419): 18 Ind App 73: 70 Pun Re 1891: 6 Sar 26: 15 Ind Jur 284 P C; *Rajmal Girdhari Lal Marwadi* v. *Maruti Shivaram*, 1921 Bom 389 (391): 45 Bom 329: 59 Ind Cas 755. 22 Bom L R 1377; *Bhajahari Saha Banikya* v. *Behary Lal Basak*, (1906) 33 Cal 881 (887): 4 Cal L Jour 162.

Note 4.

[1] *See* S 30 of the Specific Relief Act, 1877.

[1-a] *Kunjo Behari Bardhan* v. *Gosto Behari Bardhan*, (1917) 42 Ind Cas 590 (592): 27 Cal L Jour 486: 22 Cal W N 66.

[2] *Sornavalli Ammal* v. *Muthayya Sastrigal*, (1900) 23 Mad 593: 10 Mad L Jour 208.

[3] *Sheo Narain* v. *Beni Madho*, (1901) 23 All 285 (288): 1901 All W N 83.

Para. 20, Notes 4—10.

where the performance of such a duty or condition may be specifically enforced under the Specific Relief Act, the suit may be one for specific performance of the award.[4] But where the award settles or declares the title of the parties and a claim is made based on the title so conferred, the suit cannot be called a suit for specific performance of the award any more than is a suit upon a sale-deed, a suit for specific performance of a contract of sale.[4-a] On the same principle it has been held that a suit for recovery of money due under an award is a suit for money and as such cognisable by a Court of Small Causes, even though, in such a suit, the validity of the award may be contested.[5] As to whether a suit, brought after an application to file the award under this Paragraph is dismissed, is barred by the *res judicata, see* Note 27 to S. 11, *ante.*

5. **Awards made pending suit.**—*See* Note 9 to O. 23, R. 3, *ante.*

See also Para. 10, *ante.*

6. "**Where any matter has been referred to arbitration.**"—*See* Para. 21, *infra.*

7. **Award determining matters not referred.**—*See* Para. 21, *infra.*

8. **Whether part of award may be filed.**—*See* Note 7 to Para. 21, *infra.*

9. "**Any person interested in the award.**"—A person who is not a party to the reference to arbitration and therefore is not bound by the award, cannot enforce the award, even though he may derive an advantage from it.[1]

10. **Jurisdiction over the subject-matter of the award.**—Under the old Code, the application had to be filed in the Court of the lowest grade having jurisdiction "over the matter to which the award *relates*".[1] It was held on an interpretation of the words in quotation, that the jurisdiction depended upon the value of the matter to which the *arbitration related* and not on the value of the *matter awarded.*[2] The use of the words "having jurisdiction over the *subject-matter of the award*" in the present Paragraph makes it clear that the jurisdiction now depends upon the reliefs *awarded* rather than on the matter originally in dispute.[3] In order to decide whether the Court has jurisdiction over the subject-matter of the award, it is necessary to determine whether the Court would have under Ss. 16 to 20 of the Code,

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(4) See *Brij Mohan Lal* v. *Shiam Singh,* (1902) 24 All 164 (168, 169): 1901 All W N 208. See also *Bhajahari Saha Banikya* v. *Behary Lal Basak,* (1906) 33 Cal 881 (887): 4 Cal L Jour 162.

(4-a) *Sheo Narain* v. *Beni Madho,* (1901) 23 All 285 (288): 1901 All W N 83.

(5) *Nanalal Lallubhai* v. *Chhotalal Narsi Das,* 1925 Bom 519 (519): 49 Bom 693: 91 Ind Cas 1032; *Mizaji Lal* v. *Partab Kuar,* (1920) 58 Ind Cas 546: 18 All L J 70: 42 All 169; *Thirumurthy Chetty* v. *Ponnan Chetty,* 1924 Mad 485 (485): 46 Mad L Jour 51: 19 Mad L W 210: 1924 Mad W N 46: 76 Ind Cas 843; *Simson* v. *McMaster,* (1890) 13 Mad 344 (346); *Maung Ni* v. *Maung Aung Ba,* 1926 Rang 198 (200): 4 Rang 227: 97 Ind Cas 1032: 5 Bur L Jour 133; *Bansidhar Mangatrai* v. *Dinnanath & Co,* 1929 Sind 43 (43): 112 Ind Cas 11: 23 S L R 411.

[But see *Ma Hla Gyi* v. *Maung Seik Po,* 1924 Rang 192 (192): 1 Rang 700: 79 Ind Cas 718; *Mt Guneshee* v. *Chotey Lal,* (1871) 3 N W P 117 (118).]

Note 9.

(1) *Hira Singh* v. *Ganga Sahai,* (1884) 6 All 322 (328): 11 Ind App 20: 4 Sar P C J 491 [Confirming 2 All 809]; *Prem Sagar* v. *Ram Gopal,* 1929 Lah 814 (815). See also *Jonee* v. *Ledgard,* (1886) 8 All 340 (351): 1886 All W N 107.

Note 10.

(1) See *Balakrishna Bhashkar Ex parte,* (1864-66) 2 Bom H C R 91.

(2) *Subraya* v. *Manjunath,* (1906) 29 Mad 44 (45); *Narasing Das* v. *Ajodhya Prosad,* (1904) 31 Cal 203 (206).

(3) *Mohesh Chandra* v. *Amar Chand,* (1914) 22 Ind Cas 793 (795): 18 Cal W N 867: 19 Cal L Jour 260; *Upendra Nath Basu* v. *Het Lal,* 1933 All 380 (381).

Para. 20, Notes 10—12.

jurisdiction to try a regular suit between the parties in which the reliefs claimed are the reliefs granted by the award.[3-a] It is, however, the *entire* matter dealt with by the award and not merely a particular portion thereof that must be considered in determining the jurisdiction of the Court.[4] Where the award deals with matters partly within the jurisdiction of a Court and partly without it, it cannot be filed under this Paragraph in that Court and no decree can be validly made thereon.[5] Thus an award directing the payment of a sum of money and also declaring the dissolution of a marriage cannot be filed in a Small Cause Court which has no jurisdiction to deal with the question of dissolution of marriages.[6] Similarly, in *Ramlal* v. *Kisan Chandra*,[6-a] where the properties in dispute and dealt with by the award, were all outside British India, it was held by the Privy Council that the award could not be filed in a British Indian Court.

Before assuming jurisdiction under this Paragraph the Court has to be satisfied that it has jurisdiction to entertain the application and should, if necessary, take evidence regarding jurisdiction before assuming jurisdiction.[7]

11. **Small Cause Court.**—Where an award merely directs the payment of money a suit to recover the money is cognisable by a Court of Small Causes.[1]

12. **"Shall be numbered and registered as a suit."**—It has been seen in Note 5 to S. 2, sub-S. (2), *ante*, that the word "suit" for the purposes of the Code, means—

(1) any proceeding under the Code which is instituted by the presentation of a *plaint*, and

(2) any proceeding which, according to any specific provisions of law should be regarded as a suit under the Code.

An application under this Paragraph or under Para. 17 must, therefore, be regarded as a suit for the purpose of the Code, inasmuch as it has to be

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(3-a) *Upendra Nath Basu* v. *Het Lal*, 1933 All 380 (381).

(4) *Rathamali Servai* v. *Ramaswami Servai*, (1919) 51 Ind Cas 53 (54): 10 Mad L W 57; *M Gangappa* v. *M Kapinappa*, (1869-70) 5 Mad H C R 128 (129); *Krishna* v. *Subbarama*, 1932 Mad 462 (463): 1932 Mad W N 234: 62 Mad L Jour 550: 35 Mad L W 565: 55 Mad 689: 139 Ind Cas 877; *Upendra Nath Basu* v. *Het Lal*, 1933 All 380 (381). See however *S A Nathan* v. *S R Samson*, 1931 Rang 252 (254): 9 Rang 480: 135 Ind Cas 65 [Observation of Mya Bu, J, in the order of reference to the effect that where the portion within jurisdiction is separable from the other portion without affecting the basis of the award, the case may be different].

(5) *Krishna* v. *Subbarama*, 1932 Mad 462 (463): 1932 Mad W N 234: 62 Mad L Jour 550: 35 Mad L W 565: 55 Mad 689: 139 Ind Cas 877. *See* cases cited in Foot Notes (6) and (7) below.

(6) *Rathamali Servai* v. *Ramaswamy Servai*, (1919) 51 Ind Cas 53 (54): 10 Mad L W 57.

(6-a) 51 Cal 361: 51 Ind App 72: 22 All L J 386: 26 Bom L R 586: 28 Cal W N 977: 46 Mad L Jour 628: 34 Mad L Tim 62: 1924 Mad W N 79: 19 Mad L W 549: 20 Nag L R 33: 7 Nag L Jour 62: 83 Ind Cas 531: 1924 P C 95 P C. See also *S A Nathan* v. *S R Samson*, 1931 Rang 252 (254): 9 Rang 480: 135 Ind Cas 65 [Property outside British India]; *Muralimal* v. *Sant Ram*, 1929 Lah 24 (26): 10 Lah L Jour 500: 113 Ind Cas 899 [Award relating to property situate outside British India cannot be filed in British India]; *Dakumal Ramoomal* v. *Khajumal Parn Mal*, 1931 Sind 47 (48): 25 Sind L R 204: 131 Ind Cas 182 [Property outside jurisdiction of Court]; *Altaf Hossein* v. *Girish Chunder*, (1871) 15 Suth W R 556 (556) [Munsif's Court not having jurisdiction over the collection of rent the award relating to that matter cannot be filed in that Court].

(7) *Bindessuri* v. *Jankee*, (1889) 16 Cal 482 (486); *Krishna* v. *Subbarama*, 1932 Mad 462 (463): 1932 Mad W N 234: 62 Mad L Jour 550: 35 Mad L W 565: 55 Mad 689: 139 Ind Cas 877.

Note 11.

(1) *Maung Ni* v. *Maung Aung Ba*, 1926 Rang 198 (200): 4 Rang 227: 97 Ind Cas 1032: 5 Bur L Jour 133; *Elam Purmanaick* v. *Safaetutta Sheikh*, (1868) 10 Suth W R 85 (85): 1 Beng L R A C 43; *Simson* v. *McMaster*, (1890) 13 Mad 344 (346); *George Bridge* v. *Edalji Mancharji*, (1873) 10 Bom H C R 54.

Para. 20, Notes 12—13.

"numbered and registered as a suit".[1] It has accordingly been held that the provisions of O. 9, R. 13,[2] O. 23, Rr. 1 and 3[3] and O. 38, R. 5[4] can be applied to such applications. But though such an application is a "suit" the order thereon is not a "decree". The reason is that such a decision is appealable as an *order* under the provisions of S. 104, *ante,* and is thus excluded from the definition of "decree".[5]

It has, however, been held in the undermentioned cases[6] that an application under Para. 17 or under this Paragraph is not a "suit" at all for the purposes of the Code. It is submitted that this view cannot be accepted as correct.

But an application under Para. 17 or under this Paragraph should be regarded as a suit only *for the purposes of the Code.* It is not a "suit" within the meaning of the Limitation Act, 1908[7] or of the Dekkhan Agriculturists' Relief Act[8] or of the Court Fees Act, 1870[8-a] or for the purposes of the taxation of the pleaders' fee on such applications.[9]

13. Notice to parties.—The issue of a notice to the parties under sub-Para. (4) is imperative.[1] The word "parties" is not confined to persons who have actually appeared before the arbitrators. *A, B* and *C* agreed that in case of any dispute between them the matter should be referred to the arbitration of persons chosen by each party to the dispute and that in the event of any such party refusing to nominate an arbitrator, the arbitrator nominated by the other party should nominate another arbitrator and the two together should nominate an umpire. Disputes having arisen, *A* and *B* called upon *C* to nominate an arbitrator; *C* failed to do so and thereupon *A* and *B* nominated an arbitrator who chose another arbitrator and they having appointed an umpire, made an award. *A* applied to file the award in Court.

Note 12.

(1) *Govinda Narayan Probhu* v. *Venkatesh Laxman Kamat,* 1927 Bom 259 (259, 260): 29 Bom L R 842: 101 Ind Cas 430; *Selvarayan Samson* v. *Amalorpavanadan,* 1928 Mad 969 (971): 55 Mad L Jour 262: 112 Ind Cas 691: 29 Mad L W 490.

(2) *Mahabir Prasad* v. *Bal Krishun Das,* 1922 Pat 376 (378): 1 Pat 48: 62 Ind Cas 927: 1922 Pat H C C 76: 3 Pat L Tim 29; *Selvarayan Samson* v. *Amalorpavanadan,* 1928 Mad 969 (971): 55 Mad L Jour 262: 112 Ind Cas 691: 29 Mad L W 490.

(3) *Gouri Shankar* v. *Maida Koer,* (1904) 31 Cal 516 (518) [O 23, R 1]; *Dwarka Das* v. *Krishna Kishore,* 1921 Lah 84 (88): 2 Lah 114: 3 Lah L Jour 349: 73 Pun L R 1921: 61 Ind Cas 626 [O 23, R 3]; *Behari Lal* v. *Dholan Das,* (1910) 5 Ind Cas 994 (995): 38 Pun W R 1910; *Fazal Ahmad* v. *Inayat,* 1922 Oudh 189 (196): 9 Oudh L J 219: 68 Ind Cas 209: 25 Oudh Cas 213.

(4) *Govinda Narayan Probhu* v. *Venkatesh Laxman Kamat,* 1927 Bom 259 (259, 260): 29 Bom L R 842: 101 Ind Cas 430.

(5) *See* definition of "decree" in S 2, sub-S (2).

(6) *Rajmal Girdharlal Marwadi* v. *Maruti Shivaram,* 1921 Bom 389 (390): 45 Bom 329: 59 Ind Cas 755; *Satish Chandra Bose* v. *Paliram Agarwala,* 1921 Pat 161 (162): 6 Pat L Jour 287: 1921 Pat H C C 170: 2 Pat L Tim 277: 61 Ind Cas 390; *Gurbaksh Singh* v. *Sant Ram,* 1929 Lah 533 (533): 30 Pun L R 395: 117 Ind Cas 94 [1921 Bom 389 and 1921 Pat 161 followed]; *Secretary of State* v. *Kundan Singh,* 1932 Lah 374 (375, 376): 137 Ind Cas 266: 33 Pun L R 508: 13 Lah 672 [Not a suit for purposes of S 80 of the Code. No decisions have been noticed]; *Senmal Nichalchand* v. *Mulomal Rahumal,* (1915) 28 Ind Cas 60 (61): 8 Sind L R 260 [Application under para 17—Reference and award—Award set aside—It was held that there was no *suit* and *therefore no decree* and hence no appeal—It is submitted that even if the proceeding is a suit, the decision setting aside the award is only described as an "order" under para 15 which applies to such orders and is therefore not a decree]; *Ghulam Rasul* v. *Pamandas Dewan Das,* 1927 Sind 103 (104): 19 Sind L R 202: 99 Ind Cas 178 [Mortgage decree on basis of award is not a decree under O 34, R 5, 28 Ind Cas 60 followed].

(7) *Matherin Tin* v. *Maung Ba Than,* 1923 Rang 226 (227): 1 Rang 256: 76 Ind Cas 493. See also *Ram Ugrah* v. *Acharj Nath,* (1915) 38 All 85 (91): 13 All L J 1115: 31 Ind Cas 899.

(8) *Hotchand* v. *Kishen Chand,* 1924 Sind 23 (24): 17 Sind L R 178: 88 Ind Cas 548; *Mohan* v. *Tukaram,* (1897) 21 Bom 63 (67, 68).

(8-a) *Bijadhur Bhugut* v. *Monohar Bhugat,* (1884) 10 Cal 11 (14).

(9) *Ram Charan* v. *Mt Jasoda,* 1930 Oudh 89 (90): 7 Oudh W N 97: 126 Ind Cas 506: 5 Luck 678.

Note 13.

(1) *Abdul Karim* v. *Kallam,* 1933 All 166 (167): 1933 All L J 40.

Para. 20, Notes 12—18.

It was held that *C*, was a "party" to whom notice should go, although he did not actually appear before the arbitration.[2]

14. Lost award.—*See* Note 8 to Para. 21, *infra.*

15. Decision of majority.—Where a dispute is referred to several arbitrators and the agreement of reference does not provide that the decision of the majority shall prevail, an award by the majority of the arbitrators is not valid.[1] The mere fact that an uneven number of arbitrators have been appointed does not show that the parties agreed to be bound by the award of the majority.[2] The Court cannot in such cases appoint an umpire.[3] Even in a case where the parties agree to be bound by the award of the majority, the proceedings will be vitiated unless all the arbitrators take part in the proceedings.[4] As to the validity of a decision by the majority of the arbitrators on a reference pending suit *see* Note 2 to Para. 4, *ante.*

16. Parties to reference.—An award binds only the parties making the reference. Where a reference is made by some only of several persons having a common interest, and they have no express authority from the others to act on their behalf also, the latter are not bound by the award.[1] Where one of the parties to a reference is a minor and an application is made to the Court by another party to file the award, the Court, before filing the award, should decide definitely whether the reference was for the benefit of the minor so as to be binding on him.[2]

17. Court-fee.—An application to file an award under this Paragraph is not chargeable with a Court-fee as if it is a *suit*, but is chargeable only as an application.[1] *See also* Art. 18, Sch. II of the Court Fees Act, 1870.

18. Limitation.—The period of limitation for an application to file an award is six months from the date of the award.[1] (Art. 178, Indian Limitation Act). It has been held that "the date of the award" in Art. 178 really means the date on which the award was published or handed over to the parties and not the date on which it was made or signed.[2] The Court has no power to

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[2] *G S Jones* v. *H Ledgard*, (1886) 8 All 340 (351): 1886 All W N 107.

Note 15.

[1] *Babua Lal Pardhan* v. *Badri Lal Pardhan*, (1919) 49 Ind Cas 522 (527) Pat; *Nand Kishore* v. *Kishori Lal*, 1923 Oudh 181 (181): 10 Oudh L J 29: 26 Oudh Cas 350: 74 Ind Cas 299: 904 All L R 544; *Hardhyan* v. *Mehr Chand*, 1879 Pun Re No. 57; *Junglee Ram* v. *Ram Heet*, (1873) 19 Suth W R 47 (48); *Surubjeet* v. *Gouree*, (1867) 7 Suth W R 269 (270); *Nadir Chand* v. *Gobinda Chunder*, (1905) 2 Cal L Jour 61 (64); *Mussammat Bejam Bibi* v. *Ghulam Ghous*, 1882 Pun Re No. 191.

[2] *Ayyasamy* v. *Appandai*, (1920) 54 Ind Cas 912 (918): 38 Mad L Jour 145 [Dissenting from 41 Ind Cas 264].

[3] *Ramayya* v. *Bapaya*, 1926 Mad 1183 (1184): 51 Mad L Jour 440: 24 Mad L W 384: 97 Ind Cas 824.

[4] *Ali Hamid* v. *Gulam Sarwar*, (1917) 40 Ind Cas 422 (423): 22 Cal W N 301: 25 Cal L Jour 396; *Hafizallah* v. *Rahimullah*, (1903) 23 All W N 159.

Note 16.

[1] *Hashmat Hussain* v. *Siddiq Hasan*, 1927 All 128 (130): 98 Ind Cas 998.

[2] *Jainath* v. *Kamalanath*, (1910) 7 Ind Cas 31 (33) Cal.

Note 17.

[1] *Bijadhur* v. *Monohur*, (1884) 10 Cal 11 (14).

Note 18.

[1] *Ram Ugrah* v. *Achraj*, (1915) 38 All 85 (91): 13 All L J 1115: 31 Ind Cas 899. See also *Muthukaruppa* v. *Veerabadhra*, (1915) 29 Ind Cas 49 (50): 2 Mad L W 320: 17 Mad L Tim 241; *Buyrab Jha* v. *Hanooman Dutt Jha*, (1866) 5 Suth W R 123 (123).

[2] *Kunj Lall* v. *Banwari Lall*, (1919) 48 Ind Cas 711 (719): 4 Pat L Jour 394; *Dutto Singh* v. *Dosad*, (1883) 9 Cal 575 (578, 579); *Sreenath Chatterjee* v. *Kylash Chunder*, (1874) 21 Suth W R 248.

Para. 20, Note 18.

enlarge this period under S. 5 of the Limitation Act.[3] Nor can a party claim the benefit of S. 6 of the Act.[4]

Para. 21, Notes 1—2.

Filing and enforcement of such award.

P. 21. [S. 526.] (1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon[3] and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved,[10] the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

[1877—S. 526; 1859—S. 327.]

Synopsis.

1. Legislative changes.
2. Scope of the enquiry under this Paragraph.
3. "Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon."
    4. Validity of reference and award.
    5. Subject-matter of the award.
    6. Form of award.
        7. Part of award, if can be filed.
        8. Lost award.
9. Grounds of objection under Paras. 14 and 15.
10. "Proved."
11. Res judicata.
12. Withdrawal of application—See Note 12 to Para. 20, ante, and Note 15 to Para. 1.
13. Revocation of submission—See Note 12 to Para. 17, ante.
14. Appeal against an order filing or refusing to file award—See S. 104, Note 15, ante.
15. Appeal against decree on award—Sub-S. (2).
    16. Enforcement of award.
17. Appeal to Privy Council.
18. Revision.

"A decree shall follow." See Note 16.
Award on a vague agreement to refer—Whether valid. See Note 18, F.-N. (5).
Delay in making the award—Award whether valid. See Note 9, F.-N. (2).
Matters for enquiry under this Paragraph. See Note 2.
Suit to enforce award. See Para. 20, Note 4.

1. Legislative changes:—

1. The words "where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon" are new. *See* Note 3.
2. The word "proved" has been substituted for the word "shown", *see* Note 10.
3. Sub-S. (2) is new. *See* Note 15 and S. 104 (*f*), *ante*.

2. Scope of the enquiry under this paragraph.—It has been seen in Note 4 to Para. 14, *ante* that it is a fundamental principle of the law of arbitration that the submission furnishes the source and prescribes the limits of the

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(3) *Ram Ugrah* v. *Aharj Nath*, (1915) 38 All 85 (91): 13 All L J 1115: 31 Ind Cas 899.

(4) *Ma Theiru Tin* v. *Maung Ba Than*, 1923 Rang 226 (226, 227): 1 Rang 256: 76 Ind Cas 493.

Para. 21, Note 2.

authority of the arbitrator and that the award must conform to the submission in substance and in form. Subject to this limitation, however, the arbitrator is the sole and final judge of law and fact and the Court will not review the award upon the merits nor constitute itself as a Court of appeal to go into the *merits* of the matter and to see whether the conclusions arrived at are sound and reasonable.[1]

There is no provision of law which requires the arbitrator to adopt any special procedure in arriving at his award,[2] and the proceedings are not intended to be carried on according to the rules of procedure contained in the Code.[2-a] He is not bound, to make any record of the proceedings[2-b] or to give a reasoned judicial decision.[3] In any inquiry under this paragraph the Court has to satisfy only on the following points:—

(1) that there was a matter in difference between the parties existing at the time of the arbitration (*see* Note 3, *infra*).

(2) that there was a valid submission of the matter in difference and a reference thereon to arbitration (*see* Note. 4).

(3) that the subject-matter of the reference was such as could be lawfully referred to arbitration, and that the Court has jurisdiction over the subject-matter of the award (*see* Notes 5 and 10 to Para. 20, *ante*).

(4) that an award was made thereon (*see* Notes 6, 7 and 8): and

(5) that no grounds of objection such as those mentioned in Paras. 14 and 15 have been proved (*see* Notes 9 and 10.)

The Court should then proceed to give judgment according to the award,[3-a] that is, it should state in the judgment what its construction of the award is as to the rights and interests of the parties,[4] and a decree dealing with the *specific* rights of the parties should be drawn up.[5] The award should be construed reasonably and in accordance with what may be supposed, under the circumstances of the case, to have been the intention of the arbitrator.[6] Every

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Schedule II, Para. 21—Note 2.

(1) *Narasingh Narain* v. *Ajodhya Prasad,* (1912) 15 Cal L Jour 110 (113, 114): 13 Ind Cas 118: 16 Cal W N 256; *Ghulam Khan* v. *Muhammad Hassan,* (1902) 29 Cal 167 (183): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 25 Pun Re 1902 P C; *Ram Dhari Sahu* v. *Ram Charitar Sahu,* (1910) 38 Cal 143 (147): 7 Ind Cas 333; *Nizamuddin* v. *Gulam Ahmad,* (1909) 4 Ind Cas 553 (553, 554): 64 Pun W R 1909: 53 Pun L R 1909; *Mg Tun* v. *Mg Po Shek,* 1923 Rang 199 (201): 1 Rang 265: 76 Ind Cas 504; *Muthukaruppa Kone* v. *Veerabadra Kone.* (1915) 29 Ind Cas 49 (50): 2 Mad L W 320: 17 Mad L Tim 241; *Antaji* v. *Narayan,* (1905) 7 Bom L R 793 (797); *Mian Nathu* v. *Abdul Ghani,* 1930 Lah 22 (23): 119 Ind Cas 726.

(2) *Ram Dhari Sahu* v. *Ram Charitar Sahu,* (1910) 38 Cal 143 (147): 7 Ind Cas 333; *Narasingh Narai* v. *Ajodhya Prasad,* (1912) 15 Cal L Jour 110 (113): 13 Ind Cas 118: 16 Cal W N 256.

(2-a) *Binayakdas* v. *Sashi Bhusan,* 1922 Cal 226 (228): 26 Cal W N 804: 70 Ind Cas 459.

(2-b) *Ram Dhari Sahu* v. *Ram Charitar Sahu,* (1910) 38 Cal 143 (147): 7 Ind Cas 333; *Purushotamu Das Pragji Sait* v. *Jeta Bhai Nagji Sait,* 1912 Mad W N 1076 (1079): 17 Ind Cas 33.

(3) *Purushotama Das Pragji Sait* v. *Jeta Bhai Nagji Sait,* 1912 Mad W N 1076 (1079): 17 Ind Cas 33; *Nanjappa* v. *Nanja Rao,* (1912) 23 Mad L Jour 290 (296): 12 Mad L Tim 133: 16 Ind Cas 478: 1912 Mad W N 1091.

(3-a) *Gulab Kuar* v. *Thakur Sheo Ratan Singh* (1902) 5 Oudh Cas 27 (29); *Raza Ali* v. *Fida Ali,* (1901) 4 Oudh Cas 17 (21).

(4) *Ummi* v. *Rahimunnissa,* (1891) 13 All 366 (367): 1891 All W N 129; *Ishwar Das* v. *Dossee Bai,* (1883) 7 Bom 316 (318, 322): 7 Ind Jur 609.

(5) *Ummi* v. *Rahimunnissa,* (1891) 13 All 366 (367): 1891 All W N 129.

(6) *Abdul Majid Khan* v. *Kadri Begam,* (1898) 20 All 245 (248): 1898 All W N 84.

Para. 21, Notes 2--4.

reasonable presumption should be made in favour of the award being a final and certain termination of the matters in dispute.[7]

3. **"Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon".**—Under S. 526 of the old Code, it was held by the High Court of Bombay in the cases cited below[1] that the Court had no jurisdiction to enquire into the *factum* or validity of the submission and award, and if the defendant denied any reference to arbitration, the only course open to the Court was to dismiss the application and refer the parties to a regular suit to enforce the award. But this view was dissented from by the same High Court in a later Full Bench case[2] in which it was held, following the decisions of the other High Courts[3] that the existence and validity of the reference and award was the foundation of jurisdiction of the Court under that section, and that, therefore, the Court ought to decide on evidence whether the matter was referred to arbitration and whether an award was made thereon. The addition of these words gives effect to the latter view. *See* the undermntioned cases.[4]

The word "matter" in this as well as in the previous paragraph, is no wider than the expression "matter in difference" used in Para. 1 of this Schedule.[5] As has been seen in Note 8 to that paragraph, the difference must be one which has actually arisen at the time of the reference though it need not have arisen at the time of the agreement to refer.[5-a] The Court must, therefore, before filing the award satisfy itself that there was a real dispute between the parties, and that there was an arbitration thereon.[6]

4. **Validity of reference and award.**—Before ordering an award to be filed, the Court should satisfy itself not only that the matter in difference was referred to arbitration, but also that the submission was *valid* in law.[1]

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(7) *Kolumal* v. *Jeyramdas*, 1928 Sind 144 (145): 108 Ind Cas 791.

Note 3.

(1) *Samal Nathu* v. *Jaishankar*, (1885) 9 Bom 254 (258); *Venkatesh Khando* v. *Chanapgarda*, (1893) 17 Bom 674 (677); *Tejpur* v. *Mahomud*, (1896) 20 Bom 596 (601, 602): Chitty's S C C R 472.

(2) *Manu Lal* v. *Vanmal*, (1905) 29 Bom 621 (627) F B.

(3) *Amrit Ram* v. *Dasrat Ram*, (1895) 17 All 21 (26, 28): 1894 All W N 187; *Ganesh Singh* v. *Kashi Singh*, (1906) 28 All 621 (622): 1906 All W N 136; *Mahomed Wahiuddin* v. *Hakiman*, (1898) 25 Cal 757 (764): 2 Cal W N 529; *Micharaya* v. *Sadasiva*, (1882) 4 Mad 319 (320); *Chintamallayya* v. *Thadigangireddi*, (1897) 20 Mad 89 (90): 7 Mad L Jour 61.

[But see *Hussaini Bibi* v. *Mohsin Khan*, (1875-78) 1 All 156 (158) (Decided under S 327 of the Code of 1859)].

(4) *Hanmantram Radhakishen* v. *Shivnarayan Asuram*, (1918) 48 Ind Cas 238 (244): 20 Bom L R 970: 43 Bom 258 [The Court should be satisfied that there was a proper reference to arbitration]; *Radhakishen* v. *Ahsa Mal*, 1926 Lah 91 (93): 7 Lah L Jour 603: 92 Ind Cas 705 [Court can decide whether there was reference and whether there was any dispute for reference]; *Macnaghten* v. *Rameshwar Singh*, (1903) 30 Cal 831 (842) [The question to be determined is whether there was any matter in difference between the parties which could be and was referred to arbitration]; *Maung Tun U* v. *Maung Pashok*, 1923 Rang 199 (201): 1 Rang 265: 76 Ind Cas 504.

(5) *Dipchand* v. *Sahib Dino*, (1911) 12 Ind Cas 639 (640): 5 Sind L R 92.

(5-a) See the cases cited in foot-note (4) to Note 10 to paragraph 1; See also *Ganga Ram* v. *Ram Kishan Singh*, 1932 Lah 459 (460): 137 Ind Cas 807: 33 Pun L R 934; *Halsbury's Laws of England* Vol 1, p 627; *London and North Western and Great Western Joint Railway Co* v. *Billington*, 1899 A C 79.

(6) *Dipchand* v. *Sahib Dino*, (1911) 12 Ind Cas 639 (640): 5 Sind L R 92; *Jumnomal* v. *Gurdinomal*, 1921 Sind 61 (65): 17 Sind L R 211: 83 Ind Cas 913; *Radha Kishen Chuni Lal* v. *Ahsarkal Ishar Das*, 1926 Lah 91 (93): 7 Lah L Jour 603: 92 Ind Cas 705; *Mian Nathu* v. *Abdul Ghani*, (1930) Lah 22 (22): 119 Ind Cas 726 [Even if the dispute is not detailed in the reference, it is sufficient if the arbitrators satisfied themselves as to the nature of the dispute].

Note 4.

(1) *Lakshminarayana Tantri* v. *Ramchandra Tantri*, (1918) 45 Ind Cas 763 (766, 767): 34 Mad L Jour 71: 23 Mad L Tim 69; *Mansa Ram Govardhan Das* v. *Mangal Sain Duni Chand*, 1922 Lah 149 (154): 65 Ind Cas 497; *Ganesh Singh* v. *Kashi Singh*, (1906) 28 All 621 (622): 1906 All W N 136.

An award binds only the parties making the reference and persons who are properly represented in the arbitration proceedings.[2] Thus an award on a question of partition when all the members of the joint family are not parties to the reference is not binding on the non-parties[3] though as between the *parties themselves* it will be binding.[4] Again, the capacity to make a submission is co-extensive with the capacity to contract. A person who cannot make a contract cannot make a submission and a person whose capacity to make a contract is *restricted,* can only make a submission to that extent.[5] Thus a minor cannot himself make a submission although a guardian may make it on his behalf for his benefit.[6] An executor or administrator is, competent, but only under certain circumstances, to make a reference to arbitration.[7] But though, as a general principle a person who is not properly represented in the proceedings, is not bound thereby, the proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the Civil Procedure Code. If there is a binding reference to arbitration, all that is necessary to be seen is that there is a substantial representation of the different interests before the arbitrators. There is no rule of procedure by which, on the death of some of the parties, the arbitrators could substitute their legal representatives or appoint guardian *ad litem* for such representatives if they happen to be minors.[8]

An agreement to refer, as has been seen in Para. 17, *ante,* must, for the purposes of that paragraph, be in *writing.* In cases, however, of awards without the intervention of the Court, it is not necessary for its validity that the submission should have been in writing; it may be oral[9] or can be gathered from documents connected by oral evidence.[10]

5. **Subject-matter of the award.**—Para. 20 provides that any person interested in the award (made without the intervention of the Court) may apply to any Court *having jurisdiction over the subject-matter of the award,* that the award be filed in Court. It follows that the subject-matter of the award must be one over which, the Court would have jurisdiction, if a suit were brought in respect thereof. Questions, therefore, which could not be made the subject of a civil suit, under S. 9 of the Code such as caste questions, could not be the subject of an award enforceable in a Court of law.[1] The High Court of Bombay, has, however, held that the jurisdiction of the Court to file

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(2) ***Binayakdas Acharya Chowdhury* v. *Sasi Bhusan Chowdhury*, 1922 Cal 226 (228): 26 Cal W N 804: 70 Ind Cas 459. See Note 16 to Paragraph 20.**

(3) ***Chotley Lal* v. *Madao Bibi*, (1918) 48 Ind Cas 958 (955): 1919 Pat H C C 141.**

(4) ***Jnanandra Nath* v. *Jitendra Nath*, 1928 Cal 275 (276): 82 Cal W N 108: 107 Ind Cas 70.**

(5) ***Soudamini Ghose* v. *Gopal Chandra Ghose*, (1915) 28 Ind Cas 557 (559): 21 Cal L Jour 273: 19 Cal W N 948; *Halsbury's Laws of England*, Vol 1, p 625.**

(6) *See* Note 20 to Para. 1, *ante.*

(7) ***Soudamini Ghose* v. *Gopal Chandra Ghose*, (1915) 21 Cal L Jour 273 (277): 28 Ind Cas 557: 19 Cal W N 948.**

(8) *Binayakdas Acharya* v. *Sashi Bhusan Chowdhury*, 1922 Cal 226 (228): 26 Cal W N 804: 70 Ind Cas 459.

(9) ***Ramji Ram* v. *Salig Ram*, (1911) 14 Cal L Jour 188 (205): 11 Ind Cas 481; *Amrit Ram* v. *Dasrat Ram*, (1894) 17 All 21 (27): 1894 All W N 187; *Mudhu* v. *Nilmonee*, (1872) 18 Suth W R 533; *Bahal Singh* v. *Shibo Ram*, 1864 Suth W R 76.**

(10) ***Sukhamal Bansidhar* v. *Babulal*, (1921) 59 Ind Cas 75 (79): 18 All L J 652: 2 U P L R (All) 243: 42 All 525.**

Note 5.

(1) ***Naraindas Assammal* v. *Valabadas Vishandas*, 1929 Sind 1 (4): 111 Ind Cas 425: 23 Sind L R 299. See also *Fateh Singh* v. *Karm Chand*, 1886 Pun Re No 56.**

Para. 21, Notes 5—6.

an award is conferred by Para. 20 and not by S. 9 of the Code and that the Court could, therefore, file an award under Para. 20, even though the subject-matter of the award is not of a civil nature (such as a division of *man pan* offerings) and, therefore, not cognisable by a civil Court under S. 9, *ante.*[2] It is submitted that this view is not correct. The object of filing an award in Court is to convert it into a decree of Court so that it could be *enforced* like other decrees under *the provisions of the Code.*[3] It necessarily follows that unless the Court has jurisdiction over the subject-matter under S. 9, any decree passed in respect of such subject-matter would be incapable of execution under the Code.

But the fact that a suit *could* be instituted in a civil Court, in respect of a particular matter, does not necessarily mean that such matter can be referred to arbitration.[4] The difference or dispute between the parties should be such that the parties *could* if they were so minded settle the matter between themselves by a *valid* agreement.[5] Thus a dispute as to the office of a public charity,[6] or the appointment of a guardian to a minor,[7] not relating to a private right as beween the parties cannot be made the subject of an award by arbitrators. On the same principle a dispute arising from some illegal transaction or some transaction opposed to public policy cannot be made the subject of a valid award[8] as any agreement which the parties themselves could make in settlement of the dispute would not be enforceable; and the award of the arbitrator on such a dispute would likewise be invalid and unenforceable.[9] *See also* Para. 1 Note 10, *ante.*

6. **Form of award.**—An award on a reference *through Court,* should be in writing signed by the arbitrators. *See* Para. 10, *ante.* But as has been seen in Note 1 to that paragraph, an award made on a reference made without the intervention of the Court need not be in writing or be signed by the arbitrators. It may be oral.[1] But if the arbitrators resolve that their award is to be put in the form of a document to be signed by them as a final expression of their decision, it is only such document that can be treated as their award.[2]

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(2) *Jovind Lal* v. *Muni Lal,* (1918) 45 Ind Cas 166 (167): 81 Pun W R 1918: 79 Pun L R 1918 [As the award merely settled shares of the parties and did not actually partition agricultural land, the matter is cognisable by civil Court]; *Jhuri Singh* v. *Dwarka Singh,* (1919) 50 Ind Cas 193 (194): 6 Oudh L J 84 [A dispute as to demarcation of boundaries can be referred to arbitration and award filed in civil Court]; *Raghavendra Ayyaji Desai* v. *Guru Rao Raghavendra Desai,* (1913) 37 Bom 442 (445): 15 Bom L R 362: 19 Ind Cas 682.

(3) *Sukhamal Bansidhar* v. *Babu Lal,* (1921) 59 Ind Cas 75 (79): 18 All L J 652: 2 U P L R (All) 243: 42 All 525; *Mimutoollah Chowdhry* v. *Bibee Heerum,* (1870) 13 Suth W R 62 (62).

(4) *Mohammad Ibrahim Khan* v. *Ahmad Said Khan,* (1910) 32 All 503 (513, 516): 7 All L J 761: 6 Ind Cas 219.

(5) Halsbury's Laws of England (new edition) Vol I, p 628.

(6) *Mohammad Ibrahim Khan* v. *Ahmad Said Khan,* (1910) 32 All 503 (513): 7 All L J 761: 6 Ind Cas 219.

(7) *Mahadeo Prasad* v. *Bindeshari Prasad,* (1908) 30 All 137 (139): 5 All L J 101: 1908 All W N 51: 3 Mad L Tim 208.

(8) Halsbury's Laws of England (new edition), Vol I, p 628; *Rai Charan Purkait* v. *Amrita Lal Gain,* (1910) 5 Ind Cas 98 (99, 100): 11 Cal L Jour 131; *Gobardhan Das* v. *Jai Kishen Das,* (1900) 22 All 224 (230): 1900 All W N 52.

(9) Halsbury's Laws of England (new edition), Vol I, p 628.

Note 6.

(1) *Ram Bilas Singh* v. *Birich Singh,* 1932 Pat 60 (61): 12 Pat L Tim 738: 135 Ind Cas 518: 11 Pat 131; Halsbuyr's Laws of England, Vol. I, p 662; *Amir Bibi* v. *Arokiam,* (1918) 45 Ind Cas 813 (815): 34 Mad L Jour 184; *Kulanagabhushanam* v. *Kulaseshachalam,* (1862-63) 1 M H C R 178 (180).

(2) *Maung Nyo* v. *Maung Shwe,* (1892-1896) U B R Vol II, p. 276.

Para. 21, Note 7.

7. Part of award, if can be filed.—If the parties, agree by the terms of the submission, or at the time of the arbitration, that the matters in dispute may be taken up *seriatum* by the arbitrators and that the award may be delivered in separate parts, each part may be treated as a separate award and filed under this Paragraph.[1]

But in the absence of any specific provision in the submission, if the award

(1) determines any matter not referred to arbitration; or (2) fails to determine any of the matters referred to arbitration or (3) is indefinite or vague or is illegal in respect of a portion of it, the question arises whether the Court can file the *valid* portion of the award. In case, (1) the matter not referred to arbitration can be separated from the portion referred, the latter can be filed, the former being treated null and void.[2] But if the objectionable portion is inseparable from the rest or not so clearly separable that it can be seen that the part of the award attempted to be supported is not at all affected by the faulty portion, the whole award will be avoided.[3]

In case (2) the award is not a *complete* award and is, therefore, invalid.[4] But the parties may waive this objection[5] and if they show by their conduct that they do not want a decision upon the points[6] or if the arbitrators find that there is no matter in difference in respect of these points[7] the award may be filed to the extent it was given. Similarly if an award leaves nothing to be done but the performance of some ministerial act it is not faulty for want of finality on the principle *certum est quod certum reddi potest*[8] (that is certain, which can be made certain.)

In case (3) also, the award is invalid.[9] Where the award did not state either the facts found by the arbitrators or the grounds for their decision and it was, consequently, impossible to hold that the award proceeded solely on those grounds which entitled the arbitrators to act under the arbitration

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Note 7.

(1) *Makund Ram Sukal* v. *Saliq Ram Sukal*, (1894) 21 Cal 590 (600): 21 Ind App 47: 6 Sar 423 (P C); *Shoshemukhi* v. *Nobin Chunder*, (1879) 4 Cal L Rep 92 (94); *Janendra Nath* v. *Sures Chandra*, 1928 Pat 7 (10, 11): 6 Pat 556: 109 Ind Cas 821. See also *Bal Mukund Revia* v. *Gopiram Botica*, (1921) 60 Ind Cas 195 (198): 24 Cal W N 775.

(2) *See* Note 7 to Paragraph 14. *See also* *Kashinath* v. *Gangubai*, 1929 Bom 193 (195): 31 Bom L R 349: 117 Ind Cas 523; *Dayaram Pritamdas* v. *Naraindas*, 1929 Sind 200 (203): 119 Ind Cas 529; *Huro Sunduree* v. *Sreedhur*, (1872) 17 Suth W R 352 (352): 12 Beng L R 488 Note.

[But see *Mana Vikrama* v. *Mallichery Krishnan*, (1881) 3 Mad 68 (70) [No longer law; *see* Note 7 to Paragraph 14, foot-note 4].

(3) *Sabitree Debee* v. *Promoda Prosad Chatterjee*, (1913) 21 Cal L Jour 248 (251): 19 Ind Cas 941; *Ch Bachchan Lal* v. *Narottam Datt*, 1933 All 59 (60): 1932 All L J 1090.

(4) *Ramji Ram* v. *Salig Ram*, (1911) 14 Cal L Jour 188 (208): 11 Ind Cas 481. See also *Raj Chunder* v. *Brojendro Coomar*, (1874) 21 Suth W R 182 (183). *See also* points 2 and 3 to Note 7 to Paragraph 14 *ante*.

(5) *See* point 3 to Note 3 to Paragraph 14 *ante*.

(6) *Purushothama Das Praghji Sait* v. *Jelka Bhai Nagh*, 1912 Mad W N 1076 (1079): 17 Ind Cas 33; *Ramji Ram* v. *Salig Ram*, (1911) 14 Cal L Jour 188 (209, 210): 11 Ind Cas 481; *Harakh Ram Jain* v. *Lakshmi Ram Jain*, 1921 All 384 (388): 43 All 108: 60 Ind Cas 626: 18 All L J 960.

(7) *Harakh Ram Jani* v. *Lakshmi Ram Jani*, (1921) 43 All 108 (116): 1921 All 384: 60 Ind Cas 626: 18 All L J 960.

(8) *Ramji Ram* v. *Salig Ram*, (1911) 11 Ind Cas 481 (493, 494): 14 Cal L Jour 188.

(9) *See* point 3 to Note 7 to Paragraph 14 *ante*.

Para. 21, Notes 7—11.

clause, it was held that if the bad was not separable for the good portion of the award, the whole was bad.[10]

8. **Lost award.**—Where an award in writing is lost, secondary evidence of the terms thereof cannot be adduced in a proceeding under this Paragraph. The remedy of the parties is to file a regular suit to enforce the terms of the award.[1]

9. **Grounds of objection under Paras. 14 and 15.**—*See* generally Paras. 14 and 15 and the notes thereto. Where a period of time is fixed in the submission for the making of an award, the arbitrators have no jurisdiction to make the award after the period, and the award so made is invalid.[1] Where no such period is fixed in the submission, the award should be made within a reasonable time, which should be decided with reference to the facts of each case.[2]

10. **"Proved."**—Under S. 526 of the old Code, it was provided that where no ground as was mentioned in Ss. 520 and 521 (Paras. 14 and 15) was shown the Court should order the award to be filed. It was held in some cases that even on a mere *allegation* by affidavit or verified statement that the award was bad on the ground specified in Ss. 520 or 521, the Court was bound to dismiss the application and refer the parties to a separate suit.[1] In other cases it was, however, held that the word "shown" which occurred really meant "proved" and that it is not sufficient to allege cause or make out that there is room for argument, but that the cause must be both alleged and proved to the satisfaction of the Court.[2] The substitution of the word "proved" gives effect to the latter view.

11. **Res judicata.**—*See* Note 27 to S. 11, *ante.* As has been seen in that note, all claims embraced in a submission are put an end to by a valid award, which thereafter furnishes the only basis for determining the rights of the parties and constitutes a bar to any action on the original demand.[1] *See also* Note 2 to Para. 20, *ante.* An award may be set up as a valid defence in a

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(10) *Hurmukhroy Ram Chunder* v. *The Japan Cotton Trading Co, Ltd,* 1922 Cal 399 (400): 66 Ind Cas 842: 34 Cal L Jour 253.

Note 8.

(1) *Khodeja* v. *Ghulam Nabi,* (1920) 55 Ind Cas 845 (846): 1 Lah 45: 63 Pun L R 1920: 59 Pun W R 1920; *Gopi Reddi* v. *Mahanandi Reddi,* (1889) 12 Mad 331 (334).

Note 9.

(1) *Khanna and Co* v. *Model Town Society Ltd,* 1938 Lah 173 (174).

(2) *Muhammad Ramzan Khan* v. *Sondar Begam,* (1919) 52 Ind Cas 847 (848): 71 Pun Re 1919 [Agreement to refer was in 1905—Award in 1910—Held, award cannot be filed].

Note 10.

(1) *Icha Moyee Chowdhranee* v. *Prosunno Nath Chowdri,* (1883) 9 Cal 557 (560); *Hurronath* v. *Nistarini,* (1884) 10 Cal 74 (76): 13 Cal L Rep 14; *Husaini Bibi* v. *Mohsin Khan,* (1875-78) 1 All 156 (158).

(2) *Rang Lal* v. *Hem Narain,* (1885) 11 Cal 166 (168); *Surjan Raot* v. *Bhikhari Raot,* (1894) 21 Cal 213 (222, 238); *Jones* v. *Ledgard,* (1886) 8 All 340 (352): 1886 All W N 107; *Jagan Nath* v. *Mannu Lal,* (1894) 16 All 231 (234): 1894 All W N 60; *Dandekar* v. *Dandekars,* (1882) 6 Bom 663 (666); *Dhanjibhai* v. *Mathurbai,* (1904) 28 Bom 287 (291): 6 Bom L R 15; *Jhangi Ram* v. *Mt Budho Bai,* 1901 Pun Re No 84. See *Rajmal Motiram* v. *Krishnaralad Mahapati,* (1896) 20 Bom 208 (210).

Note 11.

(1) *San Nyein* v. *Ma Kyaw,* (1916) 33 Ind Cas 554 (554): 8 L B R 157; *Ramchand* v. *Gobindram,* (1919) 53 Ind Cas 337 (337): 13 Sind L R 75; *Bhagoti* v. *Chandan,* (1885) 11 Cal 386 (392): 12 Ind App 67: 9 Ind Jur 320: 4 Sar 624 (P C); *Mohammad Hadi* v. *Saiyad Taki,* (1916) 32 Ind Cas 465 (467): 18 Oudh Cas 282 [Title of persons claiming under award cannot be defeated merely because award was not filed in Court]; *Darbari Lal* v. *Wazir Malik,* (1920) 56 Ind Cas 115 (116) Lah; *Ahmed Bin Shaik Essa Khaliffa* v. *Sheik Essa Bin Khaliffa,* (1894) 18 Bom 495 (504).

Para. 21.
Notes
11–17.

subsequent suit between the parties[2] even though it was made on a private reference in another pending suit.[3]

12. **Withdrawal of application.**—*See* Note 12 to Para. 20, *ante* and Note 15 to Para. 1.

13. **Revocation of submission.**—*See* Note 12 to Para. 17, *ante.*

14. **Appeal against an order filing or refusing to file award.**—*See* S. 104, Note 15, *ante.*

15. **Appeal against decree on award—Sub-S. (2).**—S. 104 (*f*) provides for an appeal against an order filing or refusing to file an award under this Paragraph. This right of appeal is not taken away merely because a decree is passed in accordance with the award. *See* S. 104, Note 15, *ante.*[1-a]

But no appeal lies from a *decree* passed under this sub-Paragraph except in so far as the decree is in excess of, or not in accordance with the award.[1] Thus where the decree does not correctly interpret the award[2] or where the decree awards something which the arbitrators having jurisdiction to award did not award,[3] an appeal will lie. But the appellant is not entitled in such appeal to reopen the whole case and to address on all questions which were raised before the lower Court; his attack must be confined to the *legality of the decree as compared with the award.*[4]

The decree passed under this Paragraph is a decree "open to appeal" within the meaning of O. 43, R. 1. (*d*); and, therefore, an appeal lies against an order refusing to set aside an *ex parte* decree passed under this Paragraph.[5]

16. **Enforcement of award.**—An award could not be enforced by execution until it has been made a rule of the Court by a decree being passed in accordance therewith.[1] A person who was a party to the arbitration but who was not a party to the decree which followed the award, could not enforce the decree.[2]

17. **Appeal to Privy Council.**—*See* Note 8 to S. 104, *ante.* The provisions of sub-Para. (2) cannot be read so as to affect the right of the parties to go in appeal to the Privy Council under Ss. 109 to 111 of the Code, and do not

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(2) *Ma Hla Ye* v. *Maung Tun Maung,* (1920) 57 Ind Cas 894 (895): 3 U B R 210.

(3) *Ghellabhai* v. *Nandubai,* (1896) 20 Bom 238 (248).

Note 15.

(1-a) See also *Abdul Karim* v. *Kallan,* 1933 All 166 (167): 1933 All L J 40 [The Court should pass an order filing award and then pass a decree in accordance with award].

(1) *Ram Saran* v. *Muhammad Nawaz,* (1911) 9 Ind Cas 39 (39): 7 Pun W R 1911: 14 Pun L R 1911; *Mudhoo Soodun Das* v. *Odoit Churn Dass,* (1869) 12 Suth W R 85 (85): 8 Beng L R 316 Note; *Himutoollah Chowdhury* v. *Bibee Heerun,* (1870) 13 Suth W R 62 (62) [But an appeal will lie against an order made in execution proceedings taken in that judgment]; *Bindeasuri* v. *Jankee,* (1889) 16 Cal 482 (485). See also *Wali Muhammad* v. *Bahawal Baksh,* (1913) 21 Ind Cas 925 (926): 14 Pun L R 1914: 20 Pun W R 1914: 28 Pun Re 1914 [Award in proceedings under Paras. 17 and 19—No appeal lies from order filing award]. The following cases under the old Code are no longer law:—*Jhangi Ram* v. *Budho Rai,* 1901 Pun Re No 84: 112 Pun L R 1901; *Boonjad Mathoor* v. *Nathoo Shahoo,* (1878) 3 Cal 875 (378): 1 Cal L Rep 455; *Lala Dharam Das* v. *Ajudhia Pershad,* 1881 Pun Re No 70; *Bhagwan Singh* v. *Ram Koer,* 1906 Pun L R 38; *Hussain Amra* v. *Linganna,* (1895) 18 Mad 423 (432, 433).

(2) *Maung Tunu* v. *Maung Po,* 1923 Rang 199 (201): 1 Rang 265: 76 Ind Cas 504.

(3) *Chunni* v. *Dhan Devi,* (1909) 4 Ind Cas 1042 (1042): 97 Pun L R 1909: 111 Pun W R 1909.

(4) *Bansi Lal* v. *Gopal Lal,* 1928 Lah 849 (850): 110 Ind Cas 298.

(5) *Nehal Singh* v. *Khushal Singh,* (1916) 38 All 297 (299): 14 All L J 332: 33 Ind Cas 80.

Note 16.

(1) *Ishwar Das* v. *Dosibai,* (1883) 7 Bom 316 (318): 7 Ind Jur 609; *Sahebram* v. *Kasheenath,* (1874) 21 Suth W R 295 (296): *Dharin Das* v. *Ajudiah Pershad,* 1879 Pun Re No. 112. See also *Himutoolah* v. *Heerun,* (1870) 13 Suth W R 62 (62).

(2) *Bajrang Lal* v. *Brahma Dat,* (1919) 52 Ind Cas 849 (850): 6 Oudh L J 322.

Para. 21, Notes 17—18.

bar any such appeal.[1]

18. **Revision.**—The general principle in the case of awards is that it is final. An appeal is allowed from a decree passed on an award only to a very limited extent. A revision in such a case would be more objectionable than an appeal.[1] The High Court should, therefore, proceed very warily in allowing revision in cases of awards.[2] No revision will lie where the conditions of S. 115 are not satisfied.[3] But where there is no real dispute which could be referred to arbitration an award filed by the arbitrators into Court amounts to an abuse of the process of the Court and, therefore, the order is open to revision.[4] Similarly where the Court assumes a jurisdiction which it has not and files the award, a revision will lie.[5] It was broadly held in the undermentioned case[6] relying upon the decision of the Privy Council in *Ghulam* v. *Muhammad Hassan*,[6-a] that no revision at all will lie in any case in which a decree has been passed on an award. It is submitted that this is not correct and that the decision of the Privy Council does not lay down any such broad proposition.

Para. 22, Note 1.

Exclusion of certain words in the Specific Relief Act 1877.

P. 22. [*New*] The last thirty-seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this schedule apply.

1. **Exclusion of last thirty-seven words in S. 21, Specific Relief Act.**—S. 21 of the Specific Relief Act enumerates the contracts which cannot be specifically enforced, and the last portion of the section runs as follows:—"And save as otherwise provided by the Code of Civil Procedure and the Indian Arbitration Act, 1899, no contract to refer present or future differences to arbitration shall be specifically enforced; *but if any person who has made such a contract and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.*" The words in italics are the last thirty-seven words of this section referred to in this Paragraph. *See also* Note 1 to Para. 18, *ante.*

Para. 23.

Forms.

P. 23. [*New*] The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be issued for the respective purposes therein mentioned.

Note 17.

[1] *Ameer Begam* v. *Badruddin Hussain*, (1912) 15 Ind Cas 2 (3): 15 Oudh Cas 55.

Note 18.

[1] *Ghulam Khan* v. *Muhammad Hassan*, (1902) 29 Cal 167 (187): 29 Ind App 51: 4 Bom L R 161: 12 Mad L Jour 77: 6 Cal W N 226: 8 Sar 154: 25 Pun Re 1902 P C.

[2] *Mohidin Sahib* v. *Ramaswami Chetty*, 1921 Mad 271 (271): 41 Mad L Jour 276: 14 Mad L W 394: 1921 Mad W N 509: 65 Ind Cas 676.

[3] *Ahmed Din* v. *Atlas Trading Co*, (1915) 31 Ind Cas 80 (81): 66 Pun Re 1915: 146 Pun W R 1915 [No material irregularity—No revision]; *Thakar Das* v. *Ramdas*, (1914) 23 Ind Cas 950 (950): 18 Pun W R 1914: 114 Pun L R 1914 [No revision lay in the absence of material irregularities in the proceedings].

[4] *Velchand* v. *Liston*, (1914) 25 Ind Cas 371 (372): 16 Bom L R 517: 38 Bom 638.

[5] *Bindessuri* v. *Jankee*, (1889) 16 Cal 482 (486) [Agreement of reference vague and indefinite—Award in pursuance of it is bad and cannot be enforced]; *Dagadusa Tilak Chand* v. *Bhukan Govind*, (1885) 9 Bom 82 (85); *Bijadhur* v. *Monohur*, (1884) 10 Cal 11 (13). See also *Gulab Kuar* v. *Thakur Sheo Ratan Singh*, (1902) 5 Oudh Cas 27 (29).

[6] *Maya Wanti* v. *Tulsi Das*, (1919) 49 Ind Cas 979 (979): 31 Pun W R 1919.

[6-a] 29 Cal 167: 29 Ind App 51: 6 Cal W. N 226: 12 Mad L Jour 77: 4 Bom L R 161: 25 Pun Re 1902: 8 Sar 154 P C.

APPENDIX.

No. 1.

APPLICATION FOR AN ORDER OF REFERENCE.

(Title of suit.)

1. This suit is instituted for (*state nature of claim*).

2. The matter in difference between the parties is (*state matter of difference*).

3. The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration.

4. The applicants therefore apply for an order of reference.

A. B.
C. D.

Dated the day of 19 .

NOTE.—If the parties are agreed as to the arbitrators, it should be so stated.

No. 2.

ORDER OF REFERENCE.

(Title of suit.)

UPON reading the application presented on the day of 19 it is ordered that the following matter in difference arising in this suit, namely:—

____

____

____

be referred for determination to *X* and *Y*, or in case of their not agreeing then to the determination of *Z*, who is hereby appointed to be umpire; and such arbitrators are to make their award in writing on or before the day of 19 , and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within months after the time during which it is within the power of the arbitrators to make an award shall have ceased.

Liberty to apply.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 3.

ORDER FOR APPOINTMENT OF NEW ARBITRATOR.

(Title of suit.)

WHEREAS by an order, dated the day of 19 [*state order of reference and death, refusal, etc., of arbitrator*], it is by consent ordered that *Z* be appointed in the place of *X* (deceased, *or as the case may be*) to act as arbitrator with *Y*, the surviving arbitrator, under the said order; and it is ordered that the award of the said arbitrators be made on or before the day of 19 .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 4.

SPECIAL CASE.

(Title of suit.)

In the matter of an arbitration between *A. B.* of and *C. D.* of the following special case is stated for the opinion of the Court:—

[Here state the facts concisely in numbered paragraphs.]

The questions of law for the opinion of the Court:—

First, whether ——————————————————

——————————————————————————

Secondly, whether ——————————————————

——————————————————————————

X.
Y.

Dated the day of 19 .

No. 5.

AWARD.

(Title of suit.)

In the matter of an arbitration between *A. B.* of and *C. D* of :—

WHEREAS in pursuance of an order of reference made by the Court of and dated the day of 19 the following matter in difference between *A. B.* and *C. D.* namely, ——————————————————

——————————————————————————

has been referred to us for determination;

Now we, having duly considered the matter referred to us do hereby make our award as follows:—

We award

(1) that ——————————————————

(2) that ——————————————————

Dated the day of 19 .

X.
Y.

THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS.

Powers of Collector.

P. 1. [S. 321.] Where the execution of a decree has been transferred to the Collector under section 68, he may—

(*a*) proceed as the Court would proceed when the sale of immovable property is postponed in order to enable the judgment-debtor to raise the amount of the decree; or

(*b*) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or

(*c*) sell the property ordered to be sold or so much thereof as may be necessary.

Synopsis.

1. Applicability of this Schedule.
1-A. Powers of the Court and of the Collector.
2. Ancestral property.
3. Application to set aside a sale—See Notes 2 to 6 to S. 70.
4. Competency of Court to call back records sent to the Collector.
5. Mortgage of part of the property in satisfaction of the decree.
6 Cl. (a)—Order 21, Rule 83.
7. Appeal.

Madras Court of Wards Act. See Note 1-A, Pt. (1).
Power of Collector to dismiss or restore execution case. See Note 1, Pt. (10).
Power of Collector to order payment by instalments. See S. 70, Note 2, Pt. (6).

1. **Applicability of this Schedule.**—Section 148, Bengal Tenancy Act (VIII of 1885), provides that this Schedule shall not apply to any suit for recovery of rent. Similarly, S. 192, Cl. (*a*) of the Madras Estates Land Act (I of 1908), enacts that this Schedule shall not apply to any suit appeal or other proceeding under that Act.

Under S. 9, sub-S. (3) of the Central Provinces Tenancy Act (I of 1920), the Collector executing a decree for rent may, notwithstanding anything contained in this Schedule, allow the tenant time, not exceeding in the aggregate two months, to satisfy the decree.

Section 22-A, sub-S. (2) of the Dekkhan Agriculturist Relief Act (XVII of 1879), provides that a re-sale under that section shall be deemed to be a sale under the provisions of Para. 10 of this Schedule.

The provisions of S. 41, Madras Court of Wards Act, do not affect the duties of the executing Court or the functions of the Collector under this rule.[1]

1-A. Power of the Court and of the Collector.—As has been seen in Note 2 to S. 70, *ante,* where a decree is transferred to the Collector for execution, the Collector has the powers of *execution only,* and not of deciding other matters. And even the powers of execution are limited by this Rule to the three courses specified in this Rule.[1] Thus he has no power to enquire into the objections to attachment or sale,[2] to entertain applications for rateable distribution,[3] to decide whether the decree was satisfied[4] or to decide whether there has been a compromise.[5] Nor can he deal with property not covered by the order of sale[6] or set aside the acts of the owner of the property before the transfer was made.[7]

Within the limits of the rule, however, the Collector has absolute jurisdiction to find out the best method of execution allowed to him by law.[8] Where the execution of a decree obtained against a Hindu father and sought to be executed against the joint family property is transferred to the Collector for execution, he becomes seized of the entire interest including the son's interest in the property, and can sell it in such execution.[9] He can dismiss an execution application for default and can likewise restore it in proper cases.[10] Similarly, where an order is passed under a mistake he can set it aside on discovery of the mistake.[11]

In all matters arising in execution, but not covered by the provision of this schedule, the civil Court continues to have jurisdiction. Thus the Court has power to hear objections to the sale held by the Collector[12] or to entertain a suit to set aside the order of the Collector setting aside a sale.[13] Where the Collector fails to effect the sale of property ordered to be sold by the decree, it is open to him to return the papers to the Court. But the Court has the power to send the papers back if the reason which prevented the sale was not such as to operate as a complete impediment to the execution

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Schedule III, Para. 1—Note 1.

(1) *Srinivasa Ranga Rao* v. *Raja of Karvetnagar,* (1918) 44 Ind Cas 15 (17): 7 Mad L W 206: 23 Mad L Tim 127: 34 Mad L Jour 454: 41 Mad 503.

Note 1-A.

(1) *Mahudaji V. Karandikar* v. *Hari D Chikne,* (1883) 7 Bom 332 (335).

(2) *Balwant Dass* v. *Uma Bai Shankar Rao,* 1921 Bom 45 (46, 47): 45 Bom 812: 23 Bom L R 254: 61 Ind Cas 287 [Collector cannot confirm the sale after such objection is raised].

(3) *Dattatraya* v. *Pundlik,* (1920) 58 Ind Cas 992 (994): 22 Bom L R 1001.

(4) *Abdul Shakur* v. *Mahomed Matin,* 1924 All 307 (308): 22 All L J 202: 5 L R A Civ 93: 78 Ind Cas 429: 46 All 414; *Bhurchand Hansraj Doshi* v. *Vira Champakhachar,* (1913) 37 Bom 32 (35, 36): 14 Bom L R 787: 17 Ind Cas 142.

(5) *Reait-un-nissa* v. *Haji Mahomed Ismail Khan,* 1891 All W N 189 (190).

(6) *Gangaram* v. *Ram Gopal,* 1922 Nag 243 (244): 18 Nag L R 131: 61 Ind Cas 579.

(7) *The Collector of Ghazipur* v. *Chitbahal Bhagat,* 1885 All W N 305 (308).

(8) *Abdul Shakur* v. *Syed Mahammad Matin,* 1924 All 307 (308): 22 All L J 202: 46 All 414: 78 Ind Cas 429.

(9) *Sarju Prasad* v. *Ram Saran Lal,* 1931 All 541 (542, 544): 1931 All L J 400: 132 Ind Cas 568.

(10) *Har Lal* v. *Narayan,* 1922 Nag 267 (270, 272): 18 Nag L R 152: 64 Ind Cas 420: 4 Nag L J 118 [But cannot investigate a claim under O. 21, R. 58]. But see *Dalchand* v. *Narayan,* (1919) 51 Ind Cas 237 (238) Nag.

(11) *Wazir Ali* v. *Janki Prasad,* (1906) 28 All 671 (673): 3 All L J 458: 1906 All W N 183.

(12) *Sarfaraz Hussain* v. *Amarchand Pal,* (1917) 37 Ind Cas 78 (81, 82): 3 Oudh L J 529.

(13) *Gauri Sahai* v. *Sewa Ram,* (1887) All W N 267.

Para. 1, Notes 1-A—7.

of the decree; no fresh application for that purpose is necessary.[14] It has been held in the undermentioned case that after the transfer of the decree to the Collector for execution, the civil Court cannot entertain an application to add legal representatives of a deceased party.[15]

See also Note 2 to S. 70, Notes to S. 54 and Notes to O. 20, R. 18.

2. **Ancestral property.**—According to the Allahabad Government Notifications, decrees for the sale of *ancestral* property must be transferred to the Collector for execution. *See* Note 3 to S. 70. It has been held that property to which a title is obtained by gift is not "ancestral" property.[1]

3. **Application to set aside a sale.**—*See* Notes 2 to 6 to S. 70.

4. **Competency of Court to call back records sent to the Collector.**—The Court that has made a decree or judicial order which has been transmitted to the Collector for execution is not deprived of its judicial power with respect to it. It has power, where necessary to recall its own records transmitted to the Collector.[1] But such judicial power ought not to be exercised unless the Court is set in motion by one of the parties to the proceedings in execution.[2]

See also Note 2 to S. 70 and Note 7 to S. 54.

5. **Mortgage of part of the property in satisfaction of the decree.**—It is open to the executing authority to effect a mortgage of part of the property to satisfy a mortgage decree.[1]

6. **Clause (a)—Order 21, Rule 83.**—The postponement of the sale should be for a reasonable period. It should not be unreasonably long. *See* Note 3 to O. 21, R. 83.

7. **Appeal.**—*See* Note 7 to S. 70 and the following case.[1]

Para. 2.

Procedure of Collector in special cases.

P. 2. [S. 322.] Where the execution of a decree not being a decree ordering the sale of immovable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immovable property, has been so transferred, the

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(14) *Lal Basant* v. *Lal Sripat*, (1920) 55 Ind Cas 485 (486): 7 Oudh L J 11.

(15) *Kesho Saran* v. *Janki*, (1883) All W N 164.

Note 2.

(1) *Fazal Ahmad* v. *Wisaluddin*, (1916) 35 Ind Cas 742 (743): 14 All L J 669: 38 All 481.

Note 4.

(1) *Mahadaji* v. *Hari*, (1883) 7 Bom 332 (336); *Lallu* v. *Mithia*, (1887) 11 Bom 478 (482): 12 Ind Jur 67. See also *Sundar Das* v. *Mansa Ram*, (1885) 7 All 407 (409): 1885 All W N 87; *Madho Prasad* v. *Hansa*, (1883) 5 All 314 (315): 1883 All W N 59.

(2) *Hargovan* v. *Hira*, (1884) 8 Bom 301 (302): 8 Ind Jur 626.

Note 5.

(1) *Bacharsang Bhupatsang* v. *Naran Moti Meghji*, 1925 Bom 277 (278): 27 Bom L R 217: 86 Ind Cas 846.

Note 7.

(1) *Takkadus Fatima* v. *Baldeo*, (1890) 12 All 564 (568): 1890 All W N 185. [The Government has power to prescribe rules providing for appeals from Collector's orders].

Para. 2, Note 1.

Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immmovable property, may proceed as hereinafter provided.

1. **Decree for the payment of money.**—A decree for sale of ancestral land or of an interest in such land in enforcement of an hypothecation on such land is a "decree for the recovery of money" within the N.-W. P. Government Notification, No. 671 of 30th August, 1880.[1]

Para. 3.

Notice to be given to decree holders and to persons having claims on property.

P. **3**. [S. 322-A.] (1) In any such case as is referred to in paragraph[2], the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

(*a*) every person holding a decree for the payment of money against the judgment-debtor capable of execution by sale of his immovable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder;

(*b*) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

Schedule III, Para. 1—Note 1.

[1] *Birch* v. *Batiram*, (1882) 4 All 115 (115): 1881 All W N 146 F B.

Para 3, Notes 1—2.

Synopsis.

1. Scope of the rule.
2. Power of Collector to hear objections.

1. Scope of the rule.—The persons who are entitled to notice under this Paragraph are:—

(1) Persons holding *decrees for money*—

(*a*) which are *capable of execution by sale* of the immovable property of the judgment-debtor, or

(*b*) in which proceedings for sale of such property are *pending*, and,

(2) Persons having any claim on the *property* of the judgment-debtor.

Where properties have been placed under the management of the Collector, the Court cannot, under the provisions of Para. 11, *infra*, issue any process against such properties in execution of a decree for the payment of money. The holder of decree, passed *after* the property comes under the management of the Collector, is, therefore, not a person whose decree is "capable of execution by sale of the immovable property of the judgment-debtor" and is not entitled to be placed on the list of creditors framed under the following Paragraph.[1]

2. Power of Collector to hear objections.—The Collector is not authorised to hear any objection to the sale of the property advertised for sale. He can only call for claims.[1] Where the Collector acting under this Paragraph called on every person who had claim on the property of the judgment-debtor to submit a statement thereof, and in pursuance of the authority vested in him satisfied the claims made, it was not competent to a person who had not made the statement required to claim to set aside the arrangement made by the Collector.[2]

Para. 4.

Amount of decrees for payment of money to be asceroined. and immovable property available for their satisfaction.

P. 4. [S. 322-B.] (1) Upon the expiration of the said period, the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any) may desire to make, and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immovable property, and may, from time to time, adjourn such hearing and inquiry.

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative

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Schedule III, Para. 3—Note 1.

(1) *Muraridas* v. *The Collector of Ghazipur*, (1896) 18 All 313 (316): 1896 All W N 77.

Note 2.

(1) *Onkar Singh* v. *Mohan Kuar*, (1898) 20 All 428 (429): 1898 All W N 96.

(2) *Mahamud Serajuddin Khan* v. *Mt Alam Bi*. (1891) 4 C P L R 118 (118).

Para. 4, Notes 1—2.

priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immovable property available for that purpose.

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision.

Synopsis.

1. Statement of debts.
2. Appeal.

1. **Statement of debts.**—In the statement of debts to be prepared by the Collector under this Paragraph, only such persons are to be entered as are referred to in Para. 3, above. As has been seen in Note 1 to that Paragraph, a person who has obtained a decree for money, *after* the management of the debtor's property has been placed in the hands of the Collector, is not a person referred to in that Paragraph and is not therefore, entitled to be placed in the statement prepared under this Paragraph.[1]

2. **Appeal.**—*See* Para. 6, *infra.*

Para. 6.

Where District Court may issue notices and hold inquiry.

P. **5.** [S. 322-C.] The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment-debtor and of his immovable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court; and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector.

Schedule III, Para. 4—Note 1.

[1] *Murari Das* v. *The Collector of Ghazipur,* (1896) 18 All 313 (315): 1896 All W N 77.

Para. 6, Notes 1—2.

Effect of decision of Court as to dispute.

P. 6. [S. 322-D.] The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall as between the parties thereto, have the force of and be appealable as a decree.

Synopsis.

1. Appeal. 2 Court-fee.

1. **Appeal.**—The decision by the Court of any dispute arising under Paras. 4 and 5 is, under the terms of the Paragraph appealable as a decree. Where a District Judge to whom a dispute was referred by the Collector, wrongly sent back the same to the Collector and he decided it, it was held, that the remedy of the aggrieved party was to have *appealed* against the order of the District Judge and not to sue the Collector for a declaration of his right.[1]

2. **Court-fee.**—Art. 11 of Sch. II of the Court-Fees Act, 1870, applies only to memoranda of appeal against decisions *which are not decrees or orders having the force of decrees.* An order made by the Court under Paras. 4 and 5 has, as enacted in this Paragraph, the *force of a decree* and is consequently not within Art. 11 of the second schedule of the Court-Fees Act, 1870. A memorandum of appeal against such an order is therefore chargeable with an *ad valorem* fee under Art.1, Sch. I of that Act.[1] The High Court of Madras has, however, taken a contrary view and held that it is chargeable only with a fixed fee.[2] The decision cannot be accepted as correct.

Para. 7.

Scheme for liquidation of decrees for payment of money.

P. 7. [S. 323.] (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5. the Collector may,—

(*a*) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property; or

(*b*) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—

(*i*) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property; or

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Schedule III, Para. 6—Note 1.

(1) *Girdhar Das* v. *The Collector of Ghazipur,* 1896 All W N 69 (70).

Note 2.

(1) *Ahmad Khan* v. *Madho,* (1885) 7 All 565 (567): 1885 All W N 99.

(2) *Srinivasa Ayyangar* v. *Peria Tambi,* (1882) 4 Mad 420 (421).

Para. 7, Note 1.

(*ii*) by mortgaging the whole or any part of such property; or

(*iii*) by selling part of such property; or

(*iv*) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale; or

(*v*) partly by one of such modes, and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators one to be chosen by each party, or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government.

1. **Scope of the Paragraph.**—Where a decree is transferred to the Collector for execution the latter has absolute jurisdiction to decide and find out the best method of execution allowed to him by law.[1] The civil Court has

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Schedule III, Para. 7—Note 1.

[1] *Abdul Shakur v. Muhammad Matin*, 1924 All 307 (308): 22 All L J 202: 5 L R A Civ 98: 78 Ind Cas 429: 46 All 414.

Para. 7, Note 1.

no power to pass orders in such matters. Thus where certain properties were sold by the Collector but the whole of the sale amount was not deposited by the auction purchaser, it is entirely in the discretion of the Collector to decide whether he would resell the property or not in order to realise the balance of the purchase-money.[2] But, as has been seen in Note 1 to Para. 1 above, the Collector, has no jurisdiction to decide whether the decree is satisfied.[3]

Where, in exercise of his powers, the Collector has granted lease to the decree-holder in satisfaction of his decree he cannot subsequently resile from it; nor can the Court interfere in the matter[4] as, for example, authorising the grant of a fresh lease.[4-a] Where a decree was transferred to the Collector for making suggestions for the satisfaction of the decree and the Collector suggested that half the attached land should be farmed out to the decree-holder for certain period in satisfaction of the decree but the latter was not prepared to take such lease and the executing Court thereupon merely filed the proceedings, it was held that procedure was wrong and the proceedings could be filed only if all the lawful means for satisfying the decree had been tried and found to be impracticable.[5]

An order of a Collector under this rule disallowing the application of a decree-holder that the amount of the decree might be satisfied by a temporary alienation instead of by a sale, is not appealable.[6]

Para. 8.

Recovery of balance (if any) after letting or management.

P. 8. [S. 324.] Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property; and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.

Para. 9.

Collector to render accounts to Court.

P. 9. [S. 324-A.] (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all monies which come to his hands and of all charges in-

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[2] *Sahad Singh* v. *Hanuman Rai*, 1924 All 704 (705): 46 All 562: 22 All L J 452: 5 L R A Civ 350: 88 Ind Cas 766.

[3] *Bhurchand Hansraj* v. *Vira Khampa*, (1912) 17 Ind Cas 142 (143): 14 Bom L R 787: 37 Bom 32.

[4] *Parshottam Hargovan Parekh* v. *Harbhanji Amarangji Thakor*, (1909) 3 Ind Cas 753 (756): 33 Bom 443: 11 Bom L R 665.

[4-a] *Madho Prasad* v. *Mahtab Chand*, (1910) 8 Ind Cas 410 (411) Oudh.

[5] *Mt Bhagwanti* v. *Bachan Singh*, 1929 Lah 195 (195): 112 Ind Cas 790.

[6] *Madho Prasad* v. *Hansa Kuar*, (1883) 5 All 314 (316): 1883 All W N 59.

Para. 9. curred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him.

(3) The balance shall be applied by the Court—

(*a*) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit; and

(*b*) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immovable property, or otherwise as the Court may under section 73 direct; or

(*c*) where the Collector has proceeded under paragraph 2,—

(*i*) in keeping down the interest on incumbrances on the property;

(*ii*) where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit; and

(*iii*) in discharing rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment-debtor or such other person as the Court directs.

Para. 9, Notes 1—3.

Synopsis.

1. Scope of the Paragraph.
2. Maintenance of judgment-debtor's family.
3. Charges.

Accounting by Collector. See Note 1.

1. **Scope of the Paragraph.**—Where a decree has been sent to the Collector for execution he is bound to render, to the Court, an account of all monies which came into his hands, and must hold the balance of the amount after deducting necessary charges, at the disposal of the Court.[1] But he can not be compelled either to give up the account books into the Court; nor does the Paragraph require him to pay the balance into Court.[2]

2. **Maintenance of judgment-debtor's family.**—The provision for the maintenance of the judgment-debtor's family is a matter for the determination by the *Court* and not by the *Collector.*[1]

3. **Charges.**—The Collector is entitled to recover as expenses of sale, fees on the scale prescribed for sales under the Land Revenue Code. Poundage fee may also be allowed in addition to such expenses.[1]

Para. 10, Note 1.

Sales how to be conducted.

P. **10.** [S. 325.] Where the Collector sells any property under this schedule, he shall put it up to public auction in one or more lots, as he thinks fit, and may—

(*a*) fix a reasonable reserved price for each lot;

(*b*) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property;

(*c*) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

1. **Scope of the Paragraph.**—As soon as a sale is confirmed, the Collector is *functus officio,* and his only duty is to return the papers to the civil Court.[1]

Schedule III, Para. 9—Note 1.

(1) *Tapesri Lal* v. *Deokinandan Rai,* (1894) 16 All 1 (2): 1893 All W N 180 [It cannot make over the whole proceeds to the decree-holder]; *A. E. Jones* v. *Ram Charan,* 1931 All 700 (701): 1931 All L J 1064: 133 Ind Cas 423 [He cannot dispose of the balance in excess of the decree amount without instructions]; *Govindji Viramji* v. *Sakharam Govind,* (1912) 16 Ind Cas 59 (60): 14 Bom L R 527: 36 Bom 519; *Rupali Kalyansing* v. *Rupali Gambhirsinghji,* (1904) 6 Bom L R 825 (830, 831); *Jugraj Hemraj* v. *Kissan Singh,* (1890) 8 C P L R 147 (149).

(2) *Rupali Kalyansing* v. *Rupali Gambhirsinghji,* (1904) 6 Bom L R 825 (830, 831).

Note 2.

(1) *Purshottamadas* v. *Hiraji,* (1904) 6 Bom L R 822 (824); *Rupali Kalyansing* v. *Rupali Gambhirsinghji,* (1904) 6 Bom L R 825 (830, 831).

Note 3.

(1) *Narayan* v. *Bayaji,* 1927 Bom 17 (18): 28 Bom L R 1191: 99 Ind Cas 289; *Sayad Mahomed* v. *Thakurlal,* 1926 Bom 335 (336): 28 Bom L R 590: 96 Ind Cas 363.

Schedule III, Para. 10—Note 1.

(1) *Lallu Trikam* v. *Bhavla Mithia,* (1887) 11 Bom 478 (481, 482): 12 Ind Jur 67.

Para. 10, Note 1.

According to the Bombay civil circulars, an application by the decree-holder for permission to bid at the auction held by the Collector must be made to the Collector.[2]

Para. 11, Note 1.

Restrictions as to alienation by judgment-debtor or his representative, and prosecution of remedies by decree-holders.

P. **11**. [S. 325-A.] (1) So long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

(2) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived.

Synopsis.

1. Incompetency to transfer.
2. Alienation subsequent to adjustment.
3. Permission of the Collector.
4. Power of civil Court to issue process.
5. Termination of the Collector's powers.
6. Limitation.

Alienate—Meaning of. See Note 1, Pt. (17).

1. **Incompetency to transfer.**—This Paragraph imposes a *personal disqualification* on the judgment-debtor and his representatives by declaring that they are incompetent to mortgage, charge, lease or alienate their properties whilst they are under the management of the Collector under the provisions of this schedule.[1] A mortgage, charge, lease or other alienation made in contravention of the provisions of this Paragraph is wholly void[2] and not merely voidable as against the Collector and persons claiming through him.[3]

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(2) *Srinivasa Appacharya* v. *Jagadevappa*, (1918) 46 Ind Cas 653 (654): 20 Bom L R 708: 42 Bom 621.

Schedule III, Para. 11—Note 1.

(1) *Murray* v. *Murat Singh*, (1907) 3 Nag L R 171 (176).

(2) *Gaurishanker Balmukund* v. *Chinnumiya*, (1918) 48 Ind Cas 312 (313): 1918 P C 168: 16 Cal 183: 45 Ind App 219: 14 Nag L R 181: 16 All L J 993: 1 U P L R 14: 21 Bom L R 541: 29 Cal L Jour 201: 23 Cal W N 350: 35 Mad L Jour 733: 25 Mad L Tim 64: 9 Mad L W 327 P C [Overruling 36 Bom 510. The decision in 4 C P L R 156 is also no longer law]; *Sarju Prasad* v. *Ramsaran Lal*, 1931 All 541 (542): 1931 All L J 400: 132 Ind Cas 568.

(3) *Abdul Rahman* v. *Gaya Prasad*, 1929 Oudh 435 (436): 6 Oudh W N 848; *Amir Haider Khan* v. *Kanhaiya Baksh Singh*, 1929 Oudh 441

Para. 11, Note 1.

It is incapable of ratification or of enforcement in equity.[4] Where a mortgagee under a mortgage which is void as being in contravention of the provisions of this Paragraph pays off a prior mortgage he will have no right to be subrogated to the rights of the prior mortgagee.[5]

But the incompetency of the judgment-debtor under this Paragraph is confined to the property *in respect of which the Collector has assumed management,* and does not extend to property which has been excluded from such management. A transfer by the judgment-debtor of such property is not within the prohibition of this Paragraph.[6]

A member of a joint Hindu family against the manager of which a decree has been obtained as representing the family is a "judgment-debtor" within the meaning of this Paragraph and is incompetent to alienate any portion of the properties in the management of the Collector.[7] But the incompetency does not extend to the lessee from the Collector and he can, therefore, alienate his interest in the lease.[8] The disability to alienate begins from the date of the *order of transfer* to the Collector and continues so long as any of the debts, for the satisfaction of which the property was taken under the management of the Collector, remains unpaid.[9] In other words the disability continues until the decree is satisfied and the proceedings in appeal and revision therefrom are completed.[10]

Illustrations.

1. *A*, the judgment-debtor, makes a transfer of his property after the Court passes an order transferring the decree for execution to the Collector and before the order reaches the Collector. The transfer is void.[11]
2. A decree was transferred to the Collector for execution. A portion of the property of the judgment-debtor was sold by the Collector, the price realised being more than sufficient to satisfy the decree. Before the sale was confirmed, however, the judgment-debtor sold the remaining portion of the property to *X*. *Held*, that the sale was void inasmuch as the property must be deemed to be under the management of the Collector until confirmation of the sale.[12]
3. The execution of a decree against *A* is transferred to the Collector and his properties become vested in him for the purpose of such execution. The Collector grants a lease of the property to *X* for a certain number of years. *A* mortgages the demised properties during the subsistence of the lease.

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(443): 6 Oudh W N 750: 121 Ind Cas 888.

(4) *Salu Bai* v. *Rajat Khan*, (1917) 42 Ind Cas 200 (204, 208): 13 Nag L R 130.

(5) *Akbar Husain* v. *Shahbanshah Begam*, 1924 Oudh 302 (303): 27 Oudh Cas 56: 11 Oudh L J 82: 83 Ind Cas 854.

(6) *Nandlal* v. *Amba Prasad*, 1930 Nag 237 (238): 13 Nag L J 36: 122 Ind Cas 869: *Nago* v. *Tarachand*, 1928 Nag 128 (129): 106 Ind Cas 14: *Ramkissen Singh* v. *Mohammad Abdul Sattar*, 1928 P C 165 (170, 171): 30 Bom L R 852: 55 Mad L Jour 292: 28 Mad L W 248: 109 Ind Cas 574: 32 Cal W N 1149: 24 Nag L R 186: 48 Cal L Jour 570 P C; *Gangaram* v. *Ram Gopal*, 1922 Nag 243 (244) 18 Nag L R 131: 61 Ind Cas 579; *Mahomed Khalilur Rahman Khan* v. *The Collector of Etah*, 1931 All 38 (40): 1930 All L J 1594: 133 Ind Cas 314.

(7) *Ramkissen Singh* v. *Mohammad Abdul Sattar*, 1928 P C 165 (166); 30 Bom L R 852: 55 Mad L Jour 292: 28 Mad L W 248: 109 Ind Cas 574: 32 Cal W N 1149: 21 Nag L R 186: 48 Cal L Jour 570 P C; *Sarju Prasad* v. *Ram Saran Lal*, 1931 All 541 (544): 1931 All L J 400: 132 Ind Cas 568.

(8) *Motiram* v. *Asaram*, (1919) 53 Ind Cas 776 (777): 16 Nag L R 64.

(9) *Tikaram* v. *Narayan*, 1926 Nag 246 (247): 92 Ind Cas 44; *Ganga Prasad* v. *Ganga Bakhsh Singh*, (1907) 29 All 415 (417): 1907 All W N 112; *Chandan Lal* v. *Muhammad Husain Khan*, 1899 Pun Re No. 42.

(10) *Seth Ballabhdas* v. *Sobha Singh*, 1924 Nag 216 (219, 220): 78 Ind Cas 270.

(11) *Tikaram* v. *Narayan*, 1926 Nag 246 (247): 92 Ind Cas 44.

(12) *Mahadeo* v. *Krishnaji*, (1921) 60 Ind Cas 310 (311): 16 Nag L R 194.

Para. 11, Notes 1—3.

The mortgage is void as the incompetency of *A* continues so long as the scheme for liquidation subsists.[13]

Where, however, a sale takes place in contravention of this Paragraph without either party knowing that he was violating the law, the vendor will, in equity, be compelled to refund the purchase-money received by him.[14] Again where a suit is brought by a mortgagee on a mortgage executed by the judgment-debtor in contravention of this Paragraph, but the latter does not raise any plea as to the void character of the mortgage and a decree is passed thereon, he cannot raise such objection in execution of the decree.[15]

A contract of sale does not create a charge within the meaning of this rule.[16] The word "alienate" is used *ejusdem generis* with the preceding words "mortgage," "charge" or "lease" and contemplates a transfer which would have a *present effect* and not a devise, such as a will or a *donatio mortis causa,* which can have operation only after the death of the testator.[17]

2. **Alienation subsequent to adjustment.**—After an adjustment has been certified and is recorded by the Collector, the prohibition against alienation imposed by this Paragraph no longer subsists. It is competent to the judgment-debtor to mortgage, sell or otherwise alienate his property thereafter.[1]

3. **Permission of the Collector**—So long as the properties of the judgment-debtor are in the management of the Collector, his *written permission* is absolutely necessary to validate a mortgage or other alienation executed by the judgment-debtor. The permission need not, however, take any special form. Nor is it necessary that every detail of the transaction should be sanctioned by the Collector, nor should there be a separate permission in respect of each deed when it is clear that the whole transaction had his permission.[1]

Permission to alienate can be inferred from written words employed by the Collector from time to time.[2]

A sale will be valid even if permission is obtained before the registration of the document.[3]

A sale by a judgment-debtor with the permission of the Collector under this schedule has not the same effect as a sale by a Collector himself in execution, but amounts only to a private sale.[4]

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(13) *Ganga Prasad* v. *Ganga Baksh Singh,* (1907) 29 All 415 (417): 1907 All W N 112; *Chandan Lal* v. *Muhammad Hussain Khan,* 1899 Pun Re No. 42.

(14) *Narayan* v. *Motisa,* 1924 Nag 132 (133): 20 Nag L R 87: 78 Ind Cas 343.

(15) *Khalilur Rahman Khan* v. *Collector of Etah,* 1931 All 38 (40): 1930 All L J 1594: 133 Ind Cas 314.

(16) *Amulaksao* v. *Mahipatrao,* 1922 Nag 81 (81): 66 Ind Cas 850.

(17) *Muhammad Sayeed* v. *Muhammad Ismail,* (1910) 8 Ind Cas 834 (835): 33 All 233: 7 All L J 1176; *Narayan* v. *Vithobe,* 1927 Nag 177 (178): 100 Ind Cas 863.

Note 2.

(1) *Kushalchand* v. *Nandram,* (1911) 12 Ind Cas 572 (574): 35 Bom 516: 13 Bom L R 977.

Note 3.

(1) *Muhammad Muraffar Ali* v. *Bhagwati Prasad Singh,* 1921 Oudh 176 (181, 182): 8 Oudh L J 358: 66 Ind Cas 642.

(2) *Ejaz Ali Kidwai* v. *Special Manager, Court of Wards,* 1930 Oudh 510 (518): 7 Oudh W N 988; *Amir Haider Khan* v. *Kanhaiya Baksh Singh,* 1929 Oudh 441 (443): 6 Oudh W N 750: 121 Ind Cas 888 [Permitting an alienee to deposit decree amount is not tantamount to permission].

(3) *Parwat* v. *Ramji Rao,* (1918) 45 Ind Cas 240 (241) Nag.

(4) *Sheokisan* v. *Doma,* 1925 Nag 341 (342): 87 Ind Cas 995.

Para. 11, Notes 4—6.

4. **Power of civil Court to issue process.**—Where a Collector holds a judgment-debtor's property under his control by virtue of the powers conferred on him by S. 68, a new process cannot be issued by a civil Court in execution of a decree for the payment of money.[1] But any attachment effected before the papers which had been returned by the Collector, are sent back to the Collector, will be valid.[2] An attachment before judgment can be effected since it is not a *process in execution.*[3] The surplus sale proceeds after satisfaction of a mortgage-decree may be attached in execution as it is not an attachment of any immovable property.[4] But no Receiver can be appointed to take an account of the annual income of the property within the control of the Collector.[5] The Allahabad High Court has held that the prohibition does not apply to a mortgage-decree in which the Court has ordered the sale of specific property.[6]

5. **Termination of the Collector's powers.**—The powers of the Collector under the schedule terminate as soon as the decree is certified as satisfied.[1] Thus where a deposit is made of the amount which would fully satisfy the decree,[2] or where the Collector leases the property to the decree-holder for a certain number of years in full satisfaction of the decree, and the decree is certified as satisfied[3] the Collector's powers under this schedule cease, and an alienation made by the judgment-debtor thereafter is not void. But the mere fact that the property is sold and fetches more than the decretal amount, does not put an end to the management of the Collector. His powers continue to exist till the *confirmation* of the sale.[4] The presumption is that such powers continue until they are proved to have ceased.[5] Where a civil Court draws up "Form C" in respect of the properties attached by it, and sends the same to the Collector but the latter returns it to the civil Court for some corrections to be made therein, the proceedings before the Collector must be deemed to be pending even during the period during which the "Form C" was pending in the civil Court for correction.[6]

6. **Limitation.**—This Paragraph expressly excludes from calculation the period during which the decree is before the Collector for execution.[1]

Note 4.

[1] *Jang Bahadur* v. *Jagat Narain*, 1926 Oudh 318 (319): 92 Ind Cas 906; *Khushal Chand* v. *Nandram*, (1911) 12 Ind Cas 572 (575): 35 Bom 516: 13 Bom L R 977 [A sale executed during the pendency of the illegal attachment is however valid]; *Muzaffar Ali* v. *Bhagwati Prasad Singh*, 1921 Oudh 176 (180): 8 Oudh L J 358: 66 Ind Cas 642 [A process which is illegal cannot become legal when the Collector's powers cease].

[2] *Muhammad Muzaffar Ali* v. *Bhagwati Prasad Singh*, 1921 Oudh 176 (180): 8 Oudh L J 358: 66 Ind Cas 642.

[3] *Bansilal* v. *Sitram*, 1922 Nag 238 (238): 68 Ind Cas 188.

[4] *Jang Bahadur* v. *Jagat Narain*, 1927 Oudh 216 (217): 4 Oudh W N 510: 102 Ind Cas 94.

[5] *Jang Bahadur* v. *Bank of Upper India*, 1925 Oudh 448 (451): 12 Oudh L J 146: 2 Oudh W N 73: 87 Ind Cas 21: 28 Oudh Cas 330.

[6] *Mahomed Khalilur Rahman Khan* v. *The Collector of Etah*, 1931 All 38 (40): 1930 All L J 1594: 133 Ind Cas 314.

Note 5.

[1] *Khushalchand* v. *Nandram*, (1911) 12 Ind Cas 572 (574): 13 Bom L R 977: 35 Bom 516.

[2] *Mt Mana Karnikabai* v. *Nandlal Achaldas*, 1930 Nag 220 (223): 122 Ind Cas 371.

[3] *Maroti* v. *Krishnarao*, 1925 Nag 455 (456): 89 Ind Cas 174; *Sonba* v. *Ganesha*, (1912) 17 Ind Cas 887 (889): 8 Nag L R 182.

[4] *Mahdeo* v. *Krishnaji*, (1921) 60 Ind Cas 310 (311): 16 Nag L R 194.

[5] *Surju Prasad* v. *Ramsarn Lal*, 1931 All 541 (543): 1931 All L J 400: 132 Ind Cas 568.

[6] *Har Lal* v. *Narayan*, 1922 Nag 267 (269): 18 Nag L R 152: 64 Ind Cas 420: 4 Nag L J 118.

Note 6.

[1] *Damara Kumar Thimmanayannu* v. *Ranga Bhupala*, (1910) 7 Ind Cas 860 (860): 8 Mad L Tim 235: (1911) 1 Mad W N 15: 21 Mad L

Para. 11, Note 6.

The reason is that during such period, the decree-holders have no remedy by execution against the property of the judgment-debtor in the management of the Collector.[2] But the exclusion is permissible only in cases where a provision has been made under Para. 7 for the satisfaction of the decree and where the decree-holder has in consequence been deprived of his remedy. Consequently if no such provision is made, the period cannot be excluded.[3]

The words "period of limitation" in this Paragraph apply to the restrictions placed upon the right of the decree-holder both by the Limitation Act, 1908 and by S. 48 of the Code.[4] Where at a sale held by the Collector no bidders appear and the Collector sends the papers back to the civil Court, but the civil Court returns the papers again to the Collector, the period from the date of the original application will be excluded for the purposes of S. 48 of the Code.[5]

Para. 12.

Provision where property is in several districts.

P. **12.** [S. 325-B.] Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct.

Para. 13.

Powers of Collector to compel attendance and production.

P. **13.** [S. 325-C.] In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a civil Court to compel the attendance of parties and witnesses and the production of documents.

Jour 464; *Madhav* v. *Balaji*, 1927 Bom 123 (125): 29 Bom L R 75: 100 Ind Cas 619: 51 Bom 143; *Keshablal* v. *Pitamberdas*, (1895) 19 Bom 261 (267).

(2) *Girdhar Das* v. *Har Shankar Prasad*, (1898) 20 All 383 (385): 1898 All W N 82.

(3) *Baurao* v. *Lahanu*, 1921 Nag 64 (65): 64 Ind Cas 855; *Sadar Shiv* v. *Rukhmabai*, (1915) 27 Ind Cas 969 (972): 11 Nag L R 25.

(4) *Shyam Karan* v. *The Collector of Benares*, (1919) 52 Ind Cas 742 (743): 42 All 118: 17 All L J 1140; *Mahomed Abdul Karim Khan* v. *Nawal Singh*, (1910) 8 Ind Cas 377 (378): 13 Oudh Cas 303.

(5) *Girdhari Lal* v. *Ramcharan Lal*, 1926 All 331 (331): 24 All L J 437: 94 Ind Cas 613; *Lal Basant Singh* v. *Lal Sripat Singh*, (1920) 55 Ind Cas 485 (486): 7 Oudh L J 11 [An application to send back papers is governed by Art. 181 or 182 according as it may be for continuance or as a step-in-aid].

THE FOURTH SCHEDULE.

(*See section* 155.)

ENACTMENTS AMENDED.

1	2	3	4
Year.	No.	Short title.	Amendment.
1870	VII	The Court-fees Act, 1870.	In article I of Schedule I, after the word "plaint" the words "written statement pleading a set-off or counter-claim" and after the word "Act" the words "or of cross-objection" shall be inserted. From article 11 of Schedule II the words "from an order rejecting a plaint or" shall be omitted. For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted, namely:— "Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908."

Tit[redacted]

Author [redacted]

Accession No. [redacted] [redacted]

Call No. [redacted] [redacted] [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date
[redacted]	[redacted]		

APPENDIX I.

The High Courts Act or the Charter Act, 1861.

An Act for establishing High Courts of Judicature in India.

(24 & 25 Vict., C. 104); (6th August, 1861).

High Courts Act.

[*Repealed and re-enacted with slight modifications by the Government of India Act, 5 & 6, Geo. V., Ch.* 61, (1915).]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same as follows:—

S. 1.

High Courts may be established in the several Presidencies of India.

(1) It shall be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom to erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William, aforesaid, and by like Letters Patent to erect and establish like High Courts at Madras and Bombay for those Presidencies respectively. Such High Courts to be established in the said several Presidencies at such time or respective times as to Her Majesty may seem fit and the High Court to be established under any such Letters Patent in any of the said Presidencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency, or such other time as in such Letters Patent may be appointed in this behalf.

S. 2.

Constitution of High Courts.

(2) The High Court of Judicature at Fort William in Bengal and at the Presidencies of Madras and Bombay, respectively, shall consist of a Chief Justice and as many Judges not exceeding fifteen as Her Majesty may, from time to time, think fit and appoint who shall be selected from—

1st. Barristers of not less than five years' standing; or

2nd. Members of the Covenanted Civil Service of not less than ten years' standing and who shall have served as Zillah Judges or shall have exercised the like powers as those of a Zillah Judge for at least three years of that period; or

3rd. Persons who have held judicial office not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years; or

4th. Persons who have been pleaders of a Sudder Court or a High Court for a period of not less than ten years if such pleaders of a Sudder Court shall have been admitted as pleaders of a High Court.

Provided that not unless than one-third of the Judges of such High Courts, respectively, including the Chief Justice, shall be Barristers, and not less than one-third shall be Members of the Covenanted Civil Service.

S. 3.

Certain existing Judges herein named to be the first Judges of the High Courts.

(3) Provided always that the persons who at the time of the establishment of such High Court in any of the said Presidencies, are Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency shall be and become Judges of such High Court without further appointment for that purpose; and the Chief Justice of such Supreme Court shall become the Chief Justice of such High Court.

S. 4.

Tenure of office of High Courts.

(4) All the Judges of the High Courts established under this Act shall hold their offices during Her Majesty's pleasure provided that it shall be lawful for any Judge of a High Court to resign such office of Judge to the Governor-General of *India* in Council or Governor in Council of the Presidency in which such High Court is established.

S. 5.

Precedence of Judges of High Court.

(5) The Chief Justice of any such High Court shall have rank and precedence before the other Judges of the same Court and such of the other Judges of such Court as on its establishment shall have been transferred thereto from the Supreme Court shall have rank and precedence before the Judges of the High Court not transferred from the Supreme Court and except as aforesaid, all the Judges of each High Court shall have rank and precedence according to the seniority of their appointments unless otherwise provided in their patents.

S. 6.

Salaries, etc., of Judges of the High Court.

(6) Any Chief Justice, or Judge, transferred to any High Court from the Supreme Court, shall receive the like salary, and be entitled to the like retiring pension and advantage as he would have been entitled to for and in respect of service in the Supreme Court, if such Court had been continued his service in the High Court being reckoned as service in the Supreme Court and except as aforesaid it shall be lawful for the Secretary of State in Council of *India* to fix the salaries, allowances, furloughs, retiring pensions, and (when necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts under this Act, and from time to time to alter the same. Provided always such alterations shall not affect the salary of any Judge appointed prior to the date thereof.

S. 7.

Provision for vacancy of the office of Chief Justice or other Judge.

(7) Upon the happening of a vacancy in the office of Chief Justice, and during any absence of a Chief Justice, the Governor-General in Council or Governor in Council, as the case may be, shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the office of Chief Justice of the same Court, and has entered on the discharge of the duties of such office, or until the Chief Justice has returned from such absence, and upon the happening of a vacancy in the office of any other Judge of any such High Court and during any absence of any such Judge or on the appointment of any such Judge to act as Chief Justice, it shall be lawful for the Governor-General in Council or Governor in Council, as the case may be, to appoint a person, with such qualifications as are required in persons to be appointed to the High Court to act as a Judge of the said High Court, and the person so appointed shall be authorized to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court, and has entered on the discharge of the duties of such office, or until the absent Judge has returned from such absence, or until the Governor-General in Council or Governor in Council as aforesaid, shall see cause to cancel the appointment of such acting Judge.

S. 8.

Abolition of Supreme Courts and Sudder Courts.

(8) Upon the establishment of such High Court as aforesaid in the Presidency of *Fort William in Bengal*, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at *Calcutta*, in the same Presidency, shall be abolished:

And upon the establishment of such High Court in the Presidency of *Madras*, the Supreme Court and the Court of the Sudder Adawlut and Foujdarry Adawlut in the same Presidency shall be abolished:

And upon the establishment of such High Court in the Presidency of *Bombay*, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Foujdarry Adawlut in the same Presidency shall be abolished:

And the records and documents of the several Courts so abolished in each Presidency shall become, and be, records and documents of the High Court established in the same Presidency.

High Courts Act, S. 9.

Jurisdiction and powers of High Courts.

(9) Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty, and Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate and all such powers and authority for, and in relation to, the administration of Justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid, grant and direct subject, however, to such directions and limitations as to the exercise of Original, Civil and Criminal Jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts.

S. 10.

High Courts to exercise same jurisdiction as Supreme Courts.

(10) *Until eth Crown shall otherwise provide under the powers of this Act all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras and Bombay, respectively, over inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act establishing High Courts at Fort William, Madras and Bombay, shall be exercised by such High Courts, respectively.*

S. 11.

Existing provisions applicable to Supreme Courts to apply to High Courts.

(11) Upon the establishment of the said High Courts in the said Presidencies respectively, all provisions then in force in *India* of Acts of Parliament or of any Orders of Her Majesty in Council, or Charters, or of any Acts of the Legislature of *India* which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at *Fort William* in *Bengal, Madras and Bombay,* respectively, or to the Judges of those Courts shall be taken to be applicable to the said High Courts and the Judges thereof respectively, so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council.

S 12.

Provisions as to pending proceedings in abolished Courts.

(12) From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and such proceedings and all previous proceedings in the said last mentioned Courts shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as merely as circumstances permit, under and according to the practice of the abolished Courts respectively.

S. 13.

Power to High Courts to provide for exercise of jurisdiction by single Judges or Division Courts.

(13) Subject to any laws or regulations which may be made by the Governor-General in Council, the High Courts established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges or by division Courts constituted by two or more Judges of the said High Court of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice.

S. 14.

Chief Justice to determine what Judges shall sit alone or in the Division Courts.

(14) The Chief Justice of each High Court shall, from time to time, determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid.

High Courts Act S. 15.

High Court to superintend and to frame rules of Practice for subordinate Courts.

(15) Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction, and shall have power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Court for which it shall think necessary that a form be provided, and also for keeping all books, entries and accounts to be kept by the officers and also to settle tables of fees to be allowed to the sheriffs, Attorney, and all clerks and officers of Courts and from time to time to alter any such rule or form or table; and the rules so made and the forms so framed, and the tables so settled, shall be used and observed in the said Courts; provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall before they are issued, have received the sanction, in the Presidency of *Fort William* of the Governor-General in Council, and in *Madras* or *Bombay*, of the Governor in Council of the respective Presidencies.

S. 16.

Her Majesty may establish a High Court in the North-Western Provinces.

(16) It shall be lawful for Her Majesty, if at any time hereafter Her Majesty sees fit so to do, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in *India*, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and of such number of other Judges with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty from time to time, may think fit and appoint; and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any such jurisdiction, powers, and authority as under this Act is authorised to be conferred on or will become vested in the High Court to be established in any Presidency hereinbefore mentioned, and, subject to the directions of such Letters Patent, all the provisions of this Act having reference to the High Court established in any such Presidency, and to the Chief Justice and other Judges of such Court, and to the Governor-General or Governor of the Presidency in which such High Court is established, shall as far as circumstances may permit, be applicable to the High Court established, in the said territories, and to the Chief Justice and other Judges thereof, and to the person administering the Government of the said territories.

S. 17.

Other or supplementary Charters may be granted within three years after establishment of a Court.

(17) It shall be lawful for Her Majesty, if Her Majesty shall so think fit, at any time within three years after the establishment of any High Court under this Act by Her Letters Patent, to revoke all or such parts or provisions as Her Majesty may think fit, of the Letters Patent by which such Court was established and to grant and make such other powers and provisions as Her Majesty may think fit and as might have been granted or made by such first Letters Patent or, without any such revocation as aforesaid, by like Letters Patent to grant and make any additional or supplementary powers and provisions which might have been granted or made in the first instance.

S. 18.

Territorial limits of jurisdiction of Court may be altered by order in Council.

(18) *It shall be lawful for Her Majesty from time to time, by Her Order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under this Act, and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts as to Her Majesty, with the advice of Her Privy Council, may seem meet.*

S. 19.

Interpretation of terms.

(19) The word 'Barrister' in this Act shall be deemed to include Barristers of *England* or *Ireland*, or Members of Faculty of Advocates in *Scotland;* and the words "Governor-General and Governor" shall comprehend the officer administering the Government.

APPENDIX II

GOVERNMENT OF INDIA ACT, 1915.

Govt. of Ind. Act,

[5 *and* 6, *Geo.* 5, *Ch.* 61. (1915); *as amended by* 6 *and* 7 *Geo.* 5, *Ch.* 37 (1916); 9 *and* 10 *Geo.* 5, *Ch.* 101 (1919).]

An Act to consolidate enactments relating to the Government of India.

29th July, 1915.

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

* * * * *

PART IX.

THE INDIAN HIGH COURTS.

Constitution.

S. 101.

101. (Ch. Act, Ss. 2, 19.)—(1) The High Courts referred to in this Act are the High Courts of Judicature for the time being established in British India by Letters Patent.

Constitution of High Courts.

(2) Each High Court shall consist of a Chief Justice and as many other Judges as His Majesty may think fit to appoint: Provided as follows:—

(*i*) The Governor-General in Council may appoint persons to act as additional Judges of any High Court, for such period, not exceeding two years as may be required; and the Judges so appointed shall, whilst so acting, have all the powers of a Judge of the High Court appointed by His Majesty under this Act;

(*ii*) The maximum number of Judges of a High Court, including the Chief Justice and additional Judges, shall be twenty.

(3) A Judge of a High Court must be—

(*a*) a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland, of not less than five years' standing; or

(*b*) a member of the Indian Civil Service of not less than ten years' standing, and having for at least three years served as, or exercised the powers of a district Judge; or

(*c*) a person having held judicial office, not inferior to that of a subordinate Judge or a Judge of a Small Cause Court, for a period of not less than five years; or

(*d*) a person having been a pleader of a High Court for a period of not less than ten years.

(4) Provided that not less than one-third of the Judges of a High Court, including the Chief Justice but excluding additional Judges, must be such barristers or advocates as aforesaid, and that not less than one-third must be members of the Indian Civil Service.

(5) The High Court for the North-Western Provinces may be styled the High Court of Judicature at Allahabad, and the High Court at Fort William in Bengal is in this Act referred to as the High Court at Calcutta.

Synopsis.

1. Legislative changes. ... 1 to sub-S. (2).
2. Appointment of temporary Judges. Proviso 3. Sub-S. (4).

1. **Legislative changes.**—Clause (d) of sub-S. (3) has been substituted by the Indian High Courts Act, 1922 (12 and 13 Geo. V, C. 20).

2. **Appointment of temporary Judges, Proviso 1 to sub-S. (2).**—This proviso does not mean that as regards each High Court appointments can only be made for periods not exceeding two years *in all* however much they may be required subsequently. It should be read as meaning that the appointments may be made *from time to time* for such period not exceeding two years as may be required on each occasion when the power is exercised.[1]

3. **Sub-Section (4).**—The expression "one third of the Judges of the High Court" means one-third of the *existing* number of Judges, irrespective of the previous strength and number of the Judges constituting the High Court.[1]

S. 102.

Tenure of office of Judges of High Courts.

102. (Ch. Act, S. 4.)—(1) Every Judge of a High Court shall hold his office during His Majesty's pleasure.

(2) Any such Judge may resign his office, in the case of the High Court at Calcutta, to the Governor-General in Council, and in other cases to the local Government.

S. 103.

Precedence of Judges of High Courts.

103. (Ch. Act, S. 5.).—(1) The Chief Justice of a High Court shall have rank and precedence before the other Judges of the same Court.

(2) All the other Judges of a High Court shall have rank and precedence according to the seniority of their appointments, unless otherwise provided in their patents.

S. 104.

Salaries, etc., of Judges of High Courts.

104. (Ch. Act, S. 6.)—(1) The Secretary of State in Council may fix the salaries, allowances, furloughs, retiring pensions, and where necessary, expenses for equipment and voyage, for the Chief Justices and other Judges of the several High Courts, and may alter them, but any such alteration shall not affect the salary of any Judge appointed before the date thereof.

(2) The remuneration fixed for a Judge under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein.

(3) If a Judge of a High Court dies during his voyage to India, or within six months after his arrival there, for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal

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Govt. of India Act, Section 101—Note 2.

[1] *Kandasami* v. *Muthuvenkatachala*, (1918) 43 Ind Cas 850 (850): 33 Mad L Jour 787.

Note 3.

[1] *Tajpal* v. *Jhagro*, (1919) 51 Ind Cas 65 (66):: 1 U P L R (A) 38.

personal representatives, out of the revenues of India, such sum of money as will, with the amount received by or due to him at the time of his death on account of salary, make up the amount of one year's salary.

(4) If a Judge of a High Court dies while in possession of his office and after the expiration of six months from his arrival in India for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, over and above the sum due to him at the time of his death, a sum equal to six months' salary.

Provision for vacancy in the office of Chief Justice or other Judge.

105. (Ch. Act, S. 7.)—(1) On the occurrence of a vacancy in the office of Chief Justice of a High Court, and during any absence of such a Chief Justice, the Governor-General in Council in the case of the High Court at Calcutta, and the local Government in other cases, shall appoint one of the other Judges of the same High Court to perform the duties of Chief Justice of the Court, until some person has been appointed by His Majesty to the office of Chief Justice of the Court, and has entered on the discharge of the duties of that office, or until the Chief Justice has returned from his absence, as the case requires.

(2) On the occurrence of a vacancy in the office of any other Judge of a High Court, and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice, the Governor-General in Council in the case of the High Court at Calcutta, and the Local Government in other cases, may appoint a person, with such qualifications as are required in persons to be appointed to the High Court, to act as a Judge of the Court; and the person so appointed may sit and perform the duties of a Judge of the Court, until some person has been appointed by His Majesty to the office of Judge of the Court and has entered on the discharge of the duties of the office or until the absent Judge has returned from his absence, or until the Governor-General in Council or the Local Government, as the case may be, sees cause to cancel the appointment of the acting Judge.

Synopsis.

1. Sub-S. (2).
2. Time within which appointment of acting Judge should be made.

1. Sub-Section (2).—The words "upon the happening of a vacancy in the office of Judge" mean upon the happening of a vacancy in the office of a Judge appointed to his office by *His Majesty*. They are not applicable to the case of a vacancy caused by a person appointed to act as a Judge under this sub-section.[1]

2. Time within which appointment of acting Judge should be made.—No limit of time is mentioned within which the appointment should be made. That is left to the discretion of the Local Government. Hence the fact that an appointment is made by the Local Government, not immediately or within a reasonable time after the occurrence of the vacancy will not have the effect of invalidating the appointment and render the judgment of the Judge so appointed a nullity.[1]

Section 105—Note 1.

(1) *Queen Empress* v. *Ganga Ram*, (1894) 16 All 136 (152): 1894 All W N 39.

Note 2.

(1) *Balwant Singh* v. *Rani Kishori*, (1898) 20 All 267 (293, 294): 25 Ind App 54: 2 Cal W N 278: 7 Sar 279 P C [This renders the contrary view taken in 16 All 136 F B. No longer law].

JURISDICTION.

Jurisdiction of High Courts.

106. (Ch. Act, S. 9.)—(1) The several High Courts are Courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the Court, and power to make rules for regulating the practice of the Court, as are vested in them by letters patent, and, subject to the provisions of any such letters patent, all such jurisdictions, powers and authority as are vested in those Courts respectively at the commencement of this Act.

(2) (21 Geo. 3, C. 70).—The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

Synopsis.

1. **Original revenue jurisdiction.**
2. **Revenue—Meaning of.**
3. **Power to make rules for regulating the practice of the Court.**

1. **Original revenue jurisdiction.**—Sub-S. (2) re-enacts the prohibition which was contained in S. 8 of the East India Company Act, 1780, Cl. 23 of the Charter of the Supreme Court of Madras, 1800, and Cl. 30 of the Charter of the Supreme Court of Bombay, 1823. There was no such similar provision in the Indian High Courts Act, 1861, or in the Letters Patent issued thereunder. The High Court has now no *original* jurisdiction in matters concerning revenue. Thus, a *suit* by an assessee for a declaration that an agreement for composition of income-tax between him and the Collector of Madras is in force and that the latter has no right to repudiate the agreement and assess him in contravention thereof, cannot be filed in the High Court.[1] But an order of the High Court under S. 45 of the Specific Relief Act, 1877, directing the Chief Revenue Officer to do his statutory duty and state a case for the opinion of the Court is not one made in the exercise of "Original jurisdiction in any matter concerning the revenue", and the High Court is competent to pass such an order.[2]

2. **Revenue—Meaning of.**—Money derived by a sale of smuggled goods which are seized and confiscated by the customs authorities is "revenue" within the meaning of this section. Consequently an action in trover against the Secretary of State for India for the recovery of the value of such goods on the allegation that the action of the customs authorities is illegal, cannot be entertained on the original side of the High Court.[1]

3. **Power to make rules for regulating the practice of the Court.**—The High Court is empowered under sub-S. (1) to make rules for regulating its practice. It is not necessary that the sanction of the Local Government should be obtained for such rules.[1] Where there is nothing inconsistent in the rules so framed with the provisions of the Code of Civil Procedure, the High Court can apply the provisions of the latter Code. Thus, there being no provision in the original side rules of the Madras High Court similar

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Section 106—Note 1.

(1) *Best & Co v. Collector of Madras,* (1918) 48 Ind Cas 790 (792): 35 Mad L Jour 23.

(2) *Alcock Ashdown & Co v. The Chief Revenue Authority, Bombay,* 1923 P C 138 (142): 25 Bom L Rep 920: 21 All L J 689: 50 Ind App 227: 1923 Mad W N 557: 47 Bom 742: 45 Mad L Jour 592: 33 Mad L Tim 267: 18 Mad L W 918: 4 L R P C 188: 75 Ind Cas 892: 39 Cal L Jour 302: 28 Cal W N 762.

[But see *Chief Commissioner of Income-tax v. North Anantapur Gold Mines, Ltd,* 1921 Mad 524 (525): 44 Mad 718: 41 Mad L Jour 177: 14 Mad L W 108: 1921 Mad W N 502: 64 Ind Cas 682 [Not good law in view of 1923 P C 138.]

Note 2.

(1) *Govindarajalu Naidu v. Secretary of State,* 1927 Mad 689 (692): 50 Mad 449: 53 Mad L Jour 355: 39 Mad L Tim 304: 26 Mad L W 558: 105 Ind Cas 576.

Note 3.

(1) *In the matter of A Vakalath,* 1928 Mad 472 (473): 109 Ind Cas 206.

to that contained in O. 33, Rr. 10 and 11 of the Code, the High Court of Madras has held that it is competent to apply those provisions in a suit pending on its original side. It should be noted that under S. 131 of the Act read with Sch. V thereof, the Indian Legislature is empowered to repeal or alter the provisions of this section; and the Code of Civil Procedure being an enactment of the Indian Legislature, the provisions contained therein relating to Court-fee in pauper suits may be taken to apply to the original side also.[2]

Powers of High Court with respect to subordinate Courts.

107. (Ch. Act, S. 15.)—Each of the High Courts has superintendence over all Courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say:—

(*a*) call for returns;

(*b*) direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction;

(*c*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts;

(*d*) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts; and

(*e*) settle tables of fees to be allowed to the sheriff, attarneys, and all clerks and officers by Courts:

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any law for the time being in force, and shall require the previous approval, in the case of the High Court at Calcutta, of the Governor-General in Council, and in other cases of the local Government.

Synopsis.

1. Legislative changes.
2. Superintendence.
3. "Over all Courts."
4. Election Courts.
5. Rent controller.
6. Land acquisition proceedings.
7. Subject to its appellate jurisdiction.
8. Agency commissioner.
9. Commissioner acting under the Defence of India Act.
10. Proceedings under the Legal Practitioners' Act.
11. Criminal proceedings.
12. Power to expunge from record.
13. Difference of opinion among Judges.
14. Power of superintendence—If can be exercised by Judge sitting in the insolvency or original side of the High Court.
15. Power to transfer—Cl. (b).
16. Power to punish contempt of Court's authority.
17. Power to issue writ of certiorari.
18 Appeal.

Interlocutory orders—Whether can be set aside by High Court. See Note 2, Pt. (19).

Powers of superintendence and revisional jurisdiction under S. 115. See Note 2, Pt. (5).

Powers of superintendence when not to be exercised. See Note 2, Pts. (23-28).

1. **Legislative changes.**—This section is practically a reproduction of S. 15 of the High Courts Act or the Charter Act, 1861, (24 and 25, Vict., C. 104).

The word "law" in the proviso to the section was substituted for the word "Act" by Sch. I of the Government of India (Amendment) Act, 1916 (6 and 7, Geo. V, C. 37).

2. **Superintendence.**—The term "Superintendence" has a legal force and signification which are perfectly well known to the Legislature.[1] The object of superintendence is to keep all inferior Courts and jurisdictions within the bounds of their authority, to see that they do what their duty requires them to do and that they do it in a legal manner.[1-a] In England "it is the peculiar business of the Court of the King's Bench to *superintend* all inferior tribunals, and therein to enforce the due exercise of those judicial and ministerial

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(2) *Yelumalai* v. *Kuppammal*, 1928 Mad 385 (387): 54 Mad L Jour 263: 27 Mad L W 760: 109 Ind Cas 173.

Section 107—Note 2.

(1) *Gopal Singh* v. *The Court of Wards*, (1867) 7 Suth W R 430 (431) (Per Norman, J).

(1-a) Short and Mellor's Crown Practice, 2nd edition, page 2. In the matter of *Lukhy Kant Bose*, (1875-76) 1 Cal 180 (182) [Case under S. 15 of the Charter Act]; *Manmatha Nath Biswas* v. *Emperor*, 1933 Cal 132 (134): 37 Cal W N 201.

powers with which the Crown or Legislature has invested them, and this not only by restraining their excesses but also by quickening their negligence and obviating their denial of justice".[2] This wide power has been given to the High Courts in India in a limited and modified form by S. 115 of the Civil Procedure Code, by S. 435 of the Criminal Procedure Code, by S. 107 of the Government of India Act, 1915, by Cl. 13 of the Letters Patent (Madras, Bombay and Calcutta) and by other enactments. These, however, do not exhaust the powers of superintendence of the Chartered High Courts in India. When the Supreme Courts were established in India, they were invested with the same powers of superintendence as were exercised by the Court of the Queen's Bench in England.[3] Under S. 9 of the High Courts Act, 1861 (known as the Charter Act) which abolished the Supreme Courts and empowered the establishment of the High Courts, it was provided that the High Court to be established "shall have and exercise *all jurisdiction and every power and authority* whatsoever, in any manner vested in any of the Courts in the same Presidency, abolished under this Act".[3-a] Finally S. 106 of the Government of India Act, 1915 (which has repealed the High Courts Act, 1861) provides that the High Courts have, "subject to the provisions of any such Letters Patent, all such jurisdictions, powers and authority as are vested in those Courts respectively at the commencement of this Act". It is thus clear that in addition to the powers given by this section and by other statutes, the Chartered High Courts have inherited from the Supreme Courts, the wide powers of superintendence exercised by the Court of the King's Bench in England.[4] Thus a Chartered High Court can issue a writ of *certiorari* to persons or bodies acting judicially but which are not *Courts* subject to the appellate jurisdiction of the High Court, and which cannot be dealt with under S. 107 of this Act.[4-a] (For a fuller discussion of this, *see* Note 17, *infra.*)

The powers of superintendence under this section are much wider than the powers vested in the High Courts under S. 115. The latter applies only where a case has been *decided* by any Court subordinate to the High Court, in which no appeal lies thereto, and the High Court can interfere only in the three cases specified therein. There are no such limitations upon the power of the High Court, under this section which can therefore be exercised even in cases not covered by S. 115.[5] It may be exercised in *administrative* as well as judicial matters[6] and in Civil as well as Criminal proceedings.

The exercise of the power is in the *discretion* of the Court to which the application is made[7] and the power being one in the nature of extraordinary jurisdiction, should be exercised sparingly and with caution and on sound judicial principles.[7-a] The principles

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(2) Blackstone's "Commentaries", p. 110.

(3) *Shiranathaji* v. *Joma Kashinath*, (1883) 7 Bom 341 (359, 360): 7 Ind Jur 656.

(3-a) See also *Bai Atrani* v. *Leepsingh Bario.*

(4) *O A O K Lakshman Chettiar* v. *Commissioner, Corporation of Madras*, 1927 Mad 130 (130): 51 Mad L Jour 742: 24 Mad L W 778: 1926 Mad W N 985: 99 Ind Cas 152: 50 Mad 130; *Venkataratnam* v. *Secretary of State*, 1930 Mad 896 (899, 900): 32 Mad L W 475: 60 Mad L Jour 25: 128 Ind Cas 851: 53 Mad 979.

(4-a) *Nataraja Ayyar*, In re, (1912) 16 Ind Cas 755 (765): 36 Mad 72: 23 Mad L Jour 393: 1912 Mad W N 1012: 13 Mad L Tim 367.

(5) *Abdullah* v. *Salaru*, (1896) 18 All 4 (7): 1895 All W N 124; *Kadhory* v. *Emperor*, (1919) 52 Ind Cas 279 (280): 42 All 26: 17 All L J 898; *Sardari Shah* v. *Hukum Chand*, (1914) 22 Ind Cas 848 (850): 41 Cal 876: 18 Cal W N 662 [High Court's power of superintendence not restricted by Santhal Parganas regulations and rules]; In re *Siddeshwar Boral*, (1899-1900) 4 Cal W N 36 (38, 39); *Lalta Devi* v. *Balkrishna*, 1933 Lah 327 (328); *Paramasiram Pillai* v. *Perianayagathammal*, (1916) 34 Ind Cas 502 (503) [Order of District Munsif under S. 78 of Madras Village Courts Act—Cannot be revised under S. 115 but only under this section]; *Bhimnath* v. *Jagarnath*, 1925 Pat 674 (676): 1925 Pat H C C 294: 89 Ind Cas 814: 7 Pat L Tim 82; *Raghunath Singh* v. *Hazari Sahu*, (1917) 37 Ind Cas 872 (873): 2 Pat L Jour 130: 1 Pat L W 111: 1917 Pat H C C 105; *Annie Besant* v. *The Advocate-General of the Government of Madras*, (1919) 52 Ind Cas 209 (216): 37 Mad L Jour 139: 17 All L J 925: 23 Cal W N 986: 21 Bom L R 867: 1919 Mad W N 555: 10 Mad L W 451: 20 Cr. L Jour 593: 26 Mad L Tim 408: 1 U P L R (P C) 74: 43 Mad 146: 46 Ind App 176 P C.

(6) *Balakrishna Hari Phansalkar* v. *Emperor*, 1933 Bom 1 (4): 34 Bom L R 1523: 1933 Cr Cas 1: 141 Ind Cas 720 (S B); *Firm Ganesh Das Sankar Lal* v. *Firm Asa Nand Radha Shan*, 1933 Lah 259 (260); *Mt Maharup Kuer* v. *Mahabir Singh*, 1928 Patna 111 (112): 105 Ind Cas 131: 9 Pat L Tim 325; *Raghunath Singh* v. *Hazari Sahu*, (1917) 37 Ind Cas 872 (873): 2 Pat L Jour 130: 1 Pat L W 111: 1917 Pat H C C 105; *Khudabux* v. *Panjo*, 1930 Sind 265 (282): 24 Sind L R 277: 127 Ind Cas 673 F B; *Bajee Koer* v. *Damodar Das*, (1873) 5 N W P H C R 55.

(7) *Madhub Chunder* v. *Sham Chand*, (1877-78) 3 Cal 243 (248, 249).

(7-a) *Ismalji* v. *Macleod*, (1907) 31 Bom 138

Govt. Ind. Act. S. 107, Note 2.

guiding the exercise of such discretion have been thus stated by West, J., in *Shivanathaji* v. *Joma Kashinath*[8] as follows:—

(1) The Court having called up the record or proceedings of a subordinate Court, will itself investigate the facts on which a jurisdiction has been assumed or declined; on which it depends whether the subordinate Court could, or could not, legally deal with the matter in question, either at all, or on the principle to which it has referred the case; or according to which its mode of enquiry, or of action may, or may not, have been in contradiction, rather than obedience, to the rules of procedure, or the principles implied in them, to such a material extent as to defeat the purpose of the law.

(2) If the Court finds that the external conditions of jurisdiction, of investigation and of command have been satisfied by the inferior Court it will not substitute its own appreciation of evidence or its own judgment thereon.[9]

(3) Where an appeal is provided the Court will not interfere by any peremptory order with the ordinary course of adjudication save in cases wherein a defect of the law and a grave wrong are manifest and are irremediable by the regular procedure.

(4) Where a decree or order of a subordinate Court is declared by the law to be for its own purposes final or conclusive, though in its nature provisional, as subject to displacement by the decree in another more formal suit, the Court will have regard to the intention of the legislature that promptness and certainty should in such cases be in some measure accepted instead of judicial perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have plainly been infringed; but where the alleged or apparent error consists in a misappreciation of evidence or misconstruction of the law intrinsic to the enquiry and decision it will respect the intended finality and will intervene peremptorily only when it is manifest that by the ordinary and prescribed method an adequate remedy or the intended remedy cannot be had.

(5) The Court will, in all cases regard its exercise of the extraordinary jurisdiction as *discretional* and subject to considerations of the importance of the particular case or of the principle involved in it, of delay on the part of an applicant and of his merits with respect to the case in which the interference is sought.

(6) The Court will sedulously abstain from making any order or refusing to make it on grounds the appreciation of which is exclusively assigned by law to some other authority provided the legal competence be exercised in good faith on matters that may reasonably be understood as within its lawful range.

The following are some of the classes of cases in which, in accordance with the principles set forth above, the High Court will interfere under this section:—

(1) Where the decision of the lower Court is without *jurisdiction* or in excess of its jurisdiction.[10]

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(142): 8 Bom L R 969; *Manmatha Nath Biswas* v. *Emperor*, 1933 Cal 132 (134): 37 Cal W N 201; *Swinhoe* v. *Hera Lal*, (1898) 2 Cal W N 727 (729); *Sreemutty Dossee* v. *Sreenibash*, (1869) 12 Suth W R 74 (74); *Burma Oil Company* v. *Adamji Manmoonji*, 1927 Lah 14 (15): 97 Ind Cas 390: 8 Lah L Jour 578: 27 Pun L R 831; *Chatar Bhuj* v. *Emperor*, 1930 Lah 889 (891): 31 Pun L R 542: 129 Ind Cas 487: 1930 Cr Cas 985.

(8) *Shivanathaji* v. *Joma Kashinath*, (1883) 7 Bom 341 (371, 372): 7 Ind Jur 656 F B.

(9) *Rajah of Mandasa* v. *Jagannayakulu*, 1932 Mad 612 (625): 1932 Mad W N 350: 36 Mad L W 292: 63 Mad L Jour 450: 55 Mad 883: 140 Ind Cas 331 [Per Thiruvenkatachariar, J); *Balkrishna Hari Pansalkar* v. *Emperor*, 1933 Bom 1 (7): 34 Bom L R 1523: 1933 Cr. Cas 1: 141 Ind Cas 720 [Superintendence is not the same thing as hearing an appeal]; Petition of *Pearee Lal Sahoo*, 7 Suth W R 130 (131).

(10) *Elahee Buksh* v. *Hajoo*, (1870) 14 Suth W R 33 (33): 5 Beng L R App 75; *Rooknee Roy* v. *Amrit Lal*, (1870) 14 Suth W R 254 (254); *Maharajah of Burdwan* v. *Heera Lal*, (1869) 11 Suth W R 54 (55): 2 Beng L R (A C) 217; *Pigot* v. *Ali Mahomed*, 1921 Cal 30 (31, 32): 48 Cal 522: 60 Ind Cas 325 S B [Proceedings under S. 145, Cr. P. C., initiated without jurisdiction—High Court has power to pass consequential orders

(2) Where the lower Court has *failed to do its duty*.[11] Thus where the lower Court has refused to frame a material issue[12] or to add a necessary party[13] or attach a property[14] or to proceed with an execution sale,[15] or to confirm the sale[16] which it is bound to do under law, the High Court will interfere. Similarly where the order of the lower Court is hopelessly inadequate in not containing any particulars or a discussion of the evidence[17] the High Court will interfere under this section on the ground that there is a failure of duty.

(3) Where the decision of the lower Court is such that *gave and irreparable harm or loss* would result to the applicant.[18] The High Court can set aside even *interlocutory orders*.[19]

(4) Where the decision of the lower Court amounts to a *denial of the right of fair trial*.[20] In the case cited below it has interfered even with an order passed under the Court's inherent powers.[21]

(5) Where the decision of the lower Court amounts to a *manifest injustice*.[22]

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after setting aside the order]; *Ranee Umasundari*, In the matter of, (1870) 5 Beng L R App 29; *Sham Narain Singh* v. *Basudeo Prasad Singh*, 1930 Pat 277 (278): 11 Pat L Tim 172: 122 Ind Cas 152 [Order not shown to be without jurisdiction or in excess of jurisdiction]; *Showdamanee* v. *Manik Ram*, (1868) 9 Suth W R 386 (387), (Do); *Asrufunnissa* v. *Enaet Hossein*, (1870) 5 Beng L R 316: 13 Suth W R 439, (Do).

(11) *Abdullah* v. *Salaru*, (1895) 18 All 4 (8): 1895 All W N 124 [When in a partnership suit the decree was not passed in accordance with law and form and the decree given could not be executed]; *Mathura Pershad*, In the matter of, (1876) 1 All 296 (297) [Lower Court did not consider whether sufficient grounds were shown for review]; *Khenumkuree* v. *Shurat Soonduree*, (1870) 14 Suth W R 9 (10); *Collector of Bogra* v. *Kristo Indar*, (1869) 2 Beng L R A C 301: 11 Suth W R 191; *Hurdayal* v. *Tirtananda*, (1870) 4 Beng L R App 28: 13 Suth W R 34; *Nassir Jan* v. *Akbur Mozoomdar*, (1870) 7 Beng L R 144: 15 Suth W R 418; *Raghunandan* v. *Cocharne*, (1873) 20 Suth W R 16 (17).

(12) *Sheo Prasad Singh* v. *Sukhu Mahto*, 1923 Pat 518 (519): 4 Pat L Tim 401: 72 Ind Cas 148: 1 Pat L R 89.

(13) *Mula Kutla Ramamurthi* v. *Chillara Baskarrayya*, (1919) 50 Ind Cas 58 (58) Mad: *Abdul Haque* v. *Mahammad Yahya Khan*, (1918) 47 Ind Cas 725 (725) Pat.

(14) *Munohar Paul* v. *Wise*, (1871) 15 Suth W R 246 (247).

(15) *Sardari Sha* v. *Hukum Chand*, (1914) 22 Ind Cas 848 (850): 41 Cal 876: 18 Cal W N 662.

(16 *Girdhari Singh* v. *Hardeo Narain Singh*, (1876) 26 Suth W R 44 (46): 3 Ind App 230: 3 Sar 637: 3 Suth 294 P C.

(17) *Bishun Mohan Sahay* v. *Narayanan Prasad*, 1924 Pat 434 (435): 74 Ind Cas 140.

(18) *Ismalji* v. *Macleod*, (1907) 31 Bom 138 (142): 8 Bom L R 969. But see *Pogose* v. *Catchick*, (1878) 3 Cal 708 (710): 2 Cal L Rep 278; *Firm of Ganesh Das* v. *Firm of Asa Nand*, 1933 Lah 259 (260); *Mrs Tomlinson* v. *Mrs Williams*, 1930 Lah 448 (448): 127 Ind Cas 215; *Sant Ram* v. *Mutual Bank of India*, 1933 Lah 266 (266).

(19) *Gobinda Mohan* v. *Kunja Behary*, (1909) 4 Ind Cas 364 (367): 14 Cal W N 147: 10 Cal L Jour 407; *Amjad Ali* v. *Ali Hussain*, (1909) 6 Ind Cas 574 (576): 15 Cal W N 353: 12 Cal L Jour 519; *Sivaprosad Rau* v. *Tricomdas*, (1915) 27 Ind Cas 917 (918): 42 Cal 926; *Harihar Prasad* v. *Kesho Prasad*, 1922 Pat 598 (599): 3 Pat L Tim 638; *Rameshwar Narain* v. *Rikhnath Koeri*, 5 Pat L Jour 550: 1 Pat L Tim 668: 58 Ind Cas 281; *Ramji Ram* v. *Ramasre Raut*, 1924 Pat 761 (764): 1924 Pat H C C 217: 83 Ind Cas 124 [Order directing local investigation].

(20) *Nilmani Nath Sahi Deo* v. *Pratap Usaf Nath Sahi Deo*, (1919) 49 Ind Cas 389 (390): 1919 Pat H C C 60; *Chandramani Koer* v. *Basdeo Narain Singh*, (1919) 49 Ind Cas 442 (449): 4 Pat L Jour 57; *Bhimnath* v. *Jagannath*, 1925 Pat 674 (676): 1925 Pat H C C 294: 89 Ind Cas 814: 7 Pat L Tim 82; *Kali Rai* v. *Tulsi Rai*, 1926 Pat 207 (208): 4 Pat 723: 93 Ind Cas 932: 7 Pat L Tim 499 [Order refusing to add a party as a co-plaintiff]; *Naurang Ram Sahu* v. *Bhakori Mandar*, (1919) 51 Ind Cas 189 (191): 4 Pat L Jour 277 [Dismissal of suit on failure to amend plaint—No opportunity given to continue the suit with the plaint as it is]; *Mt Maharup Koer* v. *Mahabir Singh*, 1928 Pat 111 (112): 105 Ind Cas 131: 9 Pat L Tim 325.

(21) *Braja Busan* v. *Sris Chandra Tewary*, 47 Ind Cas 719 (723): 1918 Pat 337: 4 Pat L Jour 20 [Order refusing leave to sue a receiver without report therefor].

(22) *Brindaban Chander Choube* v. *Gour Chandra Rai*, (1920) 56 Ind Cas 155 (157): 1 Pat L Tim 467: 1920 Pat H C C 56; *Maharub Koer* v. *Mahabir Singh*, 1928 Pat 111 (112): 105 Ind Cas 131: 9 Pat L Tim 325 [Refusal of temporary injunction—Manifestly wrong]; *Venkatarangabhushanam* v. *Karella Ramaswami*, 1923 Mad 500 (501): 17 Mad L W 375: 1923 Mad W N 244: 45 Mad L Jour 78: 73 Ind Cas 131; *Vithilingam* v. *Ramalingam*, (1917) 38 Ind Cas 133 (134): 6 Mad L W 9: 1917 Mad W N 550; *Hemanta Kumar* v. *Baranagor Jute Factory*, (1914) 24 Ind Cas 313 (316): 19 Cal W N 442: 20 Cal L Jour 441; *Firm of Ganesh Das Sankar Lal* v. *Firm of Asa Nand Radha Shah*, 1933 Lah 259 (260) [Shutting out defendant's evidence manifestly improper and amounting to denial of justice].

The High Court will not generally interfere in the following cases:—

(1) Where the applicant has *other remedies* open to him as for instance by way of appeal[23], review[24] or separate suit.[25]

(2) Where the effect of interference would be tantamount to giving a right of appeal or revision which the applicant is not entitled to under law and which would amount to an *evasion of the law*.[26]

(3) Where the error complained of against the lower Court is not one relating to jurisdiction but is a *mere error of law or error of fact* or improper appreciation of evidence.[27]

(4) Where the applicant is *guilty of laches* and delay.[28]

3. **"Over all Courts."**—To attract the operation of this section it must first of all be established that the decision sought to be assailed is that of a *Court* subject to the appellate jurisdiction of the High Court. This section does not entitle the High Court to rectify executive injustice.[1] Thus an order passed by a Magistrate in his *executive* capacity under S. 25, of the Police Act cannot be revised under this section.[2]

4. **Election Courts.**—A subordinate Judge refusing to try an election petition under the Madras District Municipalities Act is not acting as a *Court* but as a *persona designata*, and the High Court cannot set aside such an order, though illegal, under this section.[1] Similarly, the High Court has no jurisdiction to revise an order passed by a Presidency Magistrate in an enquiry held under the rules framed under the Madras City Municipal Act III of 1904, as to the competency or otherwise of a candidate for Municipal selection.[2] A Municipal Commissioner sitting as an election Court under the U.P. Municipalities Act II of 1916 is not also a Court subject to the appellate jurisdiction of the High Court within the meaning of this section.[3]

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(23) *Chandi Roy* v. *Kirpal Roy*, (1909) 10 Ind Cas 308 (309): 15 Cal W N 682; *Empress* v. *Rajoomar*, (1878) 3 Cal 573 (576): 1 Cal L R 352: Ind Jur 24; *Mahtab Singh* v. *Secretary of State for India*, 1933 Lah 157 (158); *Harihar Prasad Singh* v. *Kesho Prasad Singh*, 1922 Pat 598 (599): 3 Pat L Tim 638.

(24) *Kumar Chandra Kishore* v. *Basat Ali*, (1918) 44 Ind Cas 763 (767, 769): 22 Cal W N 627: 27 Cal L Jour 418.

(25) *Madhub Chander Giree* v. *Sham Chand Giree*, (1878) 3 Cal 243 (248, 249); *Mohunt Bhagwant Ramanuj Das* v. *Khettermonidassi*, (1897) 1 Cal W N 617 (623); *Harkishore* v. *Sudoy Chunder*, (1872) 17 Suth W R 80: 8 Beng L R 83; *Hureehur* v. *Nobin Chander*, (1873) 20 Suth W R 202 (202); *Kali Kishore* v. *Wise*, (1872) 17 Suth W R 477 (478); *Khorshed Ali* v. *Chowdhry Wahid Ali*, (1871) 15 Suth W R 170 (170); In the matter of *Miller, A B*, (1870) 4 Beng L R A C 72 Note: 12 Suth W R 103; *Maha Shankar* v. *Vali Bhai*, (1869) 6 Bom H C A C 174.

(26) *Kumar Chandra Kishore* v. *Basat Ali Chowdhury*, (1918) 44 Ind Cas 763 (767): 22 Cal W N 627: 27 Cal L Jour 418; *Narayanabhai* v. *Ganga Krishna*, (1867) 4 Bom H C A C 87; *Gobindanath* v. *Ram Coomar*, (1868) 9 Suth W R 115 (115); *Dhunpat* v. *Indur Chander*, (1870) 13 Suth W R 121 (121, 122).

(27) *Muhammad Suleman* v. *Fatima*, (1887) 9 All 104 (105, 106): 1886 All W N 309 F B; *Adya Saran* v. *Jagannath*, 1924 All 561 (563); *Tej Ram* v. *Harsukh*, (1876) 1 All 101 (104, 105); In the matter of the petition of *Madho Ram*, (1899) 21 All 181 (183): 1899 All W N 15; *Sarat Chandra* v. *Ram Shashi Roy*, 1923 Cal 45 (47): 36 Cal L Jour 265: 26 Cal W N 1016: 69 Ind Cas 153; *Corporation of Calcutta* v. *Bhupati Roy*, (1899) 26 Cal 74 (76): 3 Cal W N 70; *Mohunt Bhagwant Ramanuj Das* v. *Khettur Moni Dasi*, (1897) 1 Cal W N 617 (623); Petition of *Pearee Lal Sahoo*, (1867) 7 Suth W R 130 (131); *Doorga Sundaree* v. *Kashee Kant*, (1870) 14 Suth W R 212 (213); *Bishnoo Chunder* v. *Shoshee Mohun*, (1874) 22 Suth W R 277 (278); *Raghu Nandan* v. *Mohesh Lal*, (1879) 3 Cal L Rep 137 (139): *Ram Lal Singh* v. *Janki Mahatoon*, (1879) 4 Cal L R 14 (17).

(28) *Bibi Zainab* v. *Paras Nath*, 1924 Pat 37 (38): 2 Pat 800: 4 Pat L Tim 491: 1 Pat L R 361: 75 Ind Cas 430 [Neglect to pay process-fee for notice to auction purchaser in a petition to set aside sale]; *Bhuggobutty* v. *Money*, (1877) 2 Cal L Rep 545 (547); *Radha Mohun* v. *Raj Chunder*, (1874) 22 Suth W R 522 (523); *Juhuran* v. *Mahomed Wajed*, (1872) 12 Suth W R 37 (69). See also *Drobo Moyee* v. *Bipin Nundal*, (1868) 10 Suth W R 6 (6).

Note 3.

(1) *British India Steam Navigation Co* v. *Secretary of State*, (1910) 8 Ind Cas 107 (110): 38 Cal 230: 12 Cal L Jour 505: 15 Cal W N 87.

(2) *Abdul Shakur* v. *Mahadev Prasad*, 1930 Lah 539 (543): 129 Ind Cas 294: 31 Pun L R 725: 1930 Cr Cas 687: 32 Cr L Jour 296.

Note 4.

(1) *Deivanayagam Pillai* v. *Mohideen Rowther*, 1923 Mad 169 (170): 44 Mad L Jour 39: 16 Mad L W 327: 1922 Mad W N 818: 70 Ind Cas 780.

(2) *Vijiaraghavalu* v. *Thiagaraya*, (1915) 25 Ind Cas 345 (347): 38 Mad 581: 27 Mad L Jour 227: 16 Mad L Tim 128.

(3) *Abdul Rahman* v. *Abdul Rahman*, 1925 All 380 (382, 383): 23 All L J 385: 6 L R A (Civ) 191: 87 Ind Cas 51: 47 All 513 F B.

Govt. Ind. Act, S. 107, Notes 5—7.

5. **Rent controller.**—It has been held by the High Court of Calcutta[1] that the Controller and the President in discharging their duties under Ss. 15 and 17 respectively of the Calcutta Rent Act 1920, act as Civil Courts, and are subject to the appellate and consequently the superintending jurisdiction of the High Court. The High Court of Rangoon[2] has, on the other hand, held that the controller under the Rangoon Rent Act 1920, is not acting as a Court, and the High Court has no power of superintendance over him. It has further held that the Chief Judge of the Rangoon Small Cause Court, when exercising his powers in references under S. 18 of the Rangoon Rent Act, does not act as a Court but only as a *persona designata* and is therefore not subject to the appellate or revisional jurisdiction of the High Court under this section.[3]

6. **Land acquisition proceedings.**—A Collector, refusing to refer a matter to the Court under S. 18 of the Land Acquisition Act[1] or making an award under S. 11 of that Act[2] does not act as a Court and is not subject to the appellate jurisdiction of the High Court. The High Court has therefore no power of superintendence in such cases.

It has been held by the High Court of Calcutta in the undermentioned case[3] that the Calcutta Improvement Trust Tribunal acting under S. 32 of the Land Acquisition Act, is a Court subject to the revisional jurisdiction of the High Court under S. 115 of the Code of Civil Procedure as also under this section. The High Court of Bombay[4] has held that the *District Court* acting under S. 198 of the Bombay City Municipalities Act 1925 and exercising its powers in Land Acquisition proceedings is subject to the appellate and superintending jurisdiction of the High Court.

7. **Subject to its appellate jurisdiction.**—In order that the present section may apply, it is essential that the decision sought to be revised should be that of a Court *subject to the appellate jurisdiction of the High Court.*[1] The two things necessary to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter.[2] It is not however necessary that the particular decision sought to be set aside under this section should be appealable to the High Court.[3] The words "subject to its appellate jurisdiction" do not mean subject to appellate jurisdiction in that particular matter, for revision, would not be necessary if appeal lay, but that the Court is normally subject to its appellate jurisdiction or even in certain specific cases only.[4]

The following have been held to be Courts subject to the appellate jurisdiction of the High Court.

Note 5.

(1) *Allen Brothers & Co.* v. *Bando & Co*, 1923 Cal 169 (175, 176): 49 Cal 931: 26 Cal W N 845: 70 Ind Cas 371; *Abdul Buq* v. *Mohamaddin*, 1923 Cal 311 (312): 67 Ind Cas 302.

(2) *K A M Mohideen* v. *Bukshi Ram*, 1926 Rang 33 (41): 3 Rang 410: 91 Ind Cas 627 F B.

(3) *H A Aziz* v. *Kilyoboy*, 1927 *Rang* 1 (3): 4 Rang 304: 5 Bur L Jour 117: 98 Ind Cas 902 F B.

Note 6.

(1) *Abdul Sattar* v. *Special Deputy Collector*, 1924 Mad 442 (446): 46 Mad L Jour 209: 19 Mad L W 445: 34 Mad L Tim 18: 1924 Mad W N 224: 47 Mad 357: 84 Ind Cas 616 [Overruling 49 Ind Cas 659]; *Balkrishna* v. *The Collector of Bombay Suburban*, 1923 Bom 290 (292, 293): 25 Bom L R 398: 73 Ind Cas 354: 47 Bom 699.

(2) *British India Steam Navigation Co* v. *Secretary of State*, (1910) 8 Ind Cas 107 (110): 38 Cal 230: 12 Cal L Jour 505: 15 Cal W N 87; *Ezra* v. *Secretary of State*, (1905) 32 Cal 605 (629): 32 Ind App 93: 9 Cal W N 454: 2 All L J 771: 7 Bom L R 422: 1 Cal L Jour 227: 8 Sar 779 P C [Proceedings of Collector in making an award are administrative and not judicial].

(3) *Adhar Kumar Mitra* v. *Radha Madan Mohan Jir*, 1932 Cal 660 (661): 36 Cal W N 370: 139 Ind Cas 180.

(4) *Municipality of Sholapur* v. *Tuljaram Krishnasa Chavan*, 1931 Bom 582 (586): 33 Bom L R 1067: 55 Bom 544: 134 Ind Cas 1240.

Note 7.

(1) *Darbari* v. *Bhati Roy*, 41 Cal 915: 19 Cal L Jour 294: 18 Cal W N 575: 23 Ind Cas 883.

(2) In re *Palanikumara Chinnayya*, 1922 Mad 337 (338): 66 Ind Cas 566: 41 Mad L Jour 577: 14 Mad L W 548: 1921 Mad W N 757.

(3) *Sheonandan* v. *King Emperor*, (1918) 46 Ind Cas 977: 3 Pat L Jour 581: 1919 Pat H C C 1: 5 Pat L W 324; In the matter of *Abdul Ali*, (1875) 15 Beng L R 197; *Balakrishna Hari* v. *Emperor*, 1933 Bom 1 (4): 34 Bom L R 1523: 1933 Cr Cas 1: 141 Ind Cas 720; *Queen Empress* v. *Edwards*, (1885) 9 Bom 333 (343). ["Appellate jurisdiction" includes superintending power of transfer].

(4) *Municipailty of Sholapur* v. *Tuljaram Krishna Chavan*, 1931 Bom 582 (587): 33 Bom L R 1067: 55 Bom 544: 134 Ind Cas 1240.

(1) The special Court acting under the Emergency Ordinance 2 of 1932,[5] or the special Magistrate acting under the Bengal Emergency Ordinance 1931.[6]

(2) The special Judge proceeding under S. 108 of the Bengal Tenancy Act.[7]

(3) The Court of the Recorder of Moulmein established under Act XXI of 1863.[8]

The following have been held not to be subject to the appellate jurisdiction of the High Court within the meaning of this section.

(1) The Board of Revenue acting under S. 172 of the Madras Estates Land Act[9] or a Revenue Officer when making a settlement of rents under Chapter 11 of that Act.[10]

(2) A Revenue Divisional Officer acting under S. 7 of the Madras Hereditary Village Officers Act III of 1895.[11]

(3) The Court of a Revenue Divisional Officer in a proceeding for settlement of fair rent under S. 85 of the Chota Nagpur Tenancy Act, 1908.[12]

(4) A Judge of the High Court making an order in the exercise of Original Criminal Jurisdiction.[13]

8. **Agency Commissioner.**—A Commissioner acting under the Ganjam and Vizagapatam Agency Act,[1] and the Mewas Agent in the Bombay Presidency[2] are Courts subject to the appellate jurisdiction of the High Court.

9. **Commissioner acting under the Defence of India Act.**—The special tribunals created under the Defence of India Act 1915 are by the very Act which created them subject to no appellate jurisdiction whatever and the High Court cannot therefore exercise any superintendence under this section over such Courts.[1]

10. **Proceedings under the Legal Practitioners Act.**—Proceedings under S. 36 of the Legal Practitioners Act are judicial proceedings of a Court subject to the appellate jurisdiction of the High Court and can be revised under this section where such proceedings are not in conformity with the requirements of S. 36.[1] But the mere fact that the order of the District Judge is against the weight of evidence or is erroneous in law cannot afford a ground for interference under this section.[2]

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(5) *Balakrishna* v. *Emperor*, 1933 Bom 1 (4): 34 Bom L R 1523: 1933 Cr Cas 1: 141 Ind Cas 720.

(6) *Manmatha Nath Biswas* v. *Emperor*, 1933 Cal 132 (135, 136): 37 Cal W N 201: 142 Ind Cas 280.

(7) *Kumar Gokul Chandra Law* v. *Matilal Ghose*, 1931 Cal 553 (555): 35 Cal W N 336: 58 Cal 1013: 134 Ind Cas 889.

(8) *Thompson, In the matter of*, (1870) 6 Beng L R 180: 14 Suth W R 257.

(9) *Rajah of Mandasa* v. *Senapathi Jagannayakalu*, 1932 Mad 612 (639, 640): 1932 Mad W N 350: 36 Mad L W 292: 63 Mad L Jour 450: 55 Mad 883: 140 Ind Cas 331 F B; *Raghunada Patro* v. *Govinda Patro*, 1928 Mad 1032 (1039): 55 Mad L Jour 798.

(10) *Rajah of Mandasa* v. *Senapathi Jagannayakalu*, 1932 Mad 612 (639, 640): 1932 Mad W N 350: 36 Mad L W 292: 63 Mad L Jour 450: 55 Mad 883: 140 Ind Cas 331 F B.

(11) In re *Palanikumara Chinnayya*, 1922 Mad 337 (338, 341): 66 Ind Cas 566: 41 Mad L Jour 577: 14 Mad L W 548: 1921 Mad W N 757.

(12) *Umacharan* v. *Midnapur Zamindary Co*, 19 Cal L Jour 300: 23 Ind Cas 896: 18 Cal W N 782.

(13) *Ameer Khan, In the matter of*, (1871) 15 Suth W R Cr 60 (61): 7 Beng L R 250 Note.

Note 8.

(1) *Ramachandra Das* v. *Sri Rajah Chetrucherla Ganga Raju*, 1923 Mad 604 (604): 17 Mad L W 517: 45 Mad L Jour 8: 32 Mad L Tim 269: 1923 Mad W N 277: 72 Ind Cas 745: 46 Mad 726; *Maharaja of Jeypore* v. *Papayamma*, (1900) 23 Mad 329 (349).

(2) *Pestonji & Co* v. *Collector, West Khandesh*, 1927 Bom 272 (274): 29 Bom L R 361: 51 Bom 416: 101 Ind Cas 582.

Note 9.

(1) *Sheo Nandan Prasad Singh* v. *Emperor*, (1918) 46 Ind Cas 977 (983, 984): 3 Pat L Jour 581: 1919 Pat H C C 1: 5 Pat L W 324, F B; *Parmeshwar* v. *Emperor*, (1918) 44 Ind Cas 185 (200, 201, 203): 3 Pat L Jour 537: 4 Pat L W 157: 1918 Pat H C C 97 F B.

Note 10.

(1) *Maghanbai Nathabhai* v. *Dinkarao N Desai*, 1932 Bom 596 (597): 34 Bom L R 1281: 140 Ind Cas 553: 56 Bom 577: 34 Cr L Jour 47: 1932 Cr Cas 864; *Siddeshwar, In re*, (1899) 4 Cal W N 36 (38); *Kapoor Chand Jain* v. *Emperor*, 1930 All 641 (642): 1930 All L J 961: 128 Ind Cas 387: 32 Cr L Jour 140: 1930 Cr Cas 967 [Following 1924 All 69].

(2) *Kashinath* v. *King Emperor*, 1924 All 69 (69): 45 All 676: 21 All L J 671: 4 L R A Civ 317: 79 Ind Cas 693; *Madho Ram, In re*, (1899) 21 All 181 (183): 1899 All W N 15; *Chatar Bhuj* v. *Emperor*, 1930 Lah 889 (891): 31 Pun L R 542: 129 Ind Cas 487: 1930 Cr. Cas 985.

Govt. Ind. Act, S. 107, Notes 10—11.

The High Court of Lahore[3] has held that it can in the exercise of its general powers of superintendence send for the records of a proceeding under S. 14 of the Legal Practitioners Act and direct a transfer of the proceedings to another Court. The High Court of Patna has, on the other hand taken a contrary view in the case cited below[4] and refused to order a transfer.

11. Criminal proceedings.—As has been seen in Note 2, *ante*, the power of superintendence under this section can be exercised in Civil as well as Criminal proceedings. Thus the High Court can direct a Sessions Judge to rehear an appeal after taking additional evidence, on the ground that there is a failure of duty.[1]

The High Court has exercised its powers of superintendence in the following cases:—

(1) Order dismissing a complaint under S. 203, Criminal Procedure Code.[2]

(2) Order reviving a complaint after discharge.[3]

(3) Order refusing[4] or granting[5] sanction to prosecute.

(4) Order under S. 435 of the Criminal Procedure Code.[6]

(5) Order under S. 476 of the Criminal Procedure Code.[7]

(6) Order of a panchayat Court under Madras Panchayat Courts Act II of 1920.[8]

(7) Conviction by the Union Bench under the Bengal Village Self-Government Act, V of 1919.[9]

(8) Conviction under the Bengal Emergency Ordinance 1931.[10]

Prior to the amendment of the Code of Criminal Procedure in 1923, orders under Ss. 143 and 144 thereof and proceedings under Chapter XII (*viz.* S. 145 to 148) were excluded from the revisional jurisdiction of the High Court by virtue of S. 435, Cl. 3. Consequently the High Courts resorted to their powers under this section whenever such proceedings were in excess of the jurisdiction of the subordinate Magistrates[11] or amounted to an abuse of their powers or resulted in something akin to the denial of the right of fair trial.[12] Under the Amending Act XVIII of 1923, Cl. 3 has been omitted in S. 435 and the bar to the revisional jurisdiction of the High Court has thus been removed. But still the High Court can exercise its extraordinary powers under this section as for instance where an order under S. 144 amounts to an abuse of the process of law.[13]

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(3) *Lakshmi Narain* v. *Mt Ratni*, 1926 Lah 199 (200): 93 Ind Cas 700: 27 Pun L R 225: 27 Cr L Jour 476.

(4) *Janak Kishore*, In re, (1917) 37 Ind Cas 484 (486): 1 Pat L Jour 576: 1917 Pat H C C 60 [Held proceedings under S. 14 are administrative and disciplinary and not civil].

Note 11.

(1) *Zamiruddin* v. *Emperor*, (1918) 47 Ind Cas 274 (275): 3 Pat L Jour 632.

(2) *Gangu Reddi* v. *Samarapathy Mudali*, (1913) 21 Ind Cas 681: 38 Mad 512: 25 Mad L Jour 510; *Charoobala* v. *Barendra Nath*, (1900) 27 Cal 126 (130): 3 Cal W N 601. But see *Protap Singh* v. *Khan Mahomed*, (1909) 3 Ind Cas 861 (861): 36 Cal 994: 13 Cal W N 1221: 11 Cal L Jour 50 [Order of discharge can be interfered only under S. 439, Cr P C]; *Poona Charan*, In the matter of, (1881) 7 Cal 447 (451, 452).

(3) *Opporba Kumar* v. *Probod Kumari*, (1896) 1 Cal W N 49 (51).

(4) *Nando Lal* v. *Mitter*, (1899) 26 Cal 852 (858): 3 Cal W N 539.

(5) *Saligram* v. *Ramji Lal*, (1906) 28 All 554 (563): 3 All L J 394: 1906 All W N 103: 1 Mad L Tim 219.

(6) *Hurballabh* v. *Luchmeswar*, (1899) 26 Cal 188 (193): 3 Cal W N 49.

(7) *Purna Chandra Dutta* v. *Sheikh Dhalu*, 1930 Cal 721 (722): 52 Cal L Jour 87: 34 Cal W N 914: 129 Ind Cas 561: 1930 Cr Cas 1129; *Raj Kunwar Singh* v. *Emperor*, 1921 All 365 (366): 43 All 180: 60 Ind Cas 428: 18 All L J 1011; *Har Prasad Dass* v. *Emperor*, (1913) 19 Ind Cas 197 (204): 40 Cal 477: 17 Cal W N 647: 17 Cal L Jour 245 F B; *Jagannath Charya Ghoswami* v. *Rajagopalachari*, 1931 Pat 411 (413, 416): 12 Pat L Tim 671: 1931 Cr Cas 999: 33 Cr L Jour 147: 135 Ind Cas 513 [Order staying proceedings under S. 476—Can be revised if made without jurisdiction]; *Faujdar Rai* v. *Emperor*, 1926 Pat 25 (25, 26): 26 Cr L Jour 1565: 90 Ind Cas 445: 7 Pat L Tim 199.

(8) *Munigadu* v. *Emperor*, 1925 Mad 1144 (1144): 1925 Mad W N 600: 26 Cr L Jour 1161: 88 Ind Cas 521.

(9) *Yasin Moral* v. *Isaf Khan*, 1932 Cal 867 (867): 59 Cal 1080: 1932 Cr Cas 891: 34 Cr L Jour 111: 140 Ind Cas 873.

(10) *Manmatha Nath* v. *Emperor*, 1933 Cal 132 (136): 37 Cal W N 201: 1933 Cr Cas 193: 142 Ind Cas 280 [Conviction under the Bengal Emergency Ordinance, 1931, set aside as resting upon no foundation in evidence]; *Balkrishna* v. *Emperor*, 1933 Bom 1 (7): 34 Bom L R 1523: 1933 Cr Cas 1: 141 Ind Cas 720: 34 Cr L Jour 199 [Conviction under Emergency Ordinance, II of 1932—Held High Court has power to revise under S. 10—But held conviction not illegal].

(11) *Ponnappa* v. *Vanamamalai*, (1919) 58 Ind Cas 483 (484): 10 Mad L W 480: 1919 Mad W N 872; *Thaylyee* v. *Srirangaroya*, 1928 Mad 60 (62): 1922 Mad W N 629: 16 Mad L W 497: 43 Mad L Jour 624: 31 Mad L Tim 202: 71 Ind Cas 228; *Kamal Kutty* v. *Udayavaruma*, (1912) 17 Ind Cas 65 (69): 36 Mad 275: 12 Mad L Tim 429: 23 Mad L Jour 499: 1912 Mad W N 1154; *Shukunathi* v. *Gulam Moideen*, 1923 Mad 24 (25): 16 Mad L W 335: 1922 Mad W N 689: 71 Ind Cas 508 [Order under S 145—No finding as to possession—Order set aside]; *Pigot* v. *Ali Mahammad*, 1921 Cal 30 (31, 32): 48 Cal 522: 60 Ind Cas 325; *Laldhari* v. *Sukhdeo Narain*, (1900) 27 Cal 892 (918):

12. **Power to expunge from record.**—The High Court has power under this section to delete irrelevant matter in the judgment of the lower Court.[1] Thus where a Magistrate found on a discussion of the evidence that the case for the prosecution was false, and went on to remark that his own impression was that the case was true, the High Court ordered the remark to be expunged from the judgment.[2]

13. **Difference of opinion among Judges.**—Where the Judges constituting a Bench which heard an application under this section differed in their opinion the order of the Senior Judge under Cl. '36 of the Letters Patent before the amendment thereof in 1928, was held to prevail.[1] As to the effect of the amendment, *see* Note 12 to S. 98.

14. **Power of superintendence—If can be exercised by Judge sitting in the Insolvency or Original Side of the High Court.**—A single Judge of the High Court exercising Insolvency Jurisdiction has no power under this section to stay insolvency proceedings pending before the District Judge in the moffussil.[1] For such a power *see* S. 18-A of the Presidency Towns Insolvency Act. The power of superintendence and revision stand on the same footing and is exercised by the High Court in its *appellate* and not in its *original* jurisdiction.[2] Hence a Judge acting in the exercise of his *original jurisdiction* has no power to stay the hearing of a suit pending before a subordinate Judge in the moffussil.

15. **Power to transfer—Cl. (b).**—The High Court has power to transfer a case pending on the file of a Court subject to its appellate jurisdiction to any other Court of equal or superior jurisdiction.[1] Thus, the High Court can transfer a case pending on the file of the Agency Commissioner in the Madras Presidency or the Mewas agent in the Bombay Presidency. But according to the High Court of Madras[1-a] the transfer cannot be made to the District Court as that Court is not of equal or superior jurisdiction but should be

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4 Cal W N 613; *Daulat Koer* v. *Kameshwari Koeri*, (1899) 26 Cal 625 (629): 3 Cal W N 461; In re *Chunder Nath Sen*, (1876) 2 Cal 293 (295): 1 Ind Jur 841; *Kulada Kinkar* v. *Danesh Mir*, (1906) 33 Cal 33 (45): 10 Cal W N 257: 2 Cal L Jour 271; *Parmeshwar Singh* v. *Kailasapati*, (1916) 35 Ind Cas 801 (803, 805): 1 Pat L Jour 336: 1 Pat L W 95: 1917 Pat H C C 1; *Sundar Nath* v. *Emperor*, (1918) 44 Ind Cas 673 (673): 40 All 364: 16 All L J 189; *Matukdhari* v. *Jaisari*, (1917) 41 Ind Cas 652 (655): 39 All 612: 15 All L J 526. But see *Sakhawat Ali* v. *Emperor*, (1919) 51 Ind Cas 337 (339): 41 All 302: 17 All L J 321 [Held High Court cannot revise under this section]; *Jhingai Singh* v. *Ram Partap*, 1 Ind Cas 762 (763): 31 All 150: 6 All L J 113, (Do); *Mutsaddilal* v. *Tarif*, (1917) 38 Ind Cas 978 (979): 18 Cr L Jour 418, (Do).

(12) *Shebalak Singh* v. *Kamruddin Mandal*, 1922 Pat 435 (438): 2 Pat 94: 1 Pat L R Cr 2. 1922 Pat L C C 241: 3 Pat L Tim 573: 68 Ind Cas 149: 4 U P L R (Pat) 57 F B; *Aran Sardar* v. *Hara Sundar Mazumdar*, 1923 Cal 95 (96): 27 Cal W N 171: 37 Cal L Jour 39: 71 Ind Cas 225; *Govinda Chetty* v. *Perumal Chetty*, (1913) 21 Ind Cas 381 (382): 25 Mad L Jour 370.

(13) *Vedappan Servai* v. *Periannam Servai*, 1928 Mad 1108 (1109): 28 Mad L W 506: 1928 Mad W N 779: 52 Mad 69: 55 Mad L Jour 621: 1 Mad Cr Cas 304: 113 Ind Cas 279.

Note 12.

(1) *Birnarayan* v. *King Emperor*, 1922 Pat 97 (100): 3 Pat L Tim 239: 67 Ind Cas 195; *V Krishnaswami Ayyangar*, In re, (1918) 47 Ind Cas 981 (981, 982): 35 Mad L Jour 368 [Per Abdur Rahim, J—Oldfield, J, dissenting]; *Dandayudapani* v. *District Munsif of Kallakurichi*, 1925 Mad 402 (402): 78 Ind Cas 6 [High Court cannot expunge matter at the instance of third parties].

(2) *Bir Narayan Singh* v. *King Emperor*, 1922 Pat 97 (100): 3 Pat L Tim 239: 67 Ind Cas 195: 23 Cr L Jour 371.

Note 13.

(1) *Moniram* v. *Mrijan*, (1919) 54 Ind Cas 169 (171, 172): 47 Cal 438: 24 Cal W N 97: 21 Cal L Jour 183; *India Iron and Steel Co* v. *Bunso Gopal*, (1921) 59 Ind Cas 403 (411): 32 Cal L Jour 54.

Note 14.

(1) *Sasoon and Sons, Ltd* v. *Gasto Behari De*, 1927 Cal 629 (631): 31 Cal W N 847: 103 Ind Cas 754.

(2) *Chinna Pillai* v. *Sellappa*, (1913) 20 Ind Cas 633 (634): 1913 Mad W N 595.

(3) *Narayan* v. *Jankibai*, (1915) 30 Ind Cas 560 (562): 39 Bom 604: 17 Bom L R 655.

Note 15.

(1) *Lolit Mohun Moitra* v. *Surja Kanta*, (1901) 28 Cal 709 (711): 5 Cal W N 749.

(1-a) *Maharajah of Jeypore* v. *Chetrucherla Ganguraju*, 1923 Mad 604 (606): 17 Mad L W 517: 45 Mad L Jour 8: 32 Mad L Tim 269: 1923 Mad W N 277: 72 Ind Cas 745: 46 Mad 726 [Distinguishing 23 Mad 329 which was a case decided under the old Agency Rules].

made only to the High Court; whereas, according to the High Court of Bombay the transfer can be made to the District Court.[2]

The High Court can exercise its powers of transfer under this section even where an application has been made to the District Judge under S. 24 of the Code of Civil Procedure and he has refused it.[3]

16. **Power to punish contempt of Court's authority.**—The Chartered High Courts in India are superior *Courts of Record* and have the power to punish in a summary manner either by fine or imprisonment or by both any contempt of their authority. The contempt of Court is not punishable as an offence under the Indian Penal Code or the Code of Criminal Procedure but is an offence punishable under the common law of England; and the High Courts in India have, as has been seen in Note 2 above, inherited the power from the old Supreme Courts which were invested with, and exercised the powers of the Court of the King's Bench in England.[1]

Prior to the passing of the Contempt of Courts Act, XII of 1926, there was a conflict of judicial opinion as to whether the High Court had power to punish a contempt not of itself but of the subordinate Courts.

In *Governor of Bengal* v. *Moti Lal*, (I. L. R. 41 Cal. 173), the High Court of Calcutta held that the common law jurisdiction of the High Court to punish contempt did not extend to punishing a contempt of the subordinate Court. In re *Venkat Rao*, (21 Mad L. Jour. 832), the High Court of Madras on the other hand, held that the High Court had power to punish such a contempt under its common law jurisdiction though not under S. 15 of the Charter Act. In *Emperor* v. *Balkrishna*, (1922 Bom. 52), the High Court of Bombay held that where a certain publication in connection with the proceedings of a subordinate Court had the effect of impeding the administration of justice it amounted to a *contempt of the High Court* and that it could punish such contempt under its superintending powers under this section. The High Court of Allahabad has also held that it has, as a Court of Record, jurisdiction to punish acts of contempt committed against Courts subordinate to itself.[1-a] The conflict has now been set at rest by the aforementioned Act XII of 1926 which empowers the High Court specifically to punish a contempt of the subordinate Court where such contempt does not amount to an offence punishable under the Indian Penal Code. The Act besides defining and fixing a limit as to the punishment to be imposed in such cases, also empowers the *Chief Courts* (which do not possess any common law powers of the Court of the King's Bench in England as the High Courts do) to punish a contempt of its authority. *See also* the cases cited below.[2]

17. **Power to issue writ of certiorari.**—"The writ of *certiorari* is the process by which the King's Bench Division in the exercise of its superintending power over inferior jurisdictions requires the Judge or such officers of such jurisdictions to certify or send proceedings before them into the King's Bench Division whether for the purpose of examining into the legality of such proceedings or for giving fuller or more satisfactory effect to them than could be done by the Court below".[1] The jurisdiction of the High Courts in India to issue such writs, as already noticed in Note 2, *ante*, is derived from the Supreme Courts which had and exercised the jurisdiction and powers of the Court of the King's Bench in England. Being a power derived from the English common law, the High Courts in India should be guided by the principles laid down by the English

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(2) *Pestonji & Co* v. *Collector, West Khandesh*, 1927 Bom 272 (276, 278): 29 Bom L R 361: 51 Bom 416: 101 Ind Cas 582.

(3) *Saroj Bashini* v. *Girija Prosad*, 1926 Cal 326 (327): 87 Ind Cas 170. See also *Nilmoni* v. *Taranath Mukerjee*, (1883) 9 Cal 295 (300): 9 Ind App 174: 4 Sar 392: 12 Cal L Rep 361: 6 Ind Jur 547: 5 Shome L R 130 P C.

Note 16.

(1) *Surendranath* v. *Chief Justice*, (1884) 10 Cal 109 (131, 132): 10 Ind App 171: 4 Sar 474 P C; *Satish Chandra* v. *Ram Doyal*, 1921 Cal 1 (6): 48 Cal 388: 24 Cal W N 982: 32 Cal L Jour 94: 59 Ind Cas 143.

(1-a) *Hadi Husain* v. *Nasiruddin Haider*, 1926 All 623 (627): 24 All L J 849: 97 Ind Cas 108: 48 All 711.

(2) *Tushar Kanti Ghose* v. *The Governor of Bengal in Council*, 1933 Cal 118 (120): 1933 Cr Cas 134: 37 Cal W N 276 [Case under Act XII of 1926].

Note 17.

(1) Short and Mellor's Crown Practice also cited in *Venkatrathnam* v. *Secretary of State*, 1930 Mad 896 (897): 32 Mad L W 475: 60 Mad L Jour 25: 128 Ind Cas 851: 58 Mad 979.

authorities as regards the scope and limitations of their jurisdiction to issue such writs.[2] Such jurisdiction is *original* jurisdiction, but extends over all inferior tribunals amenable to its authority.[3] It, however, applies to the *judicial* acts and not to the *ministerial* acts of such tribunals.[4] The term "judicial does" not mean only acts of *Judges* or *legal tribunals*. "Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench division exercised in these writs."[5] But the High Court has no power to issue the writ against the Governor acting with the minister of public health, for the latter can claim exemption from the jurisdiction of the High Court for any act, counselled or ordered by them in their public capacity under S. 110 of this Act.[6]

The issue of the writ of *certiorari* is in the exercise of the *discretion* of the High Court and the High Court will decline to exercise it in favour of an applicant who "armed with a point either of law or of fact which would oust the jurisdiction of the lower Court has elected to argue a case on its merits before that Court".[7]

18. **Appeal.**—An order of a single Judge of the High Court in the exercise of its powers of superintendence under this section is not appealable to the Privy Council by virtue of S. 111 of the Code of Civil Procedure.[1] Nor is the order appealable under Cl. 15 of the Letters Patent. (*See* commentaries under Cl. 15 of the Letters Patent.)

Exercise of jurisdiction by single Judges or division Courts.

108. (Ch. Act, Ss. 13, 14).—(1) Each High Court, may by its own rules provide as it thinks fit for the exercise, by one or more Judges, or by division Courts constituted by two or more Judges, of the High Court of the original and appellate jurisdiction vested in the Court.

(2) The Chief Justice of each High Court shall determine what Judge in each case is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute the several division Courts.

Synopsis.

1. **Division Court.**
2. **Original jurisdiction—See S. 115.**
3. **Rules.**
4. **Powers of the Chief Justice.**

1. **Division Court.**—The Division Court must consist of at least two Judges of the High Court.[1]

2. **Original jurisdiction.**—*See* S. 115.

3. **Rules.**—This section empowers the High Court to make rules for the exercise of original and appellate jurisdiction by the High Court through its Judges. But this does not enable the High Court to make a rule which is in contravention of the provisions

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(2) *O A O K Lachmanan Chettiar* v. *Commissioner, Corporation of Madras*, 1927 Mad 130 (130): 51 Mad L Jour 742: 24 Mad L W 778: 1926 Mad W N 985: 99 Ind Cas 152: 50 Mad 130.

(3) *Venkataratnam* v. *Secretary of State*, 1930 Mad 896 (902): 32 Mad L W 475: 60 Mad L Jour 25: 128 Ind Cas 851: 53 Mad 979.

(4) *Dasi Chettiar* v. *Chinnaswami Chettiar*, 1928 Mad 1271 (1271): 28 Mad L W 642: 1928 Mad W N 727: 56 Mad L Jour 162 [President Union Panchayat revising electoral roll and then rejecting nomination—Does not act judicially]; *Frome United Breweries & Co* v. *Bath Justices*, 1926 A C 52 cited in 1930 Mad 896 (897).

(5) *Rex* v. *Electricity Commissioners*, (1924) 1 K.B. 171 cited in 1930 Mad 896 (897) [Per Atkin L J].

(6) *Venkataratnam* v. *Secretary of State*, 1930 Mad 896 (902, 911): 32 Mad L W 475: 60 Mad L Jour 25: 128 Ind Cas 851: 53 Mad 979.

(7) *O A O K Lachmanan Chettiar* v. *Commissioner, Corporation, Madras*, 1927 Mad 130 (131): 51 Mad L Jour 742: 24 Mad L W 778: 1926 Mad W N 985: 99 Ind Cas 152: 50 Mad 130.

Note 18.

(1) *Satya Narayana Rao* v. *Bhashyakarulu Rao*, 1924 Mad 399 (399): 46 Mad 958: 46 Mad L Jour 117: 18 Mad L W 655: 1923 Mad W N 719: 75 Ind Cas 604.

Section 108—Note 1.

(1) *Raghubar Singh* v. *Jethu Mehta*, 1922 Pat 13 (13): 3 Pat L Tim 194: 1922 Pat H C C 88: 65 Ind Cas 675: 1 Pat 384.

Govt. Ind. Act, S. 108, Notes 3—4.

contained in the Letters Patent. Such a rule, if made, is *ultra vires*.[1] Where rules are made delegating powers to the various Judges, the jurisdiction of the latter is fixed and limited by such rules, and any order made by a Judge or Judges in excess of this authority would be void as being without jurisdiction.[2]

4. **Powers of the Chief Justice.**—It is the province and duty of the Chief Justice to determine what Judge or Judges shall decide each case. If two Judges are appointed by him to hear an appeal, no single Judge has jurisdiction to hear it.[1] When a Judge of the High Court chosen to sit in the sessions if taken ill as soon as the case is begun the Chief Justice has power to direct another Judge to preside over the sessions.[2]

S. 109, Note 1.

Power of Governor-General in Council to alter local limits of jurisdiction of High Courts.

109. (28 & 29 Vict., C. 15; Ss. 3, 4, 6.)—(1) The Governor-General in Council may, by order, transfer any territory or place from the jurisdiction of any other of the High Courts, and authorise any High Court to exercise all or any portion of its jurisdiction in any part of British India not included within the limits for which the High Court was established, and also to exercise any such jurisdiction in respect of any British subject for the time being within any part of India outside British India.

(2) The Governor-General in Council shall transmit to the Secretary of State an authentic copy of every order made under this section.

(3) His Majesty may signify, through the Secretary of State in Council, his disallowance of any such order, and such disallowance shall make void and annul the order as from the day on which the Governor-General notifies that he has received intimation of the disallowance, but no act done by any High Court before such notification shall be deemed invalid by reason only of such disallowance.

1. **Legislative changes.**—The words "Any British subject for the time being within" in sub-S. (1) have been substituted for the words "Christian subjects of His Majesty resident in" by S. 1 of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. V, C. 37).

S. 110.

Exemption from jurisdiction of High Court.

110. (13 Geo. III, C. 63, Ss. 15, 17; 21 Geo. III, C. 70, s. 1; 37 Geo. III, C. 142, s. 11; 39 and 40 Geo. III, C. 79 s. 3; 4 Geo. IV, C. 41, s. 7).—(1) The Governor-General, each Governor, Lieutenant-Governor and Chief Commissioner and each of the members of the Executive Council of the Governor-General or of a Governor or Lieutenant-Governor, and a minister appointed under this Act shall not—

Note 3.

(1) *Ma Than* v. *Mg Ba Gyaw*, 1926 Rang 1 (F B): 3 Rang 546: 4 Bur L Jour 185: 93 Ind Cas 124 [R 28 of the appellate rules is *ultra vires* as being inconsistent with Cl 13, Letters Patent].

(2) *Narayan Vithal Sammant* v. *Jankibai Sitaram Sammant*, (1915) 30 Ind Cas 560 (562): 39 Bom 604: 17 Bom L R 655 F B. See also *Peary Mohun Das* v. *Donals Weston*, (   ) 9 Ind Cas 509 (511) Cal [The powers of the Judges of the Indian High Court are governed by the Letters Patent, the Rules of the Court and the orders passed by the Chief Justice under the provisions of the High Courts Act].

Note 4.

(1) *Abdool Sobhan*, In the matter of, (1882) 8 Cal 63 (71): 4 Shome L R 57; *Kunhammad* v. *Emperor*, 1923 Mad 426 (430): 1923 Mad W N 94: 44 Mad L Jour 450: 72 Ind Cas 599: 46 Mad 382 [Criminal appeal disposed of by vacation Judge appointed by Chief Judge subsequent appeal to Division Bench not competent]; *Haladhar Maiti* v. *Choytanna Maiti*, (1903) 30 Cal 588 (592): 7 Cal W N 547 [Chief Justice constituting himself and another judge as a Division Bench can deal with application for revision against order of Small Cause Court].

Emperor v. *Dorabji*, 1927 Bom 161 (162): 29 Bom L R 204: 101 Ind Cas 178: 28 Cr L Jour 402 [Distinguishing 2 Cal W N 481].

See, however, *Empress* v. *Khagendra Nath Banerjee*, (1890) 2 Cal W N 481 (483).

(*a*) be subject to the original jurisdiction of any high Court by reason of anything counselled, ordered or done by any of them in his public capacity only; or

(*b*) be liable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its original jurisdiction; nor

(*c*) be subject to the original criminal jurisdiction of any High Court in respect of any offence not being treason or felony.

(2) The exemption under this section from liability to arrest and imprisonment shall extend also to the Chief Justices and other Judges of the several High Courts.

1. **Legislative changes.**—The following changes have been effected in sub-S. (1) of the present section by Sch. I of the Government of India (Amendment) Act, 1916:—

(1) The words "Lieutenant-Governor and Chief Commissioner" have been newly added.

(2) The words "The Executive Council of the Governor-General or of a Governor or Lieutenant-Governor" have been substituted for the words "their respective Executive Councils".

By the Government of India (Amendment) Act, 1919 (9 & 10 Geo. 5, C., 101) the words "and a minister appointed under this Act" in sub-S. (1) have been newly inserted.

S. 111.

Written order by Governor-General: Justification for act in any Court in India.

111. (21 Geo. III, C. 70, Ss. 2, 3, 4)—The order in writing of the Governor-General in Council for any act shall, in any proceeding, civil or criminal, in any High Court acting in the exercise of its original jurisdiction, be a full justification of the Act, except so far as the order extends to any European British subject; but nothing in this section shall exempt the Governor-General, or any member of his executive Council, or any person acting under their orders, from any proceedings in respect of any such Act before any competent Court in England.

LAW TO BE ADMINISTERED.

S. 112.

Law to be administered in cases of inheritance and succession.

112. (21 Geo. III, C. 70, s. 17; 37 Geo. III, C. 142, s. 13.)—The High Courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, to decide according to the law or custom to which the defendant is subject.

ADDITIONAL HIGH COURTS.

S. 113.

Power to establish additional High Courts.

113. His Majesty may, if he sees fit, by letters patent, establish a High Court of judicature in any territory in British India, whether or not included within the limits of the local jurisdiction of another High Court and confer on any

Govt. Ind. Act, S. 113. High Court so established any such jurisdiction, powers and authority as are vested in or may be conferred on any High Court existing at the commencement of this Act; and, where a High Court is so established in any area included within the limits of the local jurisdiction of another High Court, His Majesty may, by letters patent, alter those limits and make such incidental, consequential and supplemental provisions as may appear to be necessary by reason of the alteration.

ADVOCATE-GENERAL.

S. 114, Note 1.

114. (53 Geo. III, C. 255, s. 111; 21 and 22 Vic., C. 106, s. 29.)—(1) His Majesty may, by warrant under His Royal Sign Manual, appoint an Advocate-General for each of the presidencies of Bengal, Madras and Bombay.

Appointment and powers of Advocate-General.

(2) The Advocate-General for each of those presidencies may take on behalf of His Majesty such proceedings as may be taken by His Majesty's Attorney-General in England.

(3) On the occurrence of a vacancy in the office of Advocate-General or during any absence or deputation of an Advocate-General, the Governor-General in Council, in the case of Bengal, and the local Government in other cases, may appoint a person to act as Advocate-General; and the person so appointed may exercise powers of an Advocate-General until some person has been appointed by His Majesty to the office and has entered on the discharge of his duties, or until the Advocate-General has returned from his absence or deputation, as the case may be, or until the Governor-General in Council or the local Government as the case may be, cancels the acting appointment.

1. **Acting Advocate-General.**—Sub-S. (3) has been newly added by Part III of S. 2 of the Government of India Act, 1919, (9 and 10 Geo. V, C. 101). The acting Advocate-General is entitled to a right of pre-audience over all other Advocates in respect of all business whether of a private nature or on behalf of the Crown.[1]

* * * * * * *

SAVINGS.

S. 131.

131. (1) * * * * *

(2) * * * * *

(3) Nothing in this Act shall effect the power of the Indian Legislature to repeal or alter any of the provisions mentioned in the Fifth Schedule to this Act, or the validity of any previous exercise of this power.

Saving as to certain rights and powers.

Legislative changes.—The words "Indian Legislature" were substituted for the words "Governor-General in Legislative Council" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. V, C. 101).

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Section 114—Note 1.

[1] In re, *Pre-audience of the Acting Advocate-General*, 1932 Bom 71 (74): 33 Bom L R 1500: 136 Ind Cas 793 F B.

[1]THE FIFTH SCHEDULE

Section 131 (3).

Govt. Ind. Act, Sch. v.

PROVISIONS OF THIS ACT WHICH MAY BE REPEALED OR ALTERED BY THE[2] (INDIAN LEGISLATURE).

* * * * * * *

Section.	Subject.
106	.. Jurisdiction, Powers and Authority of High Courts.
108(1)	.. Exercise of jurisdiction of High Court by single judges or division Courts.
109	.. Power of Governor-General in Council to alter local limits of jurisdiction of High Courts etc.,
110	.. Exemption from jurisdiction of High Courts.
111	.. Written order by Governor-General in Council a justification for act in High Court.
112	.. Law to be administered in cases of inheritance, succession, contract and dealing between party and party.
114(2)	.. Powers of Advocate-General.

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[1] This schedule was substituted by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7, Geo. V, C. 37).

[2] These words were substituted for the words "Governor-General in Legislative Council by Part II of Sch. II of the Government of India Act, 1919 (9 & 10, Geo. V, C. 101).

Tit [redacted]

Author [redacted]

Accession No. [redacted] [redacted]

Call No. [redacted] [redacted] [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date
[redacted]	[redacted]		

APPENDIX III

DESPATCH FROM THE SECRETARY OF STATE.

SIR CHARLES WOOD'S DESPATCH ACCOMPANYING FIRST LETTERS PATENT OR CHARTER.

Judicial, No. 24.

INDIA OFFICE,
London, 14*th May*, 1862.

To

HIS EXCELLENCY THE RIGHT HONOURABLE
THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

MY LORD,

I HEREWITH transmit to you the Letters Patent or Charter[1], under the Royal Sign Manual, for the High Court of Judicature to be established in Bengal in accordance with the provisions of the Act 24 and 25, Victoria, Chapter 104, for establishing High Court of Judicature in India, and request that you will take immediate measure for instituting the Court, the first Judges of which, including those appointed under the 3rd section of the Act, are designated in the second clause of the Charter. Those appointed by the Crown will be severally informed by me of their appointments to the Court.

2. This Charter will accomplish the great object which has so long been contemplated, of substituting for the Supreme and Sudder Courts abolished by the Act of High Court of Judicature, possessing the combined powers and authorities of the abolished Courts and exercising jurisdiction both over the Provinces under the Sudder Court and over the Presidency Town which forms the local jurisdiction of the Supreme Court.

3. Before I review the provisions in detail, it is necessary that I should direct your attention to the general scope and main provisions of the Act in question.

4. It abolishes, in the first place (as soon as the Charter shall issue), the Supreme Court and the Court of Sudder Dewany Adawlut. It vests in the High Court (by the last provision of section 9) the powers and authorities of those Courts respectively, except so far as the Crown may by such Charter otherwise direct. And (by the first part of the same section) it invests the High Court with such Civil, Criminal, Admiralty, Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, and all such powers and authority in relation to the administration of justice in the Presidency, as the same Charter may confer. With respect, therefore, to the fusion of the Supreme and Sudder Courts, it appears obvious that the Act itself speaks, and that to assume and effect the same purpose by affirmative declaration in the Charter would be superfluous. It has been, consequently, deemed unnecessary that the Charter should exhibit on the face of it an explicit statement of the powers and jurisdiction to be possessed by the new Court in consequence of the fusion as would have been the proper course if these powers and jurisdiction had been entirely new. Recourse has been had in some places in lieu of such explicit statement to reference to statutory provisions, and in others, to the Charter of the Supreme Court when the object of clearness appeared to require it. But wherever the Charter does not otherwise specify, the High Court will use the powers and administer the jurisprudence appertaining to those Courts respectively to whose authority it now succeeds.

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(1) This Letters Patent, dated the 14th May, 1862, was revoked by further Letters Patent, dated 28th December, 1865.

5. But the Charter is intended positively to declare all such Civil, Criminal and other jurisdictions above specified as the Crown thinks proper by this Charter to confer on it supplementary or additional to its main purpose, namely, the fusion of the aforesaid Courts.

6. Moreover, the words giving authority to confer on the Court such jurisdiction and such powers and authorities for the administration of justice as the Crown may direct, appear very large and such as, in point of fact, invest the Crown with extensive legislative powers, so far as "the administration of justice," within the meaning of the sections, may require. It has been, however, thought best to use this power very sparingly and simply as ancillary to the real purpose of the Act, namely, the establishment of new Courts.

7. Another reason for the form which the present Letters Patent assume, is to be found in the provisions of S. 17 of the Act of last Sessions. By that section power is given to the Crown to recall the Letters Patent establishing the Court at any time within three years after its establishment, and to grant other Letters Patent in their stead. This provision was inserted in the Act, mainly with the view of enabling Her Majesty's Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect Charter by which the jurisdiction and authority of the Court is to be permanently fixed. On this point, I request you will put yourselves in communication with the Judges of the Court, and, at any time previous to the expiration of two years from the date of establishment of the Court, furnish me with any suggestions they make, or any amendments they may propose in the Letters Patent now transmitted, and I shall be glad if, in proposing alterations, the Judges will put their recommendations as nearly as possible in the form in which they wish them to appear in the future Letters Patent.

8. I proceed to notice, in order, such of the provisions of the Charter as appear to me to call for special remark.

Clause 6.

9. By clause 6, power is given to the Chief Justice to appoint the officers of the Court, and to fix their salaries subject, however, in both cases, to the approval and confirmation of the Governor-General in Council. This provision does not refer to the setting of tables of fees, where fees are allowed, which, under S. 15 of the Act, is required to be done by the Court.

10. The Supreme Court exercise an authority entirely independent of the Government in regard to its ministerial officers. The Government, however, has always considered itself at liberty to receive representations from any of the officers of the Sudder or Subordinate Courts who felt themselves aggrieved by the orders of the Judicial Authorities, and to express its opinion on the propriety or otherwise of the proceedings of the Courts in such cases. It will be expedient for you to take the question into your consideration, and, after communication with the Court, to adopt some rule in regard to it, which of course must be uniformly applicable to all the officers of the Court. Constituted as the High Court will be, it will merit all the confidence you can repose in it; but as a question of policy, the extension of the liberty of application to the Government to those who have not hitherto enjoyed it appears to me preferable to taking it away from those who have heretofore been permitted to avail themselves of it, as a mode of obtaining redress against proceedings alleged by the applicants to be unjust and oppressive.

Clauses 7-10.

11. In regard to the admission of Advocates, Vakeels, and Attorneys, the recommendations of the Law Commissioners have been followed. Under the existing practice, the Advocate pleads, and the Attorney acts, for the suitors of the Supreme Court and the Vakeel both pleads and acts for the suitors of the Sudder Court, of which Court the Advocate and Attorney of the supreme Court are *ex-officio* Vakeels. These terms are employed in the Charter simply to express the functions of these several classes of practitioners. The Advocate and Attorney will respectively plead and act in the High Court and the Vakeel will both plead and act in the High Court as he did in the Sudder Court. Any person may apply to be admitted either as an Advocate, or Vakeel, or Attorney under the rules which the

Court is authorized by the Charter to make, and there is nothing in the Charter to prevent the admission of Advocates and Attorneys to be also Vakeels of the High Court, should the Judges consider such a course to be expedient.

12. The provisions in the Act, S. 2, Cl. 4, which declares that Pleader of the Sudder Court, "who shall have been admitted as Pleaders of the High Court," shall be eligible, under certain conditions, to the Bench of the Court, implies that a discretionary power may be exercised as to the admission of the present Pleaders of the Sudder Court to the Bar of the High Court. This enactment will account to you for the omission from the Charter of any provision appointing all the present practitioners of the Supreme and Sudder Courts to the High Court. I conclude, however, that unless, in any special cases, there are strong reasons to the contrary, the Court will admit the whole of the practitioners in the abolished Courts at the date of their abolition, to be the first Advocates, Vakeels, and Attorneys of the High Court.

Clause 10.

13. With reference to the concluding sentence of Clause 10, it is to be observed that the Letters Patent contain no provision reserving to the Attorneys of the present Supreme Court the right of pleading after the issue of this Charter, in the Insolvent Court, as newly regulated by Clause 17. No such provision, however, is necessary, as the Insolvent Court is a separate tribunal not affected by the Act authorising the Letters Patent and will continue a separate Court though, for the future, presided over by a Judge of the High Court. The Attorneys, therefore, will, as heretofore, practise in accordance with the rules of the Insolvent Court itself.

14. By the important provisions contained in the clauses of the Charter, 11 to 38 inclusive, effect is given to the 9th section of the Act, respecting the jurisdictions and powers to be exercised by the High Court.

Civil Jurisdiction, Clause 11.

15. The original civil jurisdiction now exercised by the Supreme Court within the limits of the Presidency Town will henceforth be exercised under the Charter, by the High Court, including in that term (Clause 36 of the Charter) a Judge or Division Court of the High Court, appointed or constituted under the provisions of the 13th section of the Act.

16. As it is very desirable that every suit should be instituted in the Court of the district in which the property forming the subject of dispute is situated, or in which the cause of action has its origin, or in which the defendant resides or carries on business; the jurisdiction hitherto exercised by the Supreme Court (on the ground of constructive inhabitancy or otherwise) over persons and property beyond the local limits of the Presidency Town, but within the limits of the Presidency or Division subject to the authority of the High Court has not been vested in the High Court. The concluding provision of Clause 11 provides that the exercise of the ordinary original civil jurisdiction of the Court shall be confined to the local limits of the Presidency Town, with power, however, to the Court, under Clause 13, to call for and try any suit instituted in any Court subject to its superintendence, when, for reasons to be recorded, it shall think proper to do so.

Clause 12.

[1]Ardaseer Cursetji v. Perozeboye.

17. The terms of Clause 12, defining the original jurisdiction of the High Court as to suits, are nearly similar to those employed in S. 5 of the Code of Civil Procedure (Act VIII of 1859), and are intended to include every description of case over which the Mofussil Courts have jurisdiction. By the 8th section of the 21st George III, C. 70, the Supreme Court is precluded from exercising any jurisdiction in any matter concerning the revenue. Further, a decision[1] of the Judicial Committee of the Privy Council, pronounced in April 1856, ruled against the exercise of the Ecclesiastical jurisdiction of the Supreme Court in matters matrimonial between others than Christians, and even expressed some hesitation as to whether that Court should administer a remedy in such cases on the Civil side. It is one object of the present

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(1) *Ardaseer Cursetji* v. *Perozeboye*, (1865) 6 Moo Ind App 348: 4 Suth W R P C 91: 7 Suth 265: 1 Sar 548: 10 Moo P C 375 P C.

Charter to do away with all such restrictions and limitations, as far as this can be done without trenching on the proper province of legislation. It has, therefore, been sought to invest the High Court, in the exercise of its original civil jurisdiction, with as ample powers in receiving and determining cases of every description, and in applying a remedy to every wrong as are exercised by the Courts not established by Royal Charter, and thus to place the Courts of first instance in the Presidency Towns and in the interior of the country in this respect, as nearly as may be, on the same footing.

18. I shall be glad to be furnished with your opinion, after consultation with the Judges of the Courts, as to the concluding portion of Clause 12, excluding the jurisdiction of the Court in regard to cases falling within the jurisdiction of the Small Cause Court of Calcutta, in which the debt or damage or value of the property sued for does not exceed 100 Rupees. Hitherto, I believe, there has been no tendency to bring into the Supreme Court cases cognizable by the Small Cause Court; but should it appear that under the new system, the time of the High Court is unnecessarily taken up with trying cases which might be instituted in the Small Cause Court, it may become a question for consideration whether the sum, excluding the jurisdiction of the High Court, might not be raised to, say, 300 or 500 Rupees.

19. It has been suggested that the Small Cause Court should be placed on the same footing as a Zillah Court in its subjection to the High Court as a Court of appeal and general superintendence. But I do not consider that it was the purpose of the Act of Parliament of last Session that the Crown, in framing a Charter under it for the High Court, should interfere with the present position and jurisdiction of other and independent Courts. This subject, if desirable, is properly to be attained by legislation. Should you be of opinion that the Small Cause Court ought to be placed in the same relation to the High Court as any other Court subject to its appellate jurisdiction and general control, the measure can be carried into effect by an Act of the Governor-General in Council.

Clause 13.

20. As already observed, the effect of Clause 12 will be to confine the ordinary original civil jurisdiction of the High Court within narrower limits than the Civil jurisdiction exercised by the Supreme Court. By Clause 13, however, the High Court is empowered to call for and to try, as a Court of first instance, any suit which the law requires to be instituted before some other tribunal. By the exercise of the power thus conferred on it, the High Court will be enabled to obviate all reasonable ground of complaint, when it shall deem that any hardship or injustice is likely to result from the compulsory institution in a Zillah Court of a suit which, but for the change in the system, might have been instituted in the Supreme Court.

21. The introduction of the words "whether within or without the Bengal Division of the Presidency of Fort William" in this and in several other clauses, may appear to require explanation. The Court about to be established is called in S. 2 of the Act, 24 and 25 Victoria, C. 104, a Court "for the Bengal Division of the Presidency of Fort William." That title is of course preserved in the Charter. By S. 8, the Supreme and Sudder Courts are abolished and by S. 9 all their jurisdiction, power, and authority, except when otherwise provided are vested in the High Court. But the Supreme Court has various original jurisdictions, extending over the whole of the Presidency of Fort William, and also over some of the Non-Regulation Provinces under the Government of India, and the Sudder Court has various appellate jurisdictions extending over the Bengal Division of the Presidency, and also over the Province of Assam and others, which are not properly parts of the Presidency. The result is, that the High Court "for the Bengal Division," succeeding to the powers of both the Supreme and the Sudder Courts, has, in several respects, jurisdictions in territories not within the Bengal Division. As this is the result of the Act, it might not have been necessary to notice it in the Charter. But for the sake of clearness, and in order to show distinctly that the Charter is meant to apply to these extra local jurisdictions, as well as to the strictly local jurisdiction within the Bengal Division, it has been deemed advisable to introduce these words.

Clauses 14 and 15.

22. Clauses 14 and 15 give effect to the recommendation of the Law Commissioners, that the High Court shall have all the appellate jurisdiction which is now exercised by the Sudder Dewany Adawlut, and a new appellate jurisdiction in civil cases, from the Courts of original jurisdiction, constituted by one or more of its own Judges, except that in the case of a decision which has been passed by a majority of the full number of the Judges of the Court, the appeal shall lie to Her Majesty in Council.

23. It will appear, from a subsequent clause on the Letters Patent, that the proceedings in the High Court in civil cases are to be regulated by the Code of Civil Procedure enacted by the Legislature of India, of which Act XXIII of 1861 forms a part. By S. 23 of the last mentioned Indian Act, provision has been made for a difference of opinion on the hearing of an appeal. A difficulty, however, may occur when two Judges, constituting a Division Court for the trial of cases in the exercise of original jurisdiction, differ as to the judgment to be given. For such a case, the Code of Civil Procedure, which is adapted to Courts of first instance presided over by single Judges only, contain no provision. To call in a third Judge, and to re-try the case, with a view to a judgment from which there may be an appeal to the High Court under Cl. 14 would be productive of unnecessary delay and expense to the parties; and I am of opinion that the Court should make provision for such a contingency, by a rule made under the 13th section of the Act of Parliament, providing either that the judgment shall be in accordance with the opinion of the senior of the Judges constituting the Division Court, or that the final judgment shall be entered *pro forma*, according to such opinion, such judgment being a judgment for the purpose of an appeal against the same, but not for any other purpose.

Clauses 18, 19 and 20.

24. The substantive civil law to be administered by the High Court within the jurisdiction of the Supreme and Sudder Courts, respectively, will, until otherwise provided, continue as at present. This, as I have said, it was no part of the purpose of the Act of Parliament or Charter to effect. And the clauses on which I am now commenting are probably superfluous. But they have been introduced to obviate any apprehension which might have been entertained that in fusing the two Courts together, it was intended to fuse also the law which they have respectively hitherto administered, and thus to make a substantial innovation, not only in the tribunals for administration of the law but of the law itself. I trust, however, that measures may be taken ere long for effecting great improvements in this respect, by enacting for the British possessions in India a body of substantive law, by which all classes shall be governed, and all transactions shall be regulated except in cases to which our Judicatures are required to apply the personal laws of any classes of our Indian subjects.

Clauses 21, 22 and 38.

25. Under Cls. 21, 22, and 38, no change will be effected by the Charter in the administration of criminal justice in the Presidency Town or in respect of persons subject to its criminal jurisdiction, residing in the interior of the country. It appears, however, to Her Majesty's Government that some modification of the existing practice, both at the capital and in the provinces, is necessary and on these points, I shall address you in a separate despatch.

Clause 23.

26. The Sudder Court exercises no original jurisdiction, but by Cl. 23, original criminal jurisdiction, throughout the territories subject to its authority, has been given to the High Court, the principal object being to enable the Judges to hold trials for offences committed out of the Presidency Town, at which from their importance or for other specific cause, it may be expedient that a Judge or Judges of the High Court should preside.

Clauses 24-28.

27. The remaining clauses of the Letters Patent on the subject of the criminal jurisdiction of the High Court do not call for any particular notice. They contain no special provisions respecting the transfer to that Court of the criminal jurisdiction exercised by the Supreme Court over inhabitants of such parts of India as are not comprised within

the local limits of the Letters Patent that having been fully provided for by S. 10 of the Act under the authority of which the High Court is established.

28. As in the case of the Small Cause Court, you will consult the Judges in regard to the relation in which the High Court is to stand to the Magistrates of Calcutta.

Clause 30.

29. Clause 30, respecting the exercise of the jurisdiction by the High Court elsewhere than at its ordinary place of sitting, is a very important provision and one which, I have no doubt, if judiciously carried into effect, will materially tend to the greater efficiency of all the judicatories subject to the superintendence and authority of the High Court. Circumstances may frequently arise when the deputation of a Judge or Judges of the High Court would be a measure of the highest expediency. For such cases the clause under consideration will enable the Government to provide by deputing one or more Judges from the High Court, who would avail themselves of the opportunity thus afforded them of making a searching inquiry into the manner in which the local Courts were performing their duties.

30. With reference to this clause, it has been considered whether the precedence of S. 14 of the Act of Parliament should not be followed and the authority to make the necessary arrangements for exercise of the Court's jurisdiction out of the usual place of sitting vested in the Chief Justice. On the whole, it was thought that acts partaking so much of an administrative character might be more perfectly performed by the Governor-General in Council. But it is scarcely necessary for me to add that Her Majesty's Government entertain full confidence that the Chief Justice will be the authority habitually consulted in the matter.

Clauses 31 and 32.

31. The Supreme Court exercises at present, Admiralty Jurisdiction under its Charter. The Chief Justice has Vice-Admiralty Jurisdiction under the commission of the 19th July, 1822, and all or any of the Judges of the Supreme Court may be appointed Commissioners, under the provisions of 39 and 40, George III, C. 79, S. 25, for the trial and adjudication of prize causes and other maritime questions arising in India. By the present Charter, the whole of these jurisdictions and power will be vested in the High Court, and as in the Act above cited, by the expression "other maritime questions" in general, mention is made of all the jurisdictions conferred as above-mentioned in the clauses of the Charter, providing both for the civil and criminal maritime jurisdiction of the High Court.

Clauses 33 and 34.

32. The clauses respecting testamentary and intestate jurisdiction do not call for any remark.

Clause 35.

33. Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court, as to "matters matrimonial" in general as they now are under the Supreme Court, and this they believe to be effected by Cl. 35 of the Charter. But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce, which the Supreme Court does not possess, in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, established in virtue of 20 and 21 Vic., C. 85, and in regard to which further provisions were made by 22 and 23 Vic., C. 61, and 23 and 24 Vic., C. 144. The Act of Parliament for establishing the High Court, however, does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act, and some of them the Crown clearly could not so import, such for instance as those which prescribe the period of re-marriage, or those which exempt from punishment clergymen refusing to re-marry adulterers. All these are, in truth, matters for Indian legislation and I request that you will immediately take the subject into your consideration and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court in England, one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords.

34. The object of the proviso at the end of Cl. 35 is to obviate any doubt that may possibly arise as to whether, by vesting the High Court with the powers of the Court for Divorce and Matrimonial Causes in England, it was intended to take away from the Courts within the divisions of the Presidency not established by Royal Charter any jurisdiction which they might have in matters Matrimonial, as, for instance, in a suit for alimony between Armenians or Native Christians. With any such jurisdiction it is not intended to interfere.

Clause 36.

35. Clause 36 refers to the powers of single Judges and Division Courts, appointed or constituted under the provisions of the 13th section of the Act. By S. 14 of the Act, the power of determining from time to time what Judge in each case shall sit alone, and what Judges shall constitute Division Courts, is placed in the hands of the Chief Justice. It will be observed that the law does not require that a Judge selected from the Bar shall necessarily form a part of every Division Court, and it will be for the Chief Justice to consider whether, in cases exclusively between Natives, it will not be desirable to follow, as far as possible, the course which has already been resolved upon in regard to the cases under appeal to the Sudder Court at the time of its abolition, and to constitute the Division Court of Judges trained in the country, whose knowledge of the Native language will obviate the expense and delay of translating the proceedings.

Clause 37.

36. Clause 37 is a very important one, and there is little doubt, will prove a very salutary provision. It has, therefore, been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter. It extends to the High Court the Code of Civil Procedure enacted by the Legislature of India for the Court, not established by Royal Charter, and thus accomplishes the object so long contemplated of substituting one simple Code of Procedure for the various systems (corresponding to its common law, equity and admiralty jurisdiction) which have been in operation in the Supreme Court since the date of its establishment.

37. In regard to the rules respecting appeals to the Privy Council the object has been to avoid unnecessary innovation where so much of change, with its necessary inconvenience, is unavoidable. The existing rules which regulate these appeals are, therefore, left in force, with one or two additions only, which experience in the Court of the Judicial Committee has found advisable. For instance, Cl. 40 is introduced, as it had been commonly introduced, of late years in the appeal rules of other dependencies of Great Britain in order to remove all doubts as to the power of the High Court to allow an appeal to the Council from interlocutory judgments.

38. It will, however, be obvious to you that the rules, as now framed, will be liable to the reproach of confusion, and perhaps of uncertainty. They will be compounded of those contained in the Charter and those already in force which will necessitate reference to several documents. You will agree with me that a simple and intelligible Code of Rules, to regulate appeals to the Privy Council from the new High Courts, or rather from the High Courts in general which may be constituted under the Act of Parliament, will be of great advantage to the suitors and the public. I should wish, therefore, that one of the first objects of the Judges, as soon as the amount of labour thrown on them by their new position may allow it, might be to prepare suggestions for such a Code of Rules, which might then be reduced into a complete shape by the authority of the Privy Council at Home.

39. In forwarding the Letters Patent to the Judges of the High Court, you are requested to furnish them with a copy of this despatch. I trust that the Letters Patent taken in connection with the Act for establishing the Court, will be found to contain everything requisite for enabling the Court to proceed at once to the discharge of its important duties. It is possible that omissions may be discovered by the legal authorities in India, which may impede the proper action of the Courts, and should the Judges represent to you that such is the case you will take immediate steps for supplying what is wanting by such legislative measures as you may consider most expedient for remedying the defects brought under your consideration.

40. I cannot conclude this despatch without expressing the deep interest felt by Her Majesty's Government in the success of this important measure. The Crown by its Letters Patent has sanctioned the establishment of a tribunal as the Chief Court of Justice in India, which in the trained learning of the Judges selected from the Bar, and in the knowledge of the language, feelings, and habits of the Natives of that country possessed by the other members of the Court, combines the most material elements of success. And Her Majesty's Government look with confidence to the zealous exertions and cordial co-operation of the Judges to place the administration of Justice in India, under the controlling authority of the Court, in such a state of efficiency as will render it in every respect adequate to its ends, and satisfactory to the people and to the Government.

I have the honour to be,
My Lord,
Your Lordship's most obedient humble Servant,
(Signed) C. WOOD.

LETTERS PATENT [CALCUTTA, MADRAS AND BOMBAY].

CONTENTS.

CLAUSES.

1. Revocation of Letters Patent of 1862.
2. High Court at Madras to be continued.
3. Judges of the said High Court to be continued.
4. Clerks, etc., of the said High Court to be continued.
5. Declaration to be made by Judges.
6. Seal.
7. Writs, etc., to issue in name of the Crown and under Seal.
8. Appointment of officers.

Admission of Advocates, Vakeels and Attorneys.

9. Powers of High Court in admitting Advocates, Vakeels and Attorneys.
10. In making rules for the qualifications, etc., of Advocates, Vakeels and Attorneys.

Civil Jurisdiction of the High Court.

11. Local limits of the ordinary original jurisdiction of the High Court.
12. Original jurisdiction as to suits
13. Extraordinary original civil jurisdiction.
14. Joinder of several causes of action.
15. Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.
16. Appeal from Courts in the Provinces.
17. Jurisdiction as to infants and lunatics.
18. Provision with respect to the Insolvency Court.

Law to be administered by the High Court.

19. By the High Court in the exercise of ordinary original civil jurisdiction.
20. In the exercise of extraordinary original civil jurisdiction.
21. By the High Court in the exercise of appellate jurisdiction.

Criminal Jurisdiction.

22. Ordinary original jurisdiction of the High Court.
23. Jurisdiction as to persons.
24. Extraordinary original criminal jurisdiction.
25. No appeal from High Court exercising original jurisdiction—Court may reserve points of law.
26. High Court to review on certificate of the Advocate-General.
27. Appeals from Criminal Courts in the Provinces.
28. Hearing of referred cases and revision of criminal trials.
29. High Court may direct the transfer of a case from one Court to another.

Criminal Law.

30. Offenders to be punished under Indian Penal Code.

Exercise of jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

31. Judges may be authorized to sit in any place by way of circuit or special commission.

Admiralty and Vice-admiralty Jurisdiction.

32. Civil.
33. Criminal.

Testamentary and Intestate Jurisdiction.

34. Testamentary and intestate jurisdiction.

Matrimonial Jurisdiction.

35. Matrimonial jurisdiction.

Powers of Single Judges and Division Courts.

36. Single Judges and Division Courts.

Civil Procedure.

37. Regulation of proceedings.

Criminal Procedure.

38. Regulation of proceedings.

Appeals to Privy Council.

39. Power to appeal.
40. Appeal from interlocutory judgments.
41. Appeal in criminal cases.
42. Rule as to transmission of copies of evidence and other documents.

Calls for Records, etc., by the Government.

43. High Court to comply with requisition from Government for records, etc.
44. Powers of Indian Legislature preserved.
45. Provisions of former Letters Patent inconsistent with these Letters Patent to be void.

L. P. Cal.

LETTERS PATENT [CALCUTTA, MADRAS AND BOMBAY].

[N.B.—As the Letters Patent for Calcutta, Madras and Bombay are all in very similar terms, the Letters Patent, Calcutta, is given as the main one, and the differences in the wording of the other two Letters Patents indicated within square brackets.]

For the High Court of Judicature for the Presidency of Calcutta.

Recital of Acts 24 & 25 Vict., c. 104.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To all to whom these presents shall come, Greeting: Whereas by an Act of Parliament passed in the twenty-fourth and twenty-fifth years of Our Reign, entitled "An Act for establishing High Courts of Judicature in India." It was, amongst other things, enacted that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature [at Madras, for the presidency of Madras aforesaid] at Fort William in Bengal, for the Bengal division of the Presidency of Fort William aforesaid [at Bombay for the Presidency of Bombay aforesaid,] and that such High Court should consist of a Chief Justice and as many Judges, not exceeding Fifteen, as Her Majesty might, from time to time, think fit to appoint, who shall be selected from among persons qualified as in the said Act is declared: Provided always that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature, and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court, without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamat Adawlut at [Madras]. Calcutta [Bombay] in the said Presidency, should be abolished:

And that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for, and in relation to the administration of justice in the said Presidency as Her Majesty might, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdictions beyond the limits of the Presidency-town, as might be prescribed thereby; and, save as by such Letters Patent, might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever, in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts:

And whereas We did, upon full consideration of the premises, think fit to erect and establish, and by Our Letters Patent under the Great Seal of the

United Kingdom of Great Britain and Ireland bearing date at Westminster, the twenty-sixth day of June in the Twenty-fifth Year of Our Reign, in the Year of Our Lord, One thousand eight hundred and sixty-two, did accordingly, for Us, Our heirs and successors, erect and establish [at Madras, for the Presidency of Madras aforesaid, a High Court of Judicature, which should be called the High Court of Judicature at Madras] at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid, a High Court of Judicature which should be called the High Court of Judicature at Fort William in Bengal [at Bombay, for the Presidency of Bombay aforesaid, a High Court of Judicature which should be called the High Court of Judicature at Bombay] and did thereby constitute the said Court to be a Court of Record: and whereas We did thereby appoint and ordain, that the said High Court of Judicature at [Madras] Fort William in Bengal [Bombay] should, until further or other provision should be made by Us, or Our heirs and successors in that behalf, in accordance with the recited Act, consist of a Chief Justice and five Judges, and did thereby constitute and appoint certain persons, being respectively qualified as in the said Act is declared, to be Judges of the said High Court:

And whereas by the said recited Act it is declared lawful for Her Majesty, at any time within three years after the establishment of the said High Court, by Her Letters Patent, to revoke all of such parts or provisions as Her Majesty might think fit of the Letters Patent by which such Court was established, and to grant and make such other powers and provisions as Her Majesty might think fit, and as might have been granted or made by such first Letters Patent:

And whereas by the Act of the twenty-eighth year of Our Reign, chapter fifteen, entitled "An Act to extend the term for granting fresh Letters Patent for the High Courts in India, and to make further provision respecting the territorial jurisdiction of the said Courts," the time for issuing fresh Letters Patent has been extended to the first of January, One thousand eight hundred and sixty-six:

And whereas, in order to make further provision respecting the constitution of the said High Court, and the administration of justice thereby, it is expedient that the said Letters Patent, dated the twenty-sixth of June, One thousand eight hundred and sixty-two, should be revoked, and that some of the powers and provisions thereby granted and made should be granted and made with amendments and additional powers and provisions by fresh Letters Patent.

Cl. 1.

Revocation of Letters Patent of 1862.

1. Now know ye that We, upon full consideration of the premises and of Our special grace, certain knowledge, and mere motion have thought fit to revoke, and do by these presents (from and after the date of the publication thereof, as hereinafter provided, and subject to the provisions thereof) revoke Our said Letters Patent of the Fourteenth of May, [Twenty-sixth of June,] One thousand eight hundred and sixty-two, except so far as the Letters Patent of the Fourteenth year [Forty-first year] of His Majesty King George the Third, dated the

L. P. Cal. Twenty-sixth of March, One thousand seven hundred and seventy-four [Twenty-sixth of December, One thousand eight hundred], establishing a Supreme Court of Judicature at Fort William in Bengal [Madras] [Bombay] were revoked or determined thereby.

Cl. 2.

High Court at Calcutta to be continued.

2. And We do by these presents grant, direct and ordain that, notwithstanding the revocation of the said Letters Patent of the Fourteenth May [Twenty-sixth of June,] One thousand eight hundred and sixty-two, the High Court of Judicature called the High Court of Judicature at Fort William in Bengal [Madras,] shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at [Madras] Fort William in Bengal [Bombay] for the Presidency of [Madras aforesaid] Bengal division of Fort William aforesaid [Bombay aforesaid]; and that the said Court shall be and continue a Court of Record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication, and that all rules and orders in force in the said High Court immediately before the date of the publication of these Letters Patent shall continue in force except so far as the same are altered hereby, until the same are altered by competent authority.

Cl. 3.

Judges of the said High Court to be continued.

3. And We do hereby appoint and ordain that the person and persons who shall immediately before the date of the publication of those Letters Patent be the Chief Justice or Judges, or Acting Chief Justice or Judges, if any, of the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal shall continue to be the Chief Justice and Judges, or Acting Chief Justice or Judges, of the said High Court, until further or other provision shall be made by Us or Our heirs and successors in that behalf, in accordance with the said recited Act for establishing High Courts of Judicature in India.

Cl. 4.

Clerks, etc., of the said High Court to be continued.

4. And We do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal appointed by virtue of the said Letters Patent of the Fourteenth of May, [Twenty-sixth June,] one thousand eight hundred and sixty-two, shall continue, to hold and enjoy his office and employment, with the salary thereunto annexed until he be removed from such office and employment; and he shall be subject to the like power of removal, regulations and provisions as if he were appointed by virtue of these Letters Patent.

Cl. 5.

Declaration to be made by Judges.

5. And We do hereby ordain that the Chief Justice and every Judge who shall be from time to time appointed to the said High Court of Judicature at [Madras] Fort William in Bengal [Bombay] previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it:—

"I, *A. B.*, appointed Chief Justice (or a Judge) of the High Court of Judicature at Fort William in Bengal [Madras,] do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment." L. P. Cal., Cl. 5.

Seal.

6. And We do hereby grant, ordain and appoint that the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal shall have and use, as occasion may require a seal bearing a device and impression of our Royal Arms, with an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at [Madras]" [Bombay] Fort William in Bengal. And We do further grant ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice and in case of the vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section 7 of the recited Act: And We do further grant, ordain and appoint that, whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession. Cl. 6.

Writs, etc., to issue in name of the Crown, and under the seal.

7. And We do hereby further grant, ordain and appoint that all writs, summons, precepts, rules, orders and other mandatory process to be used, issued or awarded by the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court. Cl. 7.

Appointment of officers.

8. And We do hereby authorise and empower the Chief Justice of the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. Cl. 8.

And it is our further will and pleasure, and We do hereby for Us, Our heirs and successors, give, grant, direct and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time, appoint for each office and place respectively, and as the Governor-General in Council shall approve of: Provided always, and it is Our will and pleasure that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they shall hold their respective offices; but this proviso shall not interfere with or prejudice the right of any other officer or clerk to avail him-

L. P. Cal., Cl. 8.

self of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave, in accordance with the said rules.

Admission of Advocates, Vakils and Attorneys.

Cl. 9 & 10, Notes 1—2.

Powers of High Court in admitting Advocates, Vakils and Attorneys.

9. And We do hereby authorize and empower the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal to approve, admit and enrol such and so many Advocates, Vakils, and Attorneys, as to the said High Court shall seem meet, and such Advocates, Vakils and attorneys, shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

In making rules for the qualifications, etc., of Advocates, Vakils and Attorneys.

10. And We do hereby ordain that the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal shall have power to make rules for the qualifications and admission of proper persons to be Advocates, Vakils and Attorneys-at-Law of the said High Court, and shall be empowered to remove or to suspend from practice on reasonable cause the said Advocates, Vakils or Attorneys-at-Law, and no person whatsoever but such Advocates, Vakils, or Attorneys shall be allowed to act or to plead for or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor.

Synopsis.

1. **Bar Councils Act.**
2. **Authority of advocates, vakils and attorneys.**
3. **Disciplinary jurisdiction of High Court over Advocates, Attorneys and Vakils.**
4. **"Reasonable cause", meaning of.**
5. **Recognised agents.**

1. **Bar Councils Act.**—Clauses 9 and 10 and the rules made thereunder should be read as subject to the provisions of the Indian Bar Councils Act, XXXVIII of 1926 to the extent to which such provisions have come into force with reference to any High Court. *See* S. 19 (2) of the Act. Thus it has been held that Rr. 128 and 129 of the Insolvency Rules of the Madras High Court made under the Letters Patent which precluded advocates from "acting" as distinguished from "pleading" on the Insolvency side of the High Court are no longer in force as they are repugnant to the provisions of the Bar Councils Act.[1] Similarly, a complaint of misconduct against an advocate must first be referred to the Bar Council for inquiry.[2]

2. **Authority of advocates, vakils and attorneys.**—The authorities of advocates, vakils and attorneys to practise in the High Court is subject to the rules and directions made by the High Court under Cl. 9 in so far as such rules and directions are not repugnant to the provisions of the Bar Councils Act of 1926.[1] The following cases[2] are illustrative of the rules which the High Court is empowered to make under Cl. 9.

Clauses 9 and 10—Note 1.

(1) Re, *Newly enrolled advocates,* 1928 Mad 1182 (1186): 28 Mad L W 545: 52 Mad 92: 55 Mad L Jour 551: 1928 Mad W N 856.

(2) In the matter of a *vakil of Azamgarh,* 1928 All 439 (439): 26 All L J 1039: 112 Ind Cas 214: 29 Cr L Jour 998 F B.

Note 2.

(1) See Note 1, point 1, *supra.*

(2) *Bakhtawar Singh* v. *Sant Lal,* (1887) 9 All 617 (621): 1887 All W N 153 F B [Advocates can take instructions direct from client]; *Sarat Chandra Singh* v. *Brojo Lal Mukerji,* (1903) 30 Cal 986 (989): 7 Cal W N 843 [Vakil not entitled to audience on Original Side of the Calcutta High Court]; In the matter of *the Attorney,* (1876-78) 1 Mad 24 (36): 11 Mad Jur 92 F B [Vakils of Madras High Court can practise on Original Side before Bar Council's Act]; *Namberumal Chetty* v. *Narasimmachari,* (1917) 37 Ind Cas 699 (704, 707): 31 Mad L Jour 698:

3. Disciplinary jurisdiction of High Court over advocates, attorneys and vakils.—The High Court has power under Cl. 10 to remove or suspend from practice, on reasonable cause, any advocate, vakil or attorney practising before it. Under the provisions of the Bar Councils Act of 1926, a complaint of misconduct against an advocate must first be referred to the Bar Council for inquiry.[1] It is not necessary under Cl. 10 that cases of professional misconduct must be dealt with only by the full Court consisting of all the Judges of the High Court for the time being, and it is competent to a Bench of Three Judges to dispose of such cases.[2] In proceedings under Cl. 10 the High Court exercises a *special* jurisdiction and has inherent power to apply such rules of procedure as may ensure a fair trial.[3] The proceedings are not of a criminal nature and the rules of procedure applicable to a criminal trial such as the filing of a written statement by the accused are not applicable to them.[4] Nor are such proceedings in the nature of civil suits and the provisions of the Civil Procedure Code do not apply to them.[5]

Though it is not incompetent for the High Court to deal, under Cl. 10, with charges of a criminal nature against a practitioner unless and until they have been investigated by a criminal Court, it is eminently fitting that in such cases the criminal prosecution should precede any disciplinary action under Cl. 10.[6]

An order of disbarment is not necessarily final or conclusive for all time and it is open to the Court to re-admit a practitioner after a lapse of time, if it is satisfied that he has, in the interval, conducted himself honourably and that the sentence of exclusion has had the salutory effect of awakening in him a higher sense of honour and duty.[7]

An attorney is an officer of the Court and any person aggrieved by his misconduct can bring it to the notice of the Court.[8]

4. "Reasonable Cause", meaning of.—What is "reasonable cause" for the removal or suspension of a legal practitioner depends on the facts of each case.[1] It is

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(1916) 2 Mad W N 529, (Do.); *Krishnaswamy Ayyar* v. *Swaminatha Ayyar*, 1925 Mad 385 (387, 395, 397): 48 Mad L Jour 36: 85 Ind Cas 1025: 48 Mad 381 [Vakils of Madras High Court have no right of audience in the Insolvency Court before Bar Councils Act].

Note 3.

(1) In the matter of *a vakil of Azamgarh*, 1928 All 439 (439): 26 All L J 1039: 112 Ind Cas 214: 29 Cr L Jour 998 F B.

(2) In re *S Venkatachari*, 1932 Mad 131 (138): 61 Mad L Jour 148: 134 Ind Cas 33: 32 Cr L Jour 1085: 54 Mad 857: 34 Mad L W 19.

(3) In re *Abdul Rashid*, 1924 Lah 123 (124-126): 4 Lah 271: 76 Ind Cas 385: 25 Cr L Jour 161: 6 Lah L Jour 491.

(4) In re *Abdul Rashid*, 1924 Lah 123 (124, 126): 4 Lah 271: 76 Ind Cas 385: 25 Cr L Jour 161: 6 Lah L Jour 491.

(5) In the matter of *U Ba Thin*, 1930 Rang 150 (151): 8 Rang 40: 125 Ind Cas 260 [Order of disbarment—Provisions of Code relating to granting of certificate of fitness for appeal to Privy Council do not apply].

(6) *A pleader* v. *Judges, Allahabad High Court*, 1931 P C 112 (114): 53 Cal L Jour 405: 35 Cal W N 640: 1931 Mad W N 603: 1931 Cr C 519: 1931 All L J 450: 53 All 183: 33 Bom L R 945: 132 Ind Cas 608: 58 Ind App 152: 34 Mad L W 59: 61 Mad L Jour 130 P C; In re *S Venkatachari*, 1932 Mad 131 (134): 61 Mad L Jour 148: 134 Ind Cas 33: 32 Cr L Jour 1085: 54 Mad 857: 34 Mad L W 19; In the matter of *Maung Ba Kyin*, 1924 Rang 113 (115): 76 Ind Cas 827: 2 Bur L Jour 210.

(7) In re *Advocate of the High Court*, 1924 Mad 265 (266): 46 Mad 903: 45 Mad L Jour 639: 18 Mad L W 828: 33 Mad L Tim 110: 76 Ind Cas 873: 25 Cr L Jour 281.

(8) In re *an attorney*, 1914 Cal 192 (193): 41 Cal 113: 19 Ind Cas 993: 14 Cr L Jour 305.

Note 4.

(1) In the matter of *Sashi Bhusanam Sarbadhicary*, (1906) 29 All 95 (108): 11 Cal W N 273: 4 All L J 34: 9 Bom L R 9: 17 Mad L Jour 74: 5 Cal L Jour 130: 2 Mad L Tim 1: 5 Cr L Jour 152 [Confirming 3 All L J 592 (593). **See the following cases for instances of misconduct.** *President, Vakils' Association High Court, Madras* v. *A Vakil*, (1914) 23 Ind Cas 789 (791): 26 Mad L Jour 429 [Suggesting that he is in a position to influence a Judge in his favour by indirect and improper means]; *Government Pleader* v. *D N Deshpande*, 1928 Bom 385 (386): 30 Bom L R 1011: 52 Bom 559: 114 Ind Cas 259 [Insolvency]; In the matter of *a vakil of a High Court*, (1909) 4 Ind Cas 1072 (1075, 1076): 6 Mad L Tim 329 [Issuing false notice with a fraudulent object]; *Government Pleader* v. *Jagannath*, (1909) 2 Ind Cas 264: 33 Bom 252: 10 Bom L R 1169 [Passing resolutions condemning judgment passed by a Court]; In the matter of *Madhva Singh*, 1923 Pat 185 (186, 187): 1923 Pat H C C 42: 1 Pat L R Cr 36: 72 Ind Cas 875 [Connection under Criminal Law Amendment Act]; In re *an advocate*, 1932 Lah 584 (585) [Allowing clerk to enter into agreement for sharing fees]; In the matter of *two Second Grade Pleaders*, (1910) 6 Ind Cas 313 (316, 317): 1910 Mad W N 163: 8 Mad L Tim 22: 20 Mad L Jour 500: 11 Cr L Jour 310: 34 Mad 29 [Accepting directorships of fraudulent companies]; *Government Pleader* v. *Annaji*, (1913) 19 Ind Cas 529: 15 Bom L R 231: 14 Cr L Jour 257: 37 Bom 354 [Fraud, undue influence, etc.]; In the matter of *Krishnaswamy Iyer*, (1912) 23 Mad L Jour 114 (117): 35 Mad 543: 39 Ind App 191: 16 Cal W N

L. P. Cal., Cls. 9 & 10, Note 4.

not restricted to misconduct in the strict course of a practitioner's duties, but embraces all causes which may afford reasonable ground for his removal or suspension.[2] Nor is it necessary, for invoking the disciplinary jurisdiction of the High Court, that any offence should have been committed by the legal practitioner or that his act should have been such as to subject him to anything like general infamy or imputation of bad character.[3]

Disciplinary action against a practitioner under the Letters Patent rests on the principle that the Court deems him an unfit person to act as a legal practitioner and is not by way of punishment.[4]

Where proceedings are taken against a practitioner under Cl. 10 on the ground of his having been convicted of a criminal offence, the propriety of the conviction cannot be questioned in such proceedings but the practitioner can show that the degree of his culpability was not such as to make him an unfit person to be a member of the profession.[5]

An offence committed by an advocate prior to his enrolment may be "reasonable cause" for his removal or suspension from practice, if the offence implies a permanent defect of character of a disqualifying kind.[6]

1081: 14 Bom L R 1079: 16 Cal L Jour 634: 1912 Mad W N 963: 16 Ind Cas 328: 12 Mad L Tim 393 [Receiving money for printing of record and not paying it]; In the matter of *a vakil*, (1910) 6 Ind Cas 310 (313): 1910 Mad W N 159: 7 Mad L Tim 427: 20 Mad L Jour 494: 11 Cr L Jour 307 [Receiving money on client's behalf and using it for his own use]; In the matter of *a High Court Vakil*, (1911) 21 Mad L Jour 76 (78): (1911) 2 Mad W N 359: 8 Ind Cas 574: 8 Mad L Tim 375 [Filing petition containing unfounded allegations]; *Har Prasad*, In re, (1918) 46 Ind Cas 819 (833, 836) 19 Cr L Jour 803 [Intimidating and trying to prevent, witness from giving evidence]; In re *Attorney*, 1925 Bom 1 (6): 26 Bom L R 887: 84 Ind Cas 353 [Disclosing confidential information]; *Government Pleader, High Court, Bombay* v. *Vinayak Balwant Chaukar*, 1922 Bom 361 (364): 24 Bom L R 1049: 47 Bom 117: 76 Ind Cas 78 [Criticism of pending trial]; In the matter of *a vakil*, (1917) 39 Ind Cas 289 (292): 40 Mad 69: 18 Cr L Jour 449 [Taking advantage of the ignorance and needy position of his clients and obtaining conveyance from them of an equity of redemption for much less than its value]; *President, Vakils' Association* v. *A High Court Vakil*, 1914 Mad 635 (636): 26 Mad L Jour 429: 23 Ind Cas 789 [Suggesting to client that he was in a position to influence Judge by improper means]; In the matter of *a vakil*, 1920 All 1 (6): 42 All 450: 18 All L J 419: 21 Cr L Jour 469: 56 Ind Cas 501 [Putting in statement of his own, but, purporting to issue from the clients and drafted on their instructions]; *Emperor* v. *Farid-Ul-Haq Ansari*, (1933) 143 Ind Cas 737 (739, 740) Lah Lawyer assisting in celebration of independence day by Congress Committee—An unlawful association—No evidence of acts done—No ground for punishing under this clause]; In the matter of *Lawrence Wilson*, (1908) 8 Cal L Jour 165 (167) F B [Attorney, sole partner of a firm appearing in the firm's name for the plaintiff and in his own name for the defendant]; In the matter of *S. A Vakil*, 1928 Cal 820 (823, 824) F B [Pleader accepting client's vakalathnama and papers but not filing the appeal]; In re *Attorney*, 1925 Cal 1084 (1085): 52 Cal 795: 91 Ind Cas 142 [Detaching client from another solicitor reprehensible but not sufficient cause]; In the matter of *an advocate*, 1931 Oudh 161 (166): 8 Oudh W N 267: 131 Ind Cas 67: 1931 Cr Cas 433: 32 Cr L Jour 625 F B [Conviction for criminal offence]; In the matter of *Parbati Charan Chatterjee*, (1895) 17 All 498 (510, 511): 22 Ind App 193: 6 Sar 635 [Writing to another vakil asking for briefs to be sent and offering to share the fees]; In re *Sarbadhicary*, (1907) 29 All 95 (108): 34 Ind App 41: 4 All L J 34: 9 Bom L R 9: 11 Cal W N 273: 5 Cal L Jour 130: 17 Mad L Jour 74: 2 Mad L Tim 1 [Confirming 3 All L J 592 (593) publication of libel on Judges]; In re *Bomanjee Cowasjee*, (1907) 34 Cal 129 (141): 34 Ind App 55: 11 Cal W N 870: 5 Cal L Jour 123: 17 Mad L Jour 67: 9 Bom L R 3: 2 Mad L Tim 96: 4 L B R 27 [Advising client to bribe witnesses]; In re *an advocate*, (1907) 34 Cal 729 (733, 744): 11 Cal W N 437 [Having settled plaint and afterwards saying to his client that he would take the case against him unless he is paid five times the ordinary fee]; In re *an advocate*, (1906) 4 Cal L Jour 259 (262) [Accepting share of property sued for]; In the matter of *Munusamy Naidu*, 1926 Mad 568 (568): 50 Mad L Jour 399: 1926 Mad W N 412: 49 Mad 523: 24 Mad L W 100: 96 Ind Cas 685 [Negligence by itself not professional misconduct].

(2) In re *Jivanlal Varajray*, 1920 Bom 168 (169, 170): 44 Bom 418: 54 Ind Cas 679: 22 Bom L R 13: 21 Cr L Jour 151 [Signing pledge to disobey an Act]; In the matter of *Puran Chandra Pal*, (1900) 27 Cal 1023 (1037, 1038): 4 Cal W N 389; *Le Mesurier* v. *Wajid*, (1902) 29 Cal 890 (894, 902, 903): 6 Cal W N 556; In re *Abdul Rashid*, 1924 Lah 123 (124, 126): 4 Lah 271: 76 Ind Cas 385: 25 Cr L Jour 161: 6 Lah L Jour 491.

(3) In re *Jivan Lal Desai*, (1920) 54 Ind Cas 679 (682): 22 Bom L R 13: 21 Cr L Jour 151: 44 Bom 418; In re *an attorney*, 1914 Cal 192 (193): 41 Cal 113: 19 Ind Cas 993: 14 Cr L Jour 305.

(4) In re *Abdul Rashid*, 1924 Lah 123 (124): 4 Lah 271: 76 Ind Cas 385: 25 Cr L Jour 161: 6 Lah L Jour 491: In re an *Attorney*, (1913) 19 Ind Cas 993 (999): 14 Cr L Jour 305: 41 Cal 113.

(5) In the matter of *an advocate*, 1924 Mad 265 (266, 267, 268): 46 Mad 903: 45 Mad L Jour 639: 18 Mad L W 823: 33 Mad L Tim 110: 76 Ind Cas 873; In the matter of *Abdul Rashid*, 1924 Lah 123 (124, 125): 4 Lah 271: 76 Ind Cas 385: 25 Cr L Jour 161: 6 Lah L Jour 491 S B; In the matter of *Rajendra Nath Mukerji*, (1900) 22 All 49 (52, 53): 26 Ind App 242: 3 Cal W N 786: 1 Bom L R 708: 7 Sar 556 P C; In the matter of *Rajendranath Mukerji*, (1896) 18 All 174 (176): 1896 All W N 20.

(6) In re *Purna Chandra Pal*, (1900) 27 Cal 1023 (1038): 4 Cal W N 389; *Le Mesurier* v. *Wajid Hossain*, (1902) 29 Cal 890 (910, 911): 6 Cal W N 556 F B.

5. **Recognised agents.**—The last portion of Cl. 10 provides that no person other than an advocate vakil or attorney can act or plead on behalf of a suitor excepting that a suitor can plead or act on behalf of himself or co-suitor. Thus a recognised agent of a party cannot present an appeal to the High Court.[1] It has, however, been held in the case cited below that an application by a *purdanashin* lady for leave to appeal in *forma pauperis* can, in view of Ss. 132 and 133 of the Code, be presented by her recognised agent.[2]

Civil jurisdiction of the High Court.

Local limits of the ordinary original jurisdiction of the High Court.

11. And We do hereby ordain that the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any law made by competent legislative authority for India and until some local limits shall be so declared and prescribed within the limit declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Governor-General in Council on the 10th day of September, in the year of Our Lord, One thousand seven hundred and ninty-four and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.

Synopsis.

1. **"Local limits."**
2. **Issue of process outside jurisdiction.**
3. **Power to transfer or stay suit in the moffusil.**

Power of High Court to issue warrant. See Note 2, Pt. (1).

1. **"Local limits."**—The local limits of the original civil jurisdiction of the High Courts of Bombay and Madras are to be declared and prescribed by the Governor-in-Council of the respective provinces whereas in regard to the Calcutta High Court the power is in the "competent Legislative Authority for India". A High Court cannot exercise its ordinary original Civil jurisdiction beyond the local limits so prescribed except in so far as provided in Cl. 44 of the Letters Patent read with S. 109 of the Government of India Act 1915. Thus the Indian Legislature can confer on a High Court jurisdiction in any particular suit or class of suits arising outside the Local limits prescribed under this clause.[1]

The limits of the ordinary original Civil jurisdiction of the High Courts of Bombay, Calcutta and Madras have been declared and prescribed by the following Acts respectively.

Act 15 of 1919. (For Calcutta.)

Madras Act 4 of 1927. (For Madras).

2. **Issue of process outside jurisdiction.**—A warrant of arrest issued by a High Court on the Original Civil side authorising the bailiff to execute it against the judgment-debtor *wherever he may be found in the Presidency* is without jurisdiction.[1] Similarly a writ of *fieri facias* issued outside the local limits of the original jurisdiction of a High Court is illegal.[2] But a High Court has power to issue any process against a person

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Note 5.

(1) *Shib Koran* v. *Raghunandhan*, (1900) 22 All 331 (332): 1900 All W N 96.

(2) *Wazir-un-nissa* v. *Ilahi Bakat*, (1902) 24 All 172 (173): 1901 All W N 213.

Clause 11—Note 1.

(1) **Such extended jurisdiction cannot follow by implication but by express enactment.** *A G of Madras* v. *Arunachalam*, (1910) 5 Ind Cas 729 (731): 20 Mad L Jour 387: 1910 Mad W N 14: 7 Mad L Tim 292; *Official Assignee of Madras* v. *Ramaswamy*, (1912) 17 Ind Cas 342 (343): 23 Mad L Jour 726: 1912 Mad W N 974: 12 Mad L Tim 229.

Note 2

(1) *Rajah of Ramnad* v. *Seetharam*, (1903) 26 Mad 120 (121).

(2) *Monmotho Nath* v. *Greender Chunder*, (1875) 24 Suth W R 366 (369) [The Old Supreme Court had such power].

L. P. Cal., Cl. 11, Notes 2—3.

guilty of contempt of Court to be executed outside such local limits,[3] as proceedings in contempt do not fall within the *Civil* jurisdiction of the High Court.[4]

3. Power to transfer or stay suit in the moffusil.—It has been held by the High Court of Bombay that a single Judge sitting on the original side cannot stay a suit pending before a Subordinate Judge in the moffusil, except under rules so enabling.[1]

Cl. 12, Note 1.

Original jurisdiction as to suits.

12. And We do further ordain that the said High Court of Judicature at Fort William in Bengal [Madras,] in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try and determine suits of every description if, in the case of suits for land or other immovable property, such land or property shall be situated or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at [Madras,] [Bombay,] Calcutta, in which the debt or damage, or value of the property sued for, does not exceed one hundred rupees.

Synopsis.

1. **Scope of the Clause.**
2. **Ordinary jurisdiction.**
3. **Suit for land or other immovable property.**
    4. **"All other cases"—Suit for partition of property consisting of movables and immovables, the latter being situated wholly outside jurisdiction.**
    5. **Suit for land partly within and partly without jurisdiction.**
6. **"Suits of every description."**
7. **Cause of action.**
    8. **If the cause of action shall have arisen in part.**
9. **Leave of Court.**
    10. **Waiver of want of leave.**
    11. **Recession of leave.**
12. **Meaning of the word "defendant"**
13. **"Dwell."**
14. **"Carry on business."**
    15. **Suit against companies—See Note 31 to S. 20.**
    16. **Suit against non-resident foreigners—See Note 32 to S. 20.**
17. **Personally works for gain—See Note 11 to S. 20.**
18. **Suit against the Secretary of State—See Note 10 to S. 20.**
19. **Appeal.**

1. Scope of the Clause.—Clause 11 defines the territorial limits of the ordinary original civil jurisdiction of the High Court, while this clause, prescribes the classes of suits and the conditions under which they are triable by the High Courts.

Classes of Suits.—Suits of every description may be instituted on the original side of the High Court except suits of the value of one hundred rupees falling within the jurisdiction of the Presidency Small Cause Court.

Conditions.—In suits for land or other immovable property the property should be situated within the ordinary original civil jurisdiction of the High Court. *See* Notes 3 to 5 below. *Suits not being for land or other immovable property* may be instituted in the High Court if the cause of action *wholly* arises within the local limits of the original jurisdiction or if the defendant resides or works for gain or carries on business within such limits.[1] But if the cause of action arises only partly within the said limits the leave of the Court is necessary for the institution of the suit.

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[3] *Harivallabhadas* v. *Utamchand,* (1870) 7 Bom H C R (O C) 172.

[4] *Navivahoo* v. *Narotamdas,* (1883) 7 Bom 5 (12) [Such an order is appealable under Cl. 15, Letters Patent and not under O 43].

Note 3.

[1] *Narain* v. *Janki Bai,* (1915) 30 Ind Cas 560 (562, 563): 39 Bom 604: 17 Bom L R 655.

Clause 12—Note 1.

[1] *Shaw Wallace and Co* v. *Gordhandas,* (1906) 30 Bom 364 (390): 8 Bom L R 56 [Defendant carrying on business within jurisdiction—Question of cause of action does not arise]; *Seshayya Chettiar* v. *Chengayya Chettiar,* (1901) 24 Mad 31 (33).

L. P. Cal., Cl 12, Notes 1—3.

A proceeding commenced by taking out an originating summons in the High Court is a "Suit" within the meaning of this Clause.[1-a]

The restrictive provisions of this clause do not control Cl. 18 below.[2] Nor do they apply to a *defendant* where, therefore, in a suit on a mortgage, a subsequent mortgagee of immovable property part of which is outside jurisdiction is impleaded as a defendant and he claims to have such property brought to sale, the Court held that he could do so on the ground that the restrictions in Clause 12 apply only to a plaintiff.[3]

2. Ordinary jurisdiction.—"The expression 'ordinary jurisdiction' embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it; and . . . it is opposed to 'extraordinary jurisdiction,' which the Court may assume at its discretion upon special occasions and by special orders."[1] A judgment entered up by the High Court under S. 86 of the Old Indian Insolvency Act (11 and 12 *Vide* Chapter 21) is "not by way of special or discretionary action, but in the ordinary course of the duty cast upon it by law, according to which every other case of the same kind would be dealt with."[2] Matters falling under Clauses 12, 17 and 18 would thus appear to be within the ordinary jurisdiction of the High Court.

3. Suit for land or other immovable property.—On a review of the judicial decisions in India under this Clause, it cannot be said that the term "Suit for land or other immovable property" has been satisfactorily defined so as to afford a uniform criterion applicable to all cases. The only possible definition, as has been pointed out by Coutts-Trotter, C. J. in *Valliappa Chetty* v. *Saha Govind Doss*[1] appears to be by an "enumeration of categories" (*i.e.*) by a reference to the various classes or instances of suits which have been held by the Courts to be suits for land or other immovable property, or not.

THE CALCUTTA HIGH COURT.

The effect of the decisions of the Calcutta High Court bearing on the construction of the term 'suit for land' may be stated as follows:—

Suits for the establishment of *title* to land[2] or for *possession* of land[3] or claiming any *interest* in land, such as a mortgage interest[4] are suits for land.

(1-a) ***Provas* v. *Ashutosh*,** 1930 Cal 258 (260): 56 Cal 979: 122 Ind Cas 197; *Sewdayal Ramjeedas* v. *Official Trustee of Bengal*, 1931 Cal 651 (653): 58 Cal 768: 134 Ind Cas 436.

(2) *Official Assignee of Madras* v. *Vedavalli Ammal*, (1916) 36 Ind Cas 524 (526, 528): 20 Mad L Tim 811: 4 Mad L W 425: 40 Mad 810; In the matter of *Kencheria Krishna Rao*, 1928 Mad 732 (734): 51 Mad 540: 55 Mad L Jour 171: 28 Mad L W 285: 112 Ind Cas 149 F B.

(3) *Kisori Mohun Roy* v. *Kali Churn Ghose* (1897) 24 Cal 190 (192): 1 Cal W N 156.

[But see *Sarat Chandra* v. *Nahapiet*, (1910) 8 Ind Cas 1142 (1144): 37 Cal 907 (*Obiter*)].

Note 2.

(1) *Navivahu* v. *Turner*, (1889) 13 Bom 520 (538): 16 Ind App 156: 5 Sar 400: 13 Ind Jur 251 P C.

(2) *Navivahu* v. *Turner*, (1889) 13 Bom 520 (532, 538): 16 Ind App 156: 5 Sar 400: 13 Ind Jur 251 P C [Such judgment fell within ordinary original civil jurisdicton]. *See also* In the matter of *G A Kuppusamy Nayagar*, 1930 Mad 779 (780): 53 Mad 237: 59 Mad L Jour 17: 32 Mad L W 4: 126 Ind Cas 481 [Ordinary original civil jurisdiction confined to suits and matters under Cls 12 to 21—Per *Kumaraswami Sastri, J* in referring judgment].

Note 3.

(1) 1929 Mad 721 (721): 57 Mad L Jour 190: 30 Mad L W 169: 118 Ind Cas 73: 52 Mad 809 F B.

(2) *Delhi and London Bank* v. *Wordie*, (1876) 1 Cal 249 (263, 264): 25 Suth W R 272; *The East Indian Railway Co* v. *The Bengal Coal Co*, (1875-76) 1 Cal 95 (100); *Sewdayal* v. *Official Trustee*, 1931 Cal 651 (653): 58 Cal 768: 134 Ind Cas 436.

(3) *Hara Lall* v. *Nitambini*, (1902) 29 Cal 315 (322): *Ebrahim* v. *Provas Chunder*, (1909) 1 Ind Cas 472 (473): 36 Cal 59.

(4) *Satyabrata Sen* v. *Gopal Dass*, 1929 Cal 373 (374): 49 Cal L Jour 235: 120 Ind Cas 720 [Suit for declaration of equitable mortgage and for usual mortgage decree]; *J C Galstaun* v. *Dianasarkies*, 1929 Cal 227 (227): 56 Cal 224: 33 Cal W N 44: 117 Ind Cas 854 [Suit for *declaration* of mortgage right]; *Kanti Chunder Pal* v. *Kissory Mohun*, (1892) 19 Cal 361 Notes [Suit for releasing mortgage right].

Suit for foreclosure.—

[*Blaquiere* v. *Ramdhone*, Bourke O C 319; *Bibee Jaun* v. *Mohomed Hadee*, 1 Ind Jur N S 10]; *Lalmoney Dassi* v. *Juddoo Nath*, 1 Ind Jur N S 319 [Suit for redemption]. See also *Harendra Lal Roy* v. *Hari Dasi Debi*, (1914) 23 Ind Cas 637 (641) 41 Cal 972: (1914) P C 67: 41 Ind App 110, 12 All L J 774: 16 Bom L R 400: 19 Cal L Jour 181: 18 Cal W N 817: 27 Mad L Jour 80: 16 Mad L Tim 6: 1 Mad L W 1050: 1914 Mad W N 162 P C [Suit for sale on mortgage]. See *Kiernander* v. *Benimadhab*, 1931 Cal 763 (767): 58 Cal 598: 134 Ind Cas 561 [Suit for sale on mortgage]; In the matter of *Leslie*, (1872) 9 Beng L R 171: 18 Suth W R 269 [Suit for sale on mortgage. Decision under S 5 of Code of 1859].

L. P. Cal., Cl. 12, Note 3.

In suits for reliefs *other* than those enumerated above it has been fairly uniformly held that a suit is for land or other immovable property if the title to or possession of immovable property is directly and substantially *affected.* The guiding principle has been stated by Page, J. in *Goculdas* v. *Changanlal*[5] and in *Provas Chandra* v. *Ashutosh*[5-a] to be to see whether, "having regard to the issues raised in the pleadings, the decree or order will *affect* directly the proprietary or possessory title to land or other immovable property.'' The mere fact that land has something to do with a suit does not make it a suit for land.[5-b] (In cases falling under this group the question, therefore, mainly turns on the view of the Court in each case as to whether title or possession is *directly and substantially affected* by the suit).

These cases may be divided into the following classes:—

(*a*) *Suit for a share in the sale proceeds of immovable property.*—In *Goculdas* v. *Cheganlal* referred to above the plaintiffs claimed their share of the *sale proceeds* of a joint family house wrongfully sold by the defendants. The defence was, *inter alia,* that the plaintiffs had no title to the house. Page, J., held that no issue arose in the case that could *affect,* the title to the *premises* sold as the title of the purchaser was not challenged, nor the sale sought to be set aside. Both the plaintiffs and defendants approbated the sale and only claimed their share in the *proceeds.* The dispute did not, therefore, *affect* the title to the *house;* but the real question was whether the plaintiffs were members of a Joint Hindu Family at material times.

(*b*) *Suits relating to trust property.*—Where the suit is only for the enforcement of a trust in accordance with the terms of the trust deed and no beneficial interest is claimed for the plaintiff, the suit will not be a suit for land merely by reason of the trust property being land or other immovable property.[6] But where the *title* to the trust property is in dispute it will be a suit for land.[7]

(*c*) *Suits for the administration of the estate of a deceased person.*—In a suit by a legatee for the *administration* of an estate and to set aside various deeds of trust, leases of land and an award, brought about by the fraud of the executor, the Privy Council held that the suit was one primarily for administration and as such not a suit for lands.[8] In *Hara Lal* v. *Nithambriu,*[9] where this suit was for the construction of a will, for the administration of the estate and *for the present possession of immovable property,* it was held that the suit was primarily for possession of immovable property, the other reliefs being only ancillary. Similarly a suit for a declaration of the plaintiffs' title to the whole of the residuary estate of the testator and to avoid certain dedications and for the construction of a will, was held to be one for land the other reliefs being merely incidental to the above reliefs.[10]

(*d*) *Suits for damages in respect of immovable property.*—In a suit by one colliery owner against another for damages for cutting the barrier area in the plaintiffs' colliery, the substantial question was held to be one of

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(5) 1927 Cal 768 (771, 773) [In appeal in 1928 Cal 887 (889, 890) the suit was however taken to be one for tort].

(5-a) 1930 Cal 258 (261): 56 Cal 979: 122 Ind Cas 197.

(5-b) *Land Mortgage Bank* v. *Sudurudeen Ahmed,* (1892) 19 Cal 358 (367) [Per *Trevelyan,* J].

(6) *Juggodamba* v. *Puddomoney,* (1875) 15 Beng L R 318 [Suit by a trustee to enforce joint management with co-trustee of debuttar lands].

(7) *Delhi and London Bank* v. *Wordie,* (1875-76) 1 Cal 249 (263, 264): 25 Suth W R 272. See *Goculdas* v. *Chaganlal,* 1927 Cal 768 (771) [Right to possession of trust property].

(8) *Benode Behari Bose* v. *Srimath Nistarini Dassi,* (1906) 33 Cal 180 (191): 7 Bom L R 887: 32 Ind App 193: 15 Mad L Jour 331: 9 Cal W N 961: 2 Cal L Jour 189 P C.

(9) (1902) 29 Cal 315 (322).

(10) *Provas Chandra* v. *Ashutosh Mukerjee,* 1930 Cal 258 (261): 122 Ind Cas 197: 56 Cal 979.

L. P. Cal., Cl. 12, Note 3.

title to the said barrier area and the suit, a suit for land.[11] But a suit for the damages caused by the erection of certain workshops by the defendant and for an injunction restraining the nuisance caused thereby was held not to be a suit for land.[12] Where in a suit for an injunction and damages for obstruction to the plaintiffs lawfully removing certain buildings the defendants disputed the plaintiffs right to the buildings the Rangoon High Court held that the real dispute in the suit was with reference to immovable property.[13]

(e) *A suit for the recovery of title-deeds.*—Where the defendant denied the plaintiffs' title to the property was, nevertheless, held to be not a suit for land as no relief, such as possession, in respect to land was involved therein.[14]

(f) *Suit for specific performance.*—A suit by a *vendor* for the specific performance of a contract of sale is not a suit for land as neither title nor possession or any other interest in land is substantially affected[15] but a *suit by a vendee* for specific performance of the contract of sale is a suit for land.[16] Similarly a suit for the specific performance of an agreement to mortgage has been held to be one for land.[16-a]

(g) *Suits for dissolution of partnership.*—On an application to file, an award by an arbitrator dissolving a partnership, providing for the sale of immovable property of the partnership, and for the execution of a mortgage by one partner to another for the amount found due by the former it was held that the proceeding was not a suit for land but only for the dissolution of a partnership and for the adjustment of the mutual claims between the partners out of the partnership property.[17]

(h) *Suits for rent.*—A suit for rent is not a suit for land though in determining the rate of rent an issue as to the nature of the tenancy has to be raised[18] but if a lessee sues the lessor for rents and profits on account of wrongful dispossession by the lessor, the claim is one for possession by way of receiving rents and profits and the suit is one for land.[19]

THE BOMBAY HIGH COURT.

Except in the case of suits for declaration of title and for possession of immovable property[19-a] which were held to be suits for land the High Court of Bombay till recently approached the question by determining not whether a particular suit was a suit for land within the meaning of Clause 12 but whether it was a suit cognizable by an English Court of Equity. In *Holkar* v. *Dadabhoy*[20] it was held that a suit for the specific performance of a contract to execute a mortgage of property outside Bombay and for the recovery of the mortgage debt was within the original jurisdiction of the Bombay High Court. The reasoning was that such a suit was one of the kind in whole a Court

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(11) *Lodna Colliery Co* v. *Bipin Bihari Bhose*, (1912) 17 Ind Cas 500 (502, 503): 39 Cal 739; *Sudamdih Coal Co, Ltd* v. *Empire Coal Co, Ltd*. (1915) 31 Ind Cas 581 (582): 42 Cal 942; *The East Indian Railway Co* v. *The Bengal Coal Co*, (1875-76) 1 Cal 95 (100).

(12) *Rajmohan Bose* v. *The East Indian Railway Co*, (1873) 10 Beng L R 241.

(13) *Swami Iyah* v. *Commissioner, Rangoon Port*, 1931 Rang 109 (111): 9 Rang 13: 134 Ind Cas 511.

(14) *Juggernath* v. *Brijnath*, (1879) 4 Cal 322 (325): 3 Cal L Rep 375.

(15) *Land Mortgage Bank* v. *Sudurudeen*, (1892) 19 Cal 358 (366, 367); *Nagendra Nath* v. *Eraligool*, 1922 Cal 443 (446): 49 Cal 670: 70 Ind Cas 92: 27 Cal W N 65.

(16) *Ramdhone* v. *Nobeenmoney*, Bourk, 218.

(16-a) *Ratanchand* v. *Gobind*, 1922 Cal 328 (328): 48 Cal 882: 66 Ind Cas 484. See *Sreenath Roy* v. *Gally Dass Ghose*, (1880): 5 Cal 82 (85) (Obiter).

(17) *Kellie* v. *Fraser*, (1876-77) 2 Cal 445 (463, 465): 2 Ind Jur 101.

(18) *Rung Lal Lohea* v. *Wilson*, (1898) 26 Cal 204 (218): 2 Cal W N 718.

(19) *Ebrahim Ismail* v. *Proras Chunder*, (1909) 1 Ind Cas 472 (473): 36 Cal 59.

(19-a) *Vaghoji* v. *Camaji*, (1905) 29 Bom 249 258 (259): 6 Bom L R 958; *Zulekabi* v. *Ebrahim*, (1912) 17 Ind Cas 198 (201): 37 Bom 494: 14 Bom L R 846 [Suit in reality for declaration of title and for possession though ostensibly for recovery of title deeds].

(20) (1890) 14 Bom 353 (359).

L. P. Cal., Cl. 12, Note 3.

of Equity in England could exercise jurisdiction *in personam* with respect to immovable property lying outside jurisdiction and that the High Court in India had all the jurisdiction of the Equity Courts in England. Clause 12 of the Letters Patent was held not to have taken away such jurisdiction from the High Courts in India. The *ratio decidendi* of the decision in *Holkar's case* was adopted in a number of subsequent cases and suits for foreclosure[21] or for the specific performance of a contract to sell[22] were held to lie in the Bombay High Court notwithstanding that the immovable property referred to in the mortgage or contract was outside jurisdiction. In 1924, in *Venkatarao* v. *Khimji*,[23] a suit on a mortgage of immovable property outside Bombay was held to lie in the High Court. But the Court in this case went further and laid down that such a suit was not a suit for land but only for a *debt*. The question was decided with reference to the term "suit for land" in Clause 12 of the Letters Patent rather than on the analogy of the English Equity jurisdiction. The authority of the *Holkar's case* was not accepted by Fawcett, J., in *Yeshwadabai* v. *Janardhan*[24] where he held that a suit for a declaration of a charge for maintenance on immovable property was a 'suit for land'. But in a later case[25] the same Judge, feeling himself bound by *Venkatarao* v. *Khimji*[23] held that such a suit though 'a suit for land' would lie in the High Court in the exercise of the equity jurisdiction *in personam* even if the land was outside Bombay. *Venkatarao* v. *Khimji*[23] was followed in *Jasraj* v. *Akubai*[26] but was dissented from in *India Spinning and Weaving Company* v. *Climax Syndicate*[27] by a Bench of three Judges who held that a suit on a mortgage of immovable property was a suit for land. But ultimately, on a reference to a Full Bench[28] it was decided that a suit to enforce a mortgage of land is not a suit for land within the meaning of Clause 12. This decision has been subsequently followed.[29] A claim as to priority between two or more mortgagees raised in a suit on a mortgage is a claim for the recovery of *debts* in certain order and not a claim for land.[30]

The Bombay High Court also has held that a suit for administration of the estate of a deceased person is not a suit for land though the estate may consist of immovable property.[31]

The view of the Bombay High Court may therefore be summed up as follows:—Suits for declaration of title to and possession of immovable property are suits for land. Suits on mortgages are not suits for land. In regard to other classes of suits, such as for the specific performance of contract to sell, the authority of *Holkar's* case must be considered to have been greatly shaken by *Venkatarao* v. *Khimji*[23] and the Full Bench case,[28] which preferred to decide the question with reference to the terms of Cl. 12 of the Letters Patent rather than to the doctrine of the equity jurisdiction of the English Courts

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(21) *Sorabji* v. *Ruttonji*, (1898) 22 Bom 701 (707).

(22) *Hunsraj* v. *Runchor Das*, (1905) 7 Bom L R 319 (324).

(23) (1924) 80 Ind Cas 442: 26 Bom L R 535.

(1924) 80 Ind Cas 442: 26 Bom L R 535.

(24) 1924 Bom 141 (143): 25 Bom L R 1172: 81 Ind Cas 776.

(25) *Rajah Kotakkal* v. *Malabar Timber Co*, 1924 Bom 412 (416): 26 Bom L R 541: 48 Bom 625: 80 Ind Cas 1049.

(26) 1924 Bom 419 (419, 420): 80 Ind Cas 1007: 26 Bom L R 539 [But with considerable reluctance in the light of 23 Ind Cas 637 P C].

(27) 1926 Bom 1 (3, 11, 13): 50 Bom 1: 91 Ind Cas 847: 27 Bom L R 1281 F B.

(28) *Hatimbhai* v. *Framroz*, 1927 Bom 278 (286, 331, 344, 345, 354, 356): 29 Bom L R 498: 51 Bom 516: 104 Ind Cas 8 F B.

(29) *Rajaram Tukaram* v. *Central Bank of India, Ltd*, 1927 Bom 663 (663): 29 Bom L R 659: 104 Ind Cas 115: 51 Bom 711 (*n*). See also *Central Bank of India, Ltd* v. *Nusserwanji*, 1932 Bom 642 (645, 649): 34 Bom L R 1384 [No difference between legal and equitable mortgage]. See *Purushottam Das Nathu Ram* v. *Radha Kishen*, 1929 Lah 449 (453): 120 Ind Cas 279: 11 Lah L Jour 306 [View of Bombay High Court recognised by Lahore High Court].

(30) *Shamchandra* v. *Bhikamchand*, 1929 Bom 468 (470): 31 Bom L R 1002.

[But see *Pranlal* v. *Goculdas*, 1925 Bom 333 (334): 27 Bom L R 570: 88 Ind Cas 92 (This case is of doubtful authority after 1927 Bom 278 F B)].

(31) *Abdul Hussain* v. *Muhammadally*, 1922 Bom 443 (443): 46 Bom 772: 23 Bom L R 1326: 65 Ind Cas 160; *Mohamedally* v. *Abdul Hussain*, 1924 Bom 313 (314): 48 Bom 331: 79 Ind Cas 780: 26 Bom L R 163 [In such a case, the Court can go into question of title of the deceased to immovable property].

L. P. Cal. Cl. 12, Notes 3—5.

THE MADRAS HIGH COURT.

The Madras High Court has taken very nearly the same view of the expression "suit for land" as the Calcutta High Court and has extended the scope of the term not only to suits for title or possession but also to suits directly affecting title to or possession of immovable property.[32] A suit for sale on a mortgage[33] or for avoiding a mortgage encumbrance[34] or for creating a charge for maintenance on specific immovable property[35] has been held to be a suit for land. A suit for the *administration* of the estate of a deceased person[36] or of a trust[37] is not a suit for land though the estate or the trust may concern land. Suits for the recovery of *damages* for the cutting and removal of trees have, however, been held to be suits for land on the ground that in such suits the right to land is affected.[38]

In *Velliappa* v. *Govinda Doss*[39] a Full Bench has held that a suit by a purchaser for the specific performance of an agreement to sell land is not a suit for land, being an action *in personam* addressed to the defendant personally.

4. **"All other cases" suit for partition of property consisting of moveables and immovables, the latter being situated wholly outside jurisdiction.**—This clause divides suits in two main groups:—

(1) Suits for land or other immovable property and (2) "all other cases". The latter terms therefore, excludes suits for immovable property. It is only in regard to the jurisdiction in 'all other cases' that the test of cause of action or the residence of the defendant falls to be considered.[1] A suit for the partition of property, consisting of both moveable *and immoveable* does not fall into the class of "all other cases" but is a suit for land and cannot be tried in the High Court if the immovable property is *wholly* outside jurisdiction.[2] But the plaint may be amended and proceeded with in so far as the moveable properties alone are concerned.[3]

5. **Suit for land partly within and partly without jurisdiction.**—The words "either wholly, or, in case the leave of the Court shall have been first obtained in part" must be taken to apply not only to the words "if the cause of action shall have arisen" but also to the words "property shall be situated." The operative words of this clause in so far as they relate to suits for land or other immovable property should therefore be reproduced as follows:—"If, in case of suits for land or other immovable property, such land or property shall be situated, . . . either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits, etc." It follows that in suits for land

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(32) *Krishnadoss* v. *Ganshamdass*, 1925 Mad 1084 (1085): 49 Mad L Jour 311: 22 Mad L W 160: 1925 Mad W N 395: 90 Ind Cas 188; *Sundara Bai* v. *Tirumal*, (1909) 3 Ind Cas 980 (931): 6 Mad L Tim 263: 20 Mad L Jour 103: 33 Mad 131 suit for creating charge on immoveable property.

(33) *Nalam* v. *Krishnaswamy*, (1903) 27 Mad 157 (161) [Mortgage by deposit of title deeds].

(34) *Official Assignee of Madras* v. *Ramasamy Iyengar*, (1912) 17 Ind Cas 342 (343): 12 Mad L Tim 229: 1912 Mad W N 974: 23 Mad L Jour 726.

(35) *Sundara Bai* v. *Tirumal*, (1909) 3 Ind Cas 930 (931): 33 Mad 131: 6 Mad L Tim 263: 20 Mad L Jour 103.

(36) *Srinivasa* v. *Venkata*, (1906) 29 Mad 239 (257, 276, 277): 1 Mad L Tim 71: 16 Mad L Jour 238 [Affirmed by Privy Council in 11 Ind Cas 447 (449)]; *Srinivasa Murthy* v. *Venkata Varada Iyengar*, (1911) 11 Ind Cas 447 (449): 15 Cal W N 741: 8 All L J 774: 13 Bom L R 520: (1911) 2 Mad W N 375: 14 Cal L Jour 64: 21 Mad L Jour 669: 34 Mad 257: 10 Mad L Tim 263 P C; *Amir Bi* v. *Abdul Rahim*, 1928 Mad 760 (763, 764): 55 Mad L Jour 266: 110 Ind Cas 276: 28 Mad L W 583 [Notwithstanding a prayer for partition of immovable property].

(37) *Krishnadoss* v. *Ganshamdass*, 1925 Mad 1084 (1085): 49 Mad L Jour 311: 90 Ind Cas 188: 22 Mad L Jour 160: 1925 Mad W N 395.

(38) *Srinivasa* v. *Kamappa*, (1916) 33 Ind Cas 906 (907, 912): 30 Mad L Jour 120; *Srinivasa Iyengar* v. *Cunniappa Chetty*, (1914) 24 Ind Cas 895 (896): 26 Mad L Jour 567: 1914 Mad 88: 15 Mad L Tim 410.

(39) 1929 Mad 721 (722, 725, 727): 118 Ind Cas 73: 52 Mad 809: 30 Mad L W 169: 57 Mad L Jour 190 F B.

Note 4.

(1) *Jairam* v. *Atma Ram*, (1880) 4 Bom 482 (487, 488); *Balaram* v. *Ramachandra*, (1898) 22 Bom 922 (926); *Hara Lall Banerjee* v. *Nitambini*, (1901) 29 Cal 315 (322); *Seshagiri Rao* v. *Rama Rao*, (1896) 19 Mad 448 (450): 6 Mad L Jour 19.

(2) *Jairam* v. *Atmaram*, (1880) 4 Bom 482 (487, 488); *Seshagiri Rao* v. *Rama Rao*, (1896) 19 Mad 448 (450): 6 Mad L Jour 19; *Abdul Karim* v. *Badrudeen*, (1905) 28 Mad 216 (221). See *Punchanun* v. *Shib Chunder*, (1887) 14 Cal 835 (838) [A suit for partition of land is a suit for land].

(3) *Abdul Karim* v. *Badruddeen*, (1905) 28 Mad 216 (224).

L. P. Cal., Cl. 12, Notes 5—8.

only *partly* within the local limits, the Court has jurisdiction to try the *whole* suit provided the *leave* of the Court is first obtained.[1] But if no leave is obtained, the Court may entertain the suit only in so far as the property within the local limits is concerned.[2]

The provision for leave contained in this clause with regard to suits for land will not, however, sanction the institution of a suit which would offend the rules as to misjoinder of parties and causes of action. Thus where a mortgagee submortgaged his mortgage interest to the plaintiff over the mortgagors' property situated in the moffusil and included in the submortgage, some of his own property situated in Calcutta, a suit in the Calcutta High Court, by the submortgage against the original mortgagor and the mortgagee to enforce the submortgage cannot lie and no leave cannot be granted though one of the properties in the submortgage is within the local limits of the original jurisdiction of the Calcutta High Court.[3]

6. **"Suits of every description."**—The High Court has jurisdiction under this clause in suits concerning matrimonial matters among the jews,[1] or among the Parsis except in matters coming within the jurisdiction of a special Court constituted under the Parsi Marriage Act.[2]

7. **Cause of action.**—*See* Note to S. 20 and also the following cases.[1]

8. **"If the cause of action shall have arisen in part."**—Leave of the Court is necessary for the institution of a suit for which a part alone of the cause of action arises within the local limits of the jurisdiction of the High Court.[1]

Note 5.

(1) *Surendra Krishna* v. *Bhubaneshwari*, 1933 Cal 295 (300): 60 Cal 54 [In such cases each defendant need not be interested in land within jurisdiction.

Suit for partition—Other property outside British India.

[*Govind Lal* v. *Bansi Lal*, 1921 Bom 328 (330, 332): 46 Bom 249: 23 Bom L R 1049: 77 Ind Cas 934; *Jagadamba* v. *Padmamani*, (1871) 6 Beng L R 686]. See also *Padmamani* v. *Jagadamba Dasi*, (1871) 6 Beng L R 134 [Suit for partition of only the property within local limits—Partial partition deemed unjust—Plaintiff directed to include outside properties also and to apply for leave]; *Kiernander* v. *Benimadhab*, 1931 Cal 763 (767): 58 Cal 598: 134 Ind Cas 561 [Suit on mortgage]; *Matigara Coal Co* v. *Shragers, Ltd*, (1912) 13 Ind Cas 429 (430): 38 Cal 824 [Different debtors mortgaging for *joint debt* part of mortgaged property within local limits of the High Courts—Suit lies though one of the joint debtors had no interest in that property]. See also *Srinath Roy* v. *Godadhur*, (1897) 24 Cal 348 (349): 1 Cal W N 225 [Suit on mortgage by deposit of title deeds—Property partly outside jurisdiction—Suit entertained by High Court with leave].

Suit on mortgage—Obiter.

[*Namperumal Chettiar* v. *Raghavachariar*, 1921 Mad 701 (703): 14 Mad L W 563: 71 Ind Cas 390; *Sarat Chandra* v. *Nahapiet*, (1910) 8 Ind Cas 1142 (1144): 37 Cal 907; *Bank of Hindustan* v. *Nundo Lall*, (1873) 11 Beng L R 301 [Suit for foreclosure]; *Ganoda Sundary* v. *Nalini*, (1909) 1 Ind Cas 514 (516): 36 Cal 28: 12 Cal W N 1065 [Suit by an executor for declaration and injunction in respect of the estate of the testator]. See also *Parasanamayi Dasi* v. *Kadambini*, (1868) 3 Beng L R O C 85; *Seshagiri Rao* v. *Rama Rao*, (1896) 19 Mad 448 (450): 6 Mad L Jour 19 [Obiter]. See *Ramachandra* v. *Duda Mahadeo*, (1862-65) 1 Bom H C R A C 76.

[But see observations in *Hatimbhai* v. *Framroz*, 1927 Bom 278 (323): 29 Bom L R 498: 51 Bom 516: 104 Ind Cas 8 F B].

(2) Suit for partition:

[*Balaram* v. *Ramachandra*, (1898) 22 Bom 922 (927); *Punchanun* v. *Shib Chunder*, (1887) 14 Cal 835 (838); *Mahalingam* v. *Natesa Iyer*, (1916) 32 Ind Cas 423 (424): 3 Mad L W 107: (1916) 1 Mad W N 146, (Do.) obiter]; *Manindra Chandra* v. *Lal Mohan*, 1929 Cal 358 (364): 49 Cal L Jour 212: 56 Cal 940: 120 Ind Cas 577 [Suit in respect of trust property].

(3) *Krishna Kishore De* v. *Amar Nath Khattry*, (1920) 56 Ind Cas 582 (587): 31 Cal L Jour 272: 24 Cal W N 683.

Note 6.

(1) *Rachel Benjamin* v. *Benjamin*, 1926 Bom 169 (174): 28 Bom L R 328: 94 Ind Cas 59: 50 Bom 369. See also *R K Samuel* v. *F H T Samuel*, 1930 Cal 558 (558): 34 Cal W N 519: 57 Cal 1089: 127 Ind Cas 559.

(2) *Peshotam Hormasji* v. *Meherbai*, (1889) 13 Bom 302 (310) [Suit lies to declare an infant marriage amongst the Parsees to be null and void].

Note 7.

(1) *Mohamed Hajee* v. *Jute and Gunny Brokers, Ltd*, 1932 Bom 42 (43): 33 Bom L R 1364: 135 Ind Cas 170 [Cause of action confined to plaint allegations and not the defence]; *Soloman* v. *Abdul Aziz*, (1879) 4 Cal L Rep 366 (370) [Decree of High Court on compromise induced by fraud of defendant—Suit to set aside in High Court—No leave necessary]; *Sichel* v. *Berch*, 2 Hurl & C 954: 33 L J Exch (N S) 179 Fol: 3 Mad H C R 384: 15 Bom 93: Ref 12 Bom H C R 113: 9 Cal 105: 21 Bom 126; *Norman* v. *Marchant*, 7 Exch 723: 21 L J Exch R 256 Ref; 3 Mad H C R 384; *Wilde* v. *Sheridan*, 21 L J Q B 262: 1 Bail C C 56; Ref; 1 Mad H C R 202 436; 3 Mad H C R 384.

Note 8.

(1) *Ramachandra Gauri Sankar* v. *Ganapathram Biswanath*, (1921) 59 Ind Cas 539 (540): 47 Cal 583; *Hadjee Ismail* v. *Hadjee Mohomed*, (1874) 21 Suth W R 303 (306): 13 Beng L R 91; *Khimji* v. *Forbes*, (1871) 8 Bom H C R 102.

Material part of cause of action held to be necessary.

[*Pragdas* v. *Dowlatram*, (1887) 11 Bom 257 (267). See also *Kessowji* v. *Luchmidas*, (1889) 13 Bom 404 (415); *Mulchand* v. *Suganchand*, (1875-77) 1 Bom 23 (35)]. See also *Seshagiri* v. *Askur Jung*, (1904) 27 Mad 494 (495, 496).

L. P. Ca Cl. 12, Notes 8—9.

See also Notes 12 to 15 to S. 20, Civil Procedure Code, *supra* and the undermentioned cases.[2]

9. **Leave of Court.**—Leave to sue is not a formal matter of procedure but is the foundation for the exercise of jurisdiction by the Court.[1] It must therefore, be obtained *before* the Court becomes empowered to receive, try or determine the suit.[2] Such leave will enure only for the suit[3] or the cause of action[4] for which, or against the defendant[5] in respect of whom, it was granted. Leave must be distinctly applied for and granted, and cannot be implied.[6] It is a judicial act of a Court and cannot be delegated to a ministerial officer.[7]

The grant of leave is a matter within the discretion of the Court.[8] In the exercise of their discretion, the Courts can take into consideration the convenience of parties.[9]

Where leave has been at first granted but it is found that the plaint does not obviously disclose a ground justifying leave, the plaintiff may be permitted, at the trial to allege and prove such a ground, and the plaint may be also amended.[10] In fact, it is quite sufficient if grounds involving difficult questions of fact or law are established to the satisfaction of the Court upon the hearing of the action.[11]

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(2) *Mahomed Haji* v. *Jute and Gunny Brokers, Ltd*, 1932 Bom 42 (46): 33 Bom L R 1364: 135 Ind Cas 170; *Govindarajalu Naidu* v. *Secretary of State*, 1927 Mad 689 (689, 692): 50 Mad 449: 53 Mad L Jour 355: 39 Mad L Tim 304: 26 Mad L W 558: 105 Ind Cas 576; *London B and M Bank* v. *Badee Beebee*, (1880-81) 5 Bom 42 (45): 5 Ind Jur 422; *Deep Narain* v. *Dietert*, (1903) 31 Cal 274 (282, 283): 8 Cal W N 207; (1924) 46 Mad L Jour 89 (Notes); *Bhagwandas* v. *Rivet Carnac*, (1898) 3 Cal W N 103 (Notes).

Note 9.

(1) *Devidatt Ramniranjandas* v. *Shriram Narayandas*, 1932 Bom 291 (294, 300): 34 Bom L R 236: 137 Ind Cas 381: 56 Bom 324; *Hadjee Ismail* v. *Hadjee Muhammad*, (1874) 21 Suth W R 303 (307): 13 Beng L R 91; *Rampurtab* v. *Premsukh*, (1891) 15 Bom 93 (97, 98); *Abdul Kadir* v. *Dulanbibi*, (1913) 20 Ind Cas 530 (531, 532): 15 Bom L R 672: 37 Bom 563 [Hence—Issues tried without necessary leave will not be *res judicata*].

(2) *Devidutt Ramniranjandas* v. *Shriram Naraindass*, 1932 Bom 291 (294, 300): 34 Bom L R 236: 137 Ind Cas 381: 56 Bom 324 [Court has no jurisdiction even to receive plaint unless leave shall have been first obtained]; *Rampartab* v. *Premsukh*, (1891) 15 Bom 93 (96, 97); *Abdool Hamed* v. *Promithonath Bose*, 1 Ind Jur (N S) 218.

(3) *Sabhapathi Gurukkal* v. *Lakshmu Ammal*, (1901) 24 Mad 293 (295) [Suit filed with leave—Then withdrawn—Again fresh suit—Fresh grant of leave necessary].

(4) *Rampurtab* v. *Premsukh*, (1890) 15 Bom 93 (96, 98).

(5) **Application to add new defendant—Leave to be taken at the time of:**

[*Devidutt Ramniranjandas* v. *Shriram Narain*, 1932 Bom 291 (298): 34 Bom L R 236: 137 Ind Cas 381: 56 Bom 324; *Rampratab* v. *Foolibai*, (1896) 20 Bom 767 (776)]; *Karim Elahi* v. *Sher Ahmed*, 1921 Bom 195 (197, 198): 45 Bom 24: 59 Ind Cas 28: 22 Bom L R 863 [In appeal from 59 Ind Cas 12—Third party notice at the instance of a defendant—Leave must be applied for and obtained].

Original defendant dead before suit—Leave necessary to implead proper party—Defendant.

[*Rampartab* v. *Gourishankar*, 1924 Bom 109 (112): 25 Bom L R 7: 85 Ind Cas 464; *Shamchandra Rampratab* v. *Bhikamchand Ganesh Lal*, 1929 Bom 468 (471): 31 Bom L R 1002]. See *Shaw Wallace and Co* v. *Gordhandas*, (1906) 30 Bom 364 (391): 8 Bom L R 56. See also *Foolibai* v. *Rampartab*, (1893) 17 Bom 466 (468).

(6) **Plaintiff allowed to sue in forma pauperis—No leave to sue implied.**

[*Jairam* v. *Atmaram*, (1880) 4 Bom 482 (488); *Rampartab* v. *Foolibai*, (1896) 20 Bom 767 (774)]; *Karim Ellahi* v. *Sher Ahmed*, 1921 Bom 195 (197): 45 Bom 24: 59 Ind Cas 28: 22 Bom L R 863 [Issue of third party notice ordered—No leave under of 12—Implied leave—Must appear on the notice].

(7) **Rule of Calcutta High Court giving the power to Registrar is ultra vires.**

[*Laliteswar* v. *Rameswar*, (1907) 34 Cal 619 (625): 11 Cal W N 649: 5 Cal L Jour 405: 2 Mad L Tim 406; *Brij Coomari* v. *Alma Chand*, (1907) 11 Cal W N 663 (665, 666)]; *Saraswathi Dasee* v. *Biraj Mohini Dassee*, (1913) 18 Ind Cas 898 (898): 17 Cal W N 512. See also *King* v. *Secretary of State*, (1908) 35 Cal 394 (398, 399): 7 Cal L Jour 441: 12 Cal W N 705. See *Ramdeo Dass* v. *Ganesh Narain*, (1908) 35 Cal 924 (928): 12 Cal W N 921.

(8) *Surendra Krishna* v. *Bhubaneshwari*, 1933 Cal 295 (300): 60 Cal 54; *Phillips and Watkins* v. *Lakshiminarayanan Basdeodas*, 1927 Bom 660 (661, 662): 29 Bom L R 131: 100 Ind Cas 946 [Where very substantial part of cause of action arose in London].

(9) *Parameshwara* v. *Biyathan*, 1923 Mad 272 (274): 1922 Mad W N 841: 72 Ind Cas 982 [Nearly whole cause of action in Malabar—Leave rejected]; *Seshagiri* v. *Askur Jung*, (1907) 30 Mad 438 (440): 17 Mad L Jour 304 [Discretion to be exercised with caution—Defendant and witnesses' residence and acts forming cause of action in Hyderabad—Leave refused]; *Govindalal* v. *Bansilal*, 1921 Bom 328 (331-333): 46 Bom 249: 23 Bom L R 1049: 77 Ind Cas 934 [Inclusion of Hyderabad properties calculated to delay partition proceedings—Leave refused]; *Radha* v. *Madhosodhan*, (1874) 21 Suth W R 204 (208) [Parties and witnesses far away from Calcutta—Decree could be satisfied from property outside Calcutta—Leave refused].

(10) *Fink* v. *Buldeo Dass*, (1899) 26 Cal 715 (721): 3 Cal W N 524.

(11) *Secretary of State* v. *Golabai Paliram*, 1932 Cal 146 (147): 35 Cal W N 930: 135 Ind Cas 873: 59 Cal 150.

L. P. Cal.,
Cl. 12,
Notes
10—12.

10. **Waiver of want of leave.**—The question whether the objection to want of can be waived has been considered in a number of cases and there is a divergence of opinion on the point. One view is that the absence of leave amounts to want of inherent jurisdiction in the Court in respect of the suit and that consequently neither waiver nor consent can confer the jurisdiction on the Court.[1] The opposite view is that in such cases there is no inherent lack of jurisdiction, that the want of leave is only a defect in formality and that it can be waived.[2] It is submitted that the former view is correct. Clause 12 of the Letters Patent obviously lays down that the ordinary original jurisdiction in suits can be exercised by the High Court provided only that certain conditions mentioned therein exist. The obtaining of leave is distinctly enjoined as a condition in certain cases and it is provided that such leave shall have been *first* obtained. The wording of the clause clearly shows that the Court has no *power* even to "receive" a plaint unless such leave is obtained. The leave contemplated by the clause constitutes as has been seen in Note 9 above the foundation of the existence of jurisdiction and is not a matter of procedure for which provision is made separately in Clauses 37 and 38 of the Letters Patent. **Objections to jurisdiction for want of leave can be raised at any time.**[3]

In any event, the question of waiver can arise only in a case where the plaintiff alleges facts on the basis of which the necessity for leave arises but not where he alleges grounds which entitle him to sue without any leave. If in the latter case he fails to prove those grounds his suit will be dismissed and no question of waiver can arise by reason of the defendant taking no objection on the score of want of leave.[4]

11. **Rescission of leave.**—Leave may be granted *ex parte* but it is open to the defendant to question it.[1] He can appear and apply for revocation of leave without waiting for the trial.[2] He is not, however, bound to make such an application. He can wait and insist on having the legality of the leave tried as an issue at the trial.[3] In fact, it is much better that difficult questions involving issues of fact or law bearing on the grant of leave are decided upon the hearing of the suit.[4] But where heavy costs are likely to be incurred or serious inconveniences caused it is always better to apply for revocation at the earliest possible opportunity.[5]

12. **Meaning of the word "defendant".**—Where jurisdiction depends on the residence of the business place of the defendant and there are more defendants than one, *all* of them must reside or carry on business or personally work for gain within the local limits of the jurisdiction of the Court.[1]

Note 10.

[1] *Duridatt v. Shriram*, 1932 Bom 291 (294, 300): 34 Bom L R 236: 187 Ind Cas 381: 56 Bom 324 [Bench 1929 Bom 468 (471) overruled]; *Haji v. Jute and Gunny Brokers, Ltd*, 1932 Bom 42 (46): 33 Bom L R 1364: 135 Ind Cas 170: *Sewdayal v. Official Trustee*, 1931 Cal 651 (653): 58 Cal 768: 134 Ind Cas 436; *Monendra Chandra v. Lal Mohan Rai*, 1929 Cal 358 (364): 49 Cal L Jour 212: 56 Cal 940: 120 Ind Cas 577 [Bench].

[2] *King v. Secretary of State for India*, (1908) 35 Cal 394 (399): 7 Cal L Jour 441: 12 Cal W N 705 [Waiver by defendant filing written statement and applying for commissioner for examination of witnesses]; *Moore v. Gamjee*, (1890) 25 Q B D 244, Foll]; *Saraswathi v. Biraj Mohini*, (1913) 18 Ind Cas 898 (898): 17 Cal W N 512 [Waiver by filing written statement and taking part in trial]; *Ganesh Narain v. Manik Lal*, 1923 Pat 562 (563): 1 Pat L R 318: 76 Ind Cas 194: 5 Pat L Tim 342 [The question arose in the Patna High Court *in re* a decree of Calcutta High Court obtained without necessary leave]; *Mahammad Siddiq v. Mohammad Ahmad*, 1929 Rang 61 (62): 6 Rang 680: 115 Ind Cas 898. See *Bagram v. Moses*, 1 Hyde 284.

[3] **Objection lies in appeal—S 21, C P Code not applicable.**

[*Monendra Chandra v. Lal Mohan Rai*, 1929 Cal 358 (364): 49 Cal L Jour 212: 56 Cal 940: 120 Ind Cas 577; *Haji v. Jute & Gunny Brokers, Ltd*, 1932 Bom 42 (45): 33 Bom L R 1364: 135 Ind Cas 170.]

[4] *Shama Kant Chatterjee & Co v. Kusum Kumari*, (1917) 38 Ind Cas 571 (572): 44 Cal 10.

Note 11.

[1] *Bodricks v. Secretary of State*, (1912) 15 Ind Cas 955 (955): 16 Cal W N 747.

[2] *Engineering Supplies, Ltd v. Dhandhama & Co*, 1931 Cal 659 (660, 661): 58 Cal 539: 134 Ind Cas 65 [Criticism of clarity of pleadings not a ground for revocation—Remedy is amendment or further particulars]. See *Kessowji v. Luckmidas*, (1889) 13 Bom 404 (414). See also *Radha Bibee v. Munckaoodun Doss*, (1874) 21 Suth W R 204 (208) [Leave may be granted with permission for defendant to object].

[3] *Nagamoney v. Jankiram*, (1895) 18 Mad 142 (143): 5 Mad L Jour 34.

[4] *Secretary of State v. Golabrai Patiram*, 1932 Cal 146 (147): 35 Cal W N 930: 135 Ind Cas 873: 59 Cal 150.

[5] *Subbiah Chetty v. Abdul Karim*, (1910) 8 Ind Cas 299 (299): 1910 Mad W N 564: 8 Mad L Tim 349 [Obiter].

Note 12.

[1] *Hadjee Ismail v. Hadjee Mahomed*, (1874) 21 Suth W R 303 (306): 13 Beng L R 91; *Goculdas v. Chagan Lal*, 1927 Cal 768 (773): 54 Cal

13. **"Dwell."**—*See* Notes 3 to 7 to S. 20, C.P.C., and the undermentioned cases.[1]

14. **Carry on business.**—*See* Notes to S. 20, C.P.C., and the cases cited below.[1]

15. **Suit against companies.**—*See* Note 31 to S. 20, C.P.C.

16. **Suit against non-resident foreigners.**—*See* Note 32 to S. 20, C.P.C.

17. **Personally works for gain.**—*See* Note 11 to S. 20, C.P.C.

18. **Suit against the Secretary of State.**—*See* Note 10 to S. 20, C.P.C.

19. **Appeal.**—An order by one Judge of the High Court granting or refusing leave cannot be interfered with by another Judge, of the High Court except on appeal from the order.[1] The proper remedy is by way of an appeal from the order granting[2] or refusing[3] leave as the case may be. An appeal lies also from an order dismissing an application by the defendant to have the plaint taken off the file.[4]

Extraordinary original civil jurisdiction.

13. And We do further ordain that the said High Court of Judicature at [Madras,] [Bombay,] Fort William in Bengal shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Presidency of [Madras,] [Bombay], Bengal Division of the Presidency of Fort William subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

Synopsis.

1. **Withdrawal of suits by High Court to its own file.**
2. **Suit—Meaning of.**
3. **Transfer of petition from Provincial Insolvency Court.**
4. **Subject to its superintendence.**
5. **Transfer of suit from Presidency Small Cause Court.**
6. **Powers of High Court in suits transferred under this clause.**
7. **High Court's power to receive plaints.**
8. **Appeal.**

Application—Before whom to be made. See Note 1, Pt. (3).

"When the High Court shall think proper to do so." See Note 1.

1 **Withdrawal of suits by High Court to its own file.**—The High Court has power under this clause, to remove to itself cases from any Court subject to its superintendence for trial, whenever it thinks fit to do so for purposes of justice. That purpose is to be determined by reference to the circumstances of each case. The desirability or necessity to exercise the jurisdiction may arise in consequence of the importance or difficulty

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655: 104 Ind Cas 721. See however *Gokuldas* v. *Chagan Lal*, 1928 Cal 887 (889, 890): 32 Cal W N 208 [Joint tortfeasors—Suit against—May be against any one or more].

Note 13.

(1) *Govindarajalu Naidu* v. *Secretary of State*, 1927 Mad 689 (690, 692): 50 Mad 449: 53 Mad L Jour 355: 39 Mad L Tim 304: 26 Mad L W 558: 105 Ind Cas 576 ["Dwell" cannot apply to corporations]; *Venkatarao* v. *Khimji*, (1924) 80 Ind Cas 442: 26 Bom L R 535 [Person caused to appear on summons—Court has jurisdiction though not permanent resident]; Ex parte *Breull*, (1880) 16 Ch D 484 Ref: 29 Mad 239.

Note 14.

(1) *Sasoon & Co* v. *Angulia and Co*, (1911) 10 Ind Cas 895 (896) Cal [Defendant outside jurisdiction—Firm at Calcutta—Manager of firm signing contract—Suit lies in Calcutta High Court]; *Morris* v. *Baumagarten*, Coryton 152: Bourke O C 127 [Running race horses not carrying on business or personally working for gain]; *Maharaja Monindra Chandra Nundy Bahadur* v. *Chandi Charan Banerjee*, (1920) 57 Ind Cas 211 (214): 24 Cal W N 582: 31 Cal L Jour 327; Marsh v. Conquest, 17 C B N S 418 Ref; 14 Bom 541; *Macdougal* v. *Paterson*, 11 C R 755 Ref: Coryton 46; 12 Cal 317; 14 Bom 541; 16 Bom 202; 7 All 79 F B; *Kerr* v. *Hayness*, 29 L J Q B 70: 6 Jur 169 Foll: 2 Mad H C R 304 Ref: 14 Bom 541.

Note 19.

(1) *Vaithelinga* v. *Cundasamy*, (1875) 8 Mad H C R 21 (25).

(2) See *Laliteshwar* v. *Rameswar*, (1907) 34 Cal 619 (624): 11 Cal W N 649: 5 Cal L Jour 405: 2 Mad L Tim 406.

(3) *De Sousa* v. *Coles*, (1866-67) 3 Mad H C R 384 (388).

(4) *Hadjee Ismail* v. *Hadjee Mahomed*, (1873) 21 Suth W R 303 (307): 13 Beng L R 91: *Vaghoji* v. *Camaji*, (1905) 29 Bom 249 (253): 6 Bom L R 958.

L. P. Cal., Cl. 12, Notes 1—6.

of the questions involved, or in consequence of the balance of convenience or the cheapness of the trial.[1]

The power of removal is not limited to any particular *period* or *stage* of the suit and, so long as the proceedings in the original Court are in such a condition that one party is entitled to ask that Court to determine any question material to the final result of the suit, the suit is in existence in the original Court and is capable of being removed to the High Court under this clause.[2] It has been held by the High Courts of Calcutta, Madras and Rangoon that the application under this clause must be made to a Judge sitting on the *original* side of the High Court and not to a Judge sitting on the appellate side.[3] In the undermentioned Bombay case[4] the application was however made on the appellate side of the High Court.

2. **Suit—Meaning of.**—Proceedings for the grant of probate which are contested, come within the meaning of the word 'suit' as used in this clause.[1]

3. **Transfer of petition from Provincial Insolvency Court.**—An application under this clause to remove an insolvency petition pending in a moffussil Court and to transfer it for trial and disposal to the original side of the High Court is not maintainable.[1] The reason is that the powers conferred by S. 5, of the Provincial Insolvency Act (V of 1920) which are made subject to the other provisions of the Act, cannot be exercised in such a way as to give the original side of the High Court a jurisdiction from which it is expressly excluded by the terms of that section read with this clause.

4. **Subject to its superintendence.**—The civil Court of the Political Resident at Aden, as constituted by the Aden Courts' Act (II of 1864), is subject to the superintendence of the High Court at Bombay within the meaning of this clause, even though *no appeal lies* to the High Court from decrees or orders of the Resident, and therefore, the High Court has power to remove under this clause a suit from that Court to itself for trial and determination.[1]

5. **Transfer of suit from Presidency Small Cause Court.**—The Presidency Small Cause Court is a Court subject to the superintendence of the High Court. The latter can, therefore, remove to itself under this clause a suit pending before such Small Cause Court.[1]

6. **Powers of High Court in suits transferred under this clause.**—In dealing with suits transferred under this clause, the High Court has no more powers than those of the Court from which the suit is transferred.[1] Thus the High Court cannot allow an amendment

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Clause 13—Note 1.

(1) *Harendra Lal* v. *Sarvamangala,* (1897) 24 Cal 183 (190); *Brojo Gopal Naik* v. *Lakshmani Dassi,* 1927 Cal 791 (792): 54 Cal 607: 105 Ind Cas 184 [Balance of convenience must be considered].

Cheapness of trial.—

[*Payril* v. *Administrator-General,* (1880) 5 Cal 766 (767, 768): 6 Cal L Rep 221; *Jotendro Nath* v. *Raj Kristo,* (1889) 16 Cal 771 (776]; *Kapilnath Sahai* v. *Government,* (1872) 10 Beng L R 168 [The conduct of a Judge may be taken into consideration in directing a transfer].

No transfer unless prejudice is shown.

[See also *Borradaile* v. *Gregory,* Bourke Part II, Ex O C 1; *Gourjon* v. *Gourjon,* (1871) 9 Beng L R App 10].

[But see *Ojorderam* v. *Nabimoney,* 1 Ind Jur N S 396 (It must be shown that the trial in that Court would be unsatisfactory)].

(2) In the matter of *the Decree numbered suits,* 228, etc., in the Court of the Munsif of Debrugarh, (1871) 7 Beng L R 305.

(3) *Doucett* v. *Wise,* (1865) 4 Suth W R Mis 7 (7); *Srinivasa Ayyar* v. *Balakrishna Deval,* (1912) 13 Ind Cas 860 (861): 22 Mad L Jour 187: 1912 Mad W N 150: 11 Mad L Tim 159; *Jupiter General Insurance Co* v. *Abdul Aziz,* 1923 Rang 185 (186): 1 Rang 226: 76 Ind Cas 479;

(4) *Abdul Karim* v. *The Municipal Officer, Aden,* (1903) 27 Bom 575 (575): 5 Bom L R 562 [See also 28 Bom 292].

Note 2.

(1) *Pran Kumar Pal Chaudhury* v. *Darpahari Pal Chaudhury,* 1927 Cal 281 (283): 54 Cal 126: 31 Cal W N 254: 100 Ind Cas 797.

Note 3.

(1) In the matter of *Oomer Ahmed Brothers,* 1927 Rang 105 (107): 4 Rang 554: 100 Ind Cas 265; *Goculdas Jamnadas and Co* v. *N M Sadasiva Ayyar,* 1928 Mad 1091 (1092): 28 Mad L W 369: 52 Mad 57: 55 Mad L Jour 107.

Note 4.

(1) *Municipal Officer, Aden* v. *Ismail Hajee,* (1906) 30 Bom 246 (249): 33 Ind App 38: 3 All L J 53: 8 Bom L R 4: 3 Cal L Jour 5: 10 Cal W N 185: 16 Mad L Jour 73: 1 Mad L Tim 1: 8 Sar 901 P C [Affirming 27 Bom 575 on appeal to the Privy Council].

Note 5.

(1) *Pirbhai Khemji* v. *The Bombay Baroda and Central India Railway Co,* (1872) 8 Bom H C R 59; *Manganlal* v. *Bombay Co,* (1905) 7 Bom L R 143 (143, 144).

Note 6.

(1) *Besant* v. *Narayaniah,* 1914 P C 41 (43): 38 Mad 807: 41 Ind App 314: 12 All L J

of a plaint in a suit transferred from the Madras City Civil Court, so as to convert it into one which such City Civil Court would have no jurisdiction to try.[2] Under S. 14 of the Madras City Civil Court Act (VII of 1892) it is specifically provided that the Court-fee payable on a suit so transferred from the Madras City Civil Court must be calculated according to the rules in force in the High Court in relation to suits filed on the original side of the High Court.[3]

7. **High Court's power to receive plaints.**—This clause provides only that the High Court may *remove* to itself a suit pending in a Court subject to its superintendence. It does not enable the High Court to *receive* a plaint in a suit cognisable by a moffusil Court and pass orders thereon.[1]

8. **Appeal.**—The High Court of Madras has held that an order of a Judge of the High Court on the original side transferring to the High Court a suit under this clause is a "judgment" within the meaning of Cl. 15, *infra* and is therefore appealable.[1] But the Calcutta High Court has taken a contrary view.[2] *See also* notes to Cl. 15 of the Letters Patent, *infra.*

Where an application under this clause was heard and granted by a Bench sitting on the appellate side of the Bombay High Court leave was granted to appeal to the Privy Council.[3]

Joinder of several causes of action.

14. And We do further ordain that where plaintiff has several causes of action against defendant, such causes of action not being for land or other immoveable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit.

Synopsis.

1. Joinder of several causes of action.
2. "Such causes of action not being for land."

1. **Joinder of several causes of action.**—The word "several" in the expression "several causes of action" means separate.[1] This clause applies only where some causes of action arise within and some without the ordinary original jurisdiction of the High Court. It does not apply to cases where all the several causes of action arise within such jurisdiction.[2] It is not necessary that the causes of action outside the ordinary original jurisdiction, should have arisen within the extraordinary original jurisdiction contemplated by Cl. 13, *ante..* They may arise even outside the Presidency.[3]

1155: 16 Bom L R 625: 20 Cal L Jour 253: 18 Cal W N 1089: 27 Mad L Jour 30: 16 Mad L Tim 165: 1 Mad L W 520: 1914 Mad W N 585: 24 Ind Cas 290 P C [Reversing 21 Ind Cas 789 and 21 Ind Cas 545].

(2) *Singara Mudaliar* v. *Govindaswami Chetty*, 1928 Mad 400 (400): 54 Mad L Jour 145: 27 Mad L W 609: 108 Ind Cas 413.

(3) *Abdul Hakim Sahib* v. *Chattanadha Ayyar*, 1931 Mad 457 (460): 33 Mad L W 318: 60 Mad L Jour 435: 132 Ind Cas 647.

Note 7.

(1) *Jumma Bai* v. *S Rm M Rm Ramanathan Chettiar*, 1929 Mad 29 (30): 55 Mad L Jour 690: 28 Mad L W 684: 52 Mad 52: 113 Ind Cas 412.

Note 8.

(1) *Krishna Reddi* v. *Thanikachala*, 1924 Mad 90 (91): 45 Mad L Jour 153: 1923 Mad W N 681: 78 Ind Cas 1054: 47 Mad 136.

(2) *Khatizan* v. *Sonairam*, 1920 Cal 797 (798): 47 Cal 1104: 60 Ind Cas 963; *Pran Kumar Pal Chowdhury* v. *Daryahari Pal Chowdhury*, 1927 Cal 281 (282): 54 Cal 126: 31 Cal W N 254: 100 Ind Cas 797.

(3) *Municipal Officer, Aden* v. *Abdul Karim*, (1904) 28 Bom 292 (298).

Clause 14—Note 1.

(1) *Tukojirao Holkar* v. *Sowkabai Pardharinath Rajapurkar*, 1929 Bom 100 (102): 31 Bom L R 7: 53 Bom 251: 117 Ind Cas 424.

(2) *Tukoji Rao Holkar* v. *Sowkabai Pardhari Rajapurkar*, 1929 Bom 100 (103, 106): 31 Bom L R 7: 53 Bom 251: 117 Ind Cas 424.

(3) *Tukajirao Holkar* v. *Sowkabai Pardhari Nath Purkari*, 1929 Bom 100 (104): 31 Bom L R 7: 53 Bom 251: 117 Ind Cas 424. See also *J G Dobson* v. *The Krishna Mills, Ltd*, (1910) 8 Ind Cas 648 (649): 34 Bom 564: 12 Bom L R 988.

An application under this clause for leave to join several causes of action can be made also in a case in which leave has to be or has been obtained under Cl. 12, *ante*.[4]

To bring a case within this clause it is not necessary that the defendant should *admit* that any cause of action has arisen within the original jurisdiction of the High Court.[5]

2. **"Such causes of action not being for land".**—The expression "such causes of action not being for land'' qualifies the words ''several causes of action'' and refers to cases ''where plaintiff has several causes of action other than causes of action for land or other immovable property''. That is to say, in considering this clause any cause of action which is for land or other immovable property must be excluded, and if the sole cause of action within jurisdiction is one for land, or if the sole cause of action outside the jurisdiction is one for land, then this clause will have no operation.[1]

Cl. 15.

Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.

15. [And We do further ordain that an appeal shall lie to the said High Court of Judicature at [Madras] [Bombay], Fort William in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, made [on or after the first day of February 1929] in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments, of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided.]

Synopsis.

1. Amendment.
2. ''Judgment'', meaning of.
3. Orders which are not ''judgments''.
4. Orders in proceedings other than suits and appeals.
5. Orders made in the exercise of revisional jurisdiction.
6. Orders made in the exercise of powers of superintendence.
7. Orders passed in the exercise of criminal jurisdiction.
8. Appeal to Privy Council.
9. Appeal in cases of disagreement among Judges of a Division Bench.
10. S. 175 of Agra Tenancy Act, if precludes appeal.
11. ''Declares that the case is a fit one for appeal.''
12. Cross objections.
13. Security for costs.
14. Points on which appeal may be heard.
15. Limitation.
16. Court-fee.
17. Review.
18. Practice.

Point not raised before single Judge—If may be urged in L. P. appeal. See Note 14, Pt. (1).

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(4) *Dobson* v. *The Krishna Mills, Ltd*, (1910) 8 Ind Cas 648 (649): 34 Bom 564: 12 Bom L R 988 [Application under this clause may be made at any time before hearing but it is advisable to make it at the earliest opportunity].

(5) *Tukojirao Holkar* v. *Sowkabai Pardhari Nath Raja Purkar*, 1929 Bom 100 (101): 31 Bom L R 7: 53 Bom 251: 117 Ind Cas 424.

Note 2.

(1) *Tukojirao Holkar* v. *Sowkhabai Pardhari Nath*, 1929 Bom 100 (102): 117 Ind Cas 424: 31 Bom L R 7: 53 Bom 251.

1. **Amendment.**—Under the old clause[1] as it stood before the amendment thereof in 1928[1-a] an appeal lay from

(1) the decision of a single Judge in *all* cases other than
  (*a*) orders passed in the exercise of revisional jurisdiction,
  (*b*) sentences or orders passed in the exercise of the power of superintendence under S. 107 of the Government of India Act, 1915,
  (*c*) sentences or orders passed in the exercise of criminal jurisdiction.
(2) the decision of the Senior Judge where the Judges constituting a bench of two Judges differed.

The effect of the amendment of the clause is that there is now no right of appeal against decisions of a single Judge in *second appeal* except where the Judge declares that the case is a *fit one* for appeal. The right of appeal against the decisions of the senior Judge where the Judges constituting a bench differ, has been taken away in view of the newly amended Cl. 36, *infra* and there is now no power to grant a certificate in such a case.[2]

After the amendment came into force there arose a conflict of opinion as to whether it had retrospective effect. According to the High Court of Bombay[3] it had such effect, so that no appeal lay against a judgment of a single Judge, in second appeal filed after the amendment in the absence of the requisite certificate. The High Courts of Calcutta[4] and Madras[5] held on the other hand, that the amendment did not operate retrospectively so as to affect the right of appeal which had accrued in respect of suits instituted prior to the amendment. According to the High Court of Allahabad[6] all judgments delivered after the amendment were governed by the amended clause. In order to set this conflict at rest, the clause was again amended and the words “on or after the first day of February 1929” have been added.

2. **“Judgment,” meaning of.**—The definition of the word “judgment” given in S. 2 of the Civil Procedure Code is intended for the construction of the term as used *in the Code* and is not applicable to the Letters Patent.[1] There is no definition of the word in the Letters Patent. On the other hand, it seems to have been used in different senses in the various clauses. Thus this clause uses the word “judgment”, while Cl. 39 uses the words “judgment, decree or order,” and Cl. 40 the words, “preliminary or interlocutory judgment, decree or order”.[1-a] There has thus arisen a considerable conflict of opinion as to the true interpretation of the word “judgment” as used in this Clause. In *Hurrish Chandra Chowdhry* v. *Kalisundery Debi*, I.L.R. 9 Cal 482, where a single Judge of the High Court had passed an order refusing to transmit an order of Her Majesty in Council, for execution, their Lordships of the Privy Council said, “Mr. Justice Pontifex had in fact exer-

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Clause 14—Note 1.

[1] The old clause ran as follows:—

> “And we do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal, from the judgment (not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of S. 107 of the Government of India Act, 1915, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such Division Court, whenever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court, at the time being; but that the right of appeal from other judgments of the Judges of the said High Court, or of such Division Court, shall be to Us, Our heirs or Successors in Our or Their Privy Council, as hereinafter provided.”

[1-a] The amendment came into force in Calcutta on 11—1—1928; in Bombay on 27—1—1928; in Madras on 13—1—1928; in Allahabad on 28—1—1928; in Rangoon on 2—2—1928; in Lahore on 8—2—1928; in Patna on 30—1—1928 —*Vide* Gazette notification in several provinces.

[2] *Ram Charan* v. *Hamid Ali*, 1928 Cal 819 (820): 32 Cal W N 1153 F B.

[3] *Badruddin* v. *Sitaram*, 1928 Bom 371 (374): 30 Bom L R 942: 52 Bom 753.

[4] *Sadar Ali* v. *Doliluddin*, 1928 Cal 640 (644): 48 Cal L Jour 150: 32 Cal W N 1130: 113 Ind Cas 49.

[5] In re *Vasudeva Samiar*, 1929 Mad 381 (382): 115 Ind Cas 811: 52 Mad 361: 29 Mad L W 390: 1929 Mad W N 57: 56 Mad L Jour 369 S B.

[6] *Baijnath* v. *Doolavey Hajjan*, 1928 All 708 (708): 26 All L J 1371: 110 Ind Cas 719: 50 All 865.

Note 2.

[1] *Sonachalam* v. *Kumaravelu*, 1924 Mad 597 (597, 598): 47 Mad 316: 46 Mad L Jour 138: 19 Mad L W 427: 34 Mad L Tim 32: 1924 Mad W N 167: 79 Ind Cas 109.

[1-a] *Sital Din* v. *Anant Ram*, 1933 All 262 (263): 1933 All L J 127: 142 Ind Cas 331.

L. P. Cal., Cl. 15, Note 2.

cised a judicial discretion and had come to a decision of great importance, which, if it remained would entirely *conclude any rights* of Kalisunderi to an execution in this suit,'' and they held that the order was a ''judgment''. This, however, was not a complete definition of the term. In *Bhogi Lal* v. *The Dakore Temple Committee*[2] their Lordships of the Privy Council observed that the term ''judgment'' in the Letters Patent meant in civil cases a *decree* and not a ''judgment'' in the ordinary sense. The High Court of Allahabad has distinguished this case on the ground that their Lordships must be deemed to have made the observation referred to with reference to Cl. 39 of the Letters Patent and not with reference to this Clause.[3]

We now proceed to discuss the views of the various High Courts on the question.

According to the High Court of Allahabad the provisions of this clause are controlled by the Code of Civil Procedure and the right of appeal under this Clause is restricted to cases which are appealable under the Code.[4] But in a later case of the same High Court,[4-a] the view in 35 Mad. 1 F. B. (discussed below) has been adopted. This view has been dissented from by the other High Courts. *See* Note 6 to S. 104, *ante* and the cases cited below.[5]

The leading case on what may be called the Calcutta view as to the meaning of the word ''judgment'' is *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.*,[6] in which Couch, C. J. defined it as meaning "a decision which *affects the merits* of the question between the parties by determining some right or liability. It may be either preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined''. The ''right or liability'' must mean some right or liability which is the subject-matter of controversy in the suit or proceeding. It has, however, been held by the same High Court purporting to follow the case of *The Justices of the Peace for Calcutta*, that an order granting leave to sue under Cl. 12 of the Letters Patent[7] or an order setting aside an abatement[8] or an order rejecting an application for a judgment on admissions under O. 12, R. 6 of the Civil Procedure Code[9] is a judgment, on the ground that they must be taken to determine some *right.* These decisions, it is submitted, cannot be supported even on the basis of the definition which they purport to adopt. In none of these cases are the *merits affected* and there is no determination of any right or liability which is the matter *in controversy in the suit or proceeding.* In *Ebrahim* v. *Fackrunisa Begam*[10], Garth, C. J., expressed the view that the word ''judgment'' means ''a judgment or decree which decides the case one way or the other in its entirety and that it does not mean a decision or order of an interlocutory nature which merely decides some isolated point not affecting the merits or the results of the whole suit''. A similar view was adopted in the cases cited below.[11] In *Mt. Brijkumari* v. *Ramrick Dass*,[12] Mclean, C. J., was of opinion that the definition of Couch, C. J., was becoming classical, but that it was not exhaustive.[13] In *Brojogopal Roy Burman* v.

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(2) 1925 P C 155 (156): 23 All L J 555: 27 Bom L R 872: '49 Mad L Jour 25: 2 Oudh W N 535: 87 Ind Cas 313: 6 L R P C 117: 41 Cal L Jour 628: 1925 Mad W N 474: 22 Mad L W 246: 30 Cal W N 459 P C.

(3) *Sital Din* v. *Anant Ram*, 1933 All 262 (263): 1933 All L J 127: 142 Ind Cas 331 F B.

(4) *Mansab Ali* v. *Nihal Chand*, (1893) 15 All 359 (362, 363): 1893 All W N 113; *Bansidhar* v. *Gulab Kuar*, (1894) 16 All 443 (449): 1894 All W N 146; *Pokhar Singh* v. *Gopal Singh*, (1892) 14 All 361 (361): 1892 All W N 30.

(4-a) *Dr Sadiq Ali* v. *Anwar Ali*, 1923 All 44 (45): 45 All 66: 20 All L J 801: 70 Ind Cas 805.

(5) *Venugopal Mudali* v. *Venkatasubbiah Chetti*, (1915) 28 Ind Cas 367 (369): 17 Mad L Tim 208: 1915 Mad W N 211: 39 Mad 1196; *Ridu Singh* v. *Sanwal Singh*, 1922 Lah 380 (383): 3 Lah 188: 67 Ind Cas 388.

(6) (1872) 8 Beng L R 433: 17 Suth W R 364.

(7) *Hajee Ismail Hadjee Hubbell* v. *Hadjee Mahomed*, (1874) 13 Beng L R 91: 21 Suth W R 303.

(8) *Sarat Chandra* v. *Maihar Stowe and Lime Co*, 1922 Cal 335 (336, 337): 49 Cal 62: 67 Ind Cas 917.

(9) *Koramall Ramballay* v. *Mongilal*, (1920) 54 Ind Cas 836 (836, 837): 23 Cal W N 1017.

(10) (1878) 4 Cal 531 (534): 3 Cal L Rep 311.

(11) *Kali Kristo Pal* v. *Ram Chunder*, (1881) 8 Cal 147 (148): 9 Cal L Rep 461; *Murlidas* v. *Baijnath*, 1930 Cal 623 (625): 57 Cal 736: 129 Ind Cas 189; *Chandi Charan* v. *Jyanendra Nath*, (1917) 41 Ind Cas 250 (251, 252): 21 Cal W N 921: 29 Cal L Jour 225 [The test laid down in 35 Mad 1 was applied in this case].

(12) (1901) 5 Cal W N 781 (794).

(13) See also *Gour Mohan* v. *Noyan Manjivi*, 1922 Cal 172 (174): 26 Cal W N 242: 69 Ind Cas 915; *Maghar Mansingh* v. *Kalooram Lachmi*

L. P. Cal., Cl. 15, Note 2.

Amarchandra Bhattacharya, I. L. R. 56 Cal. 135 F. B., it was held, that the mere fact that an order puts in peril the finality of a decision given in a person's favour, does not, of itself, make the order a "judgment" within the meaning of this Clause. It was doubted whether such orders as an order setting aside an abatement or an order giving leave to appeal could be considered as "judgments".

The definition of Couch, C. J., given above has been accepted generally in the Bombay High Court.[14]

The earliest attempt to define the word "judgment" as used in this clause was made by the High Court of Madras in *DeSouza* v. *Coles*,[15] and it was held that it meant any decision or determination affecting the rights or interests of the suitor or applicant. It was also pointed out that it was not possible to prescribe any limit to the right of appeal conferred by this clause. This definition has, however, been considered to be very wide and has not been followed. The leading case on the point at present in the High Court of Madras is that of *Tuljaram Rao* v. *Alagappa*, I. L. R. 35 Mad 1 F. B. In that case, Sir Arnold White, C. J., laid down the view that an order is a "judgment" within the meaning of this clause.

(*i*) if its effect is to *put an end to the suit or proceeding* so far as the Court before which the suit or proceeding is pending is concerned, or

(*ii*) if the *non-compliance therewith* will have the effect of putting an end to such suit or proceeding, or

(*iii*) if it is passed on an independent proceeding which is ancillary to the suit, (not instituted as a step towards judgment, but with a view to rendering the judgment *effective* when obtained), *e.g.*, an order on an application for temporary injunction or for the appointment of a receiver.

In *Gokalchand* v. *Sanwal Das*,[16] the High Court of Lahore was of opinion that the term "judgment" included any interlocutory judgment which decided so far as the Court pronouncing it was concerned, whether finally or temporarily, any question materially in issue between the parties and directly affecting the subject-matter of the suit. In *Ruddu Singh* v. *Sanwal*,[17] the same High Court adopted the view of White, C. J., of the Madras High Court.

In *Arumugham Chetty* v. *Kanappa Chetty*,[18] the High Court of Rangoon held that where an appeal lies from an order under O. 43, R. 1 of the Civil Procedure Code the order must be taken to be a "judgment" within the meaning of this Clause. In *Chidambaram Chettiar* v. *N. A. Chettiar Firm*[19] a Full Bench of the same High Court has adopted the view of White, C. J.

The High Court of Patna,[20] has adopted the view of the Calcutta High Court as expressed in the case of *Brojo Gopal Roy Burman* referred to above.

An examination of all the cases on the subject goes to show that the test applied by White C. J., in *Tuljaram Rao's* case affords the best solution of the conflict of decisions on the point. An examination of the orders specified in the Civil Procedure Code as being appealable also shows that the Legislature, in making those provisions, has followed principles which are analogous to those laid down by White, C. J. Thus the orders referred to in Cls. (*p*) to (*s*) of R. 1 of O. 43, C.P.C., are really orders in *ancillary proceedings* instituted with a view to make the judgment that may be ultimately obtained effective.

Narain, 1926 Cal 842 (843): 30 Cal W N 706: 96 Ind Cas 182: 53 Cal 776; *Brojo Gopal* v. *Amar Chandra*, 1929 Cal 214 (214): 32 Cal W N 935: 56 Cal 135: 114 Ind Cas 88 F B.

(14) *Muja Mahomed* v. *Zarabi*, (1909) 2 Ind Cas 157 (158): 11 Bom L R 241 [This is the leading case in Bombay]; *Jehangir Manekji* v. *Secretary of State*, (1909) 2 Ind Cas 150 (151): 11 Bom L R 245; *Narrondas Dhanji*, In the matter of, (1890) 14 Bom 555 (558); *Ibrahimbhai Fazalbhai Joomabhai Laljee* v. *Yoosuf Ismailbhai Abdullabhai Laljee*, 1932 Bom 184 (134, 135): 34 Bom L R 12: 56 Bom 237: 137 Ind Cas 456.

(15) (1866-67) 3 Mad H C R 384.

(16) (1920) 55 Ind Cas 933 (934): 12 Pun W R 1920: 79 Pun L R 1920: 1 Lah 348: 2 Lah L J 32.

(17) 1922 Lah 380 (384): 3 Lah 188: 67 Ind Cas 388.

(18) 1927 Rang 139 (139): 5 Rang 99: 101 Ind Cas 791.

(19) 1929 Rang 41 (53): 6 Rang 703.

(20) *Banwari Lal* v. *Shukrullah*, 1933 Pat 139 (142): 12 Pat 202: 14 Pat L Tim 1: 142 Ind Cas 455.

The other clauses specify orders which, so far as the Court is concerned will have the effect of putting an end to the suit or proceeding. It is, therefore, submitted that the test applied by White, C. J., is correct on principle. The cases in which the orders have been held to be "judgments" have all been grouped below so as to show that they can all be supported on the principles laid down in *Tuljaram Rao's* case, though, the reasons for the decisions in the various cases differ considerably.

Orders which have been held to be "judgments" and which can be supported on the ground that they have the effect of putting an end to the suit or proceeding, so far as the Court, before which the suit or proceeding is pending, is concerned:—

(1) Order refusing to entertain a suit as being bad for multifariousness.[21]

(2) Order refusing to add necessary parties in a suit under S. 92 of the Civil Procedure Code.[22]

(3) Order refusing to allow a plaint to be amended and dismissing suit.[23]

(4) Order refusing to restore suit dismissed for default. *See* Note 12 to O. 9, R. 9, Civil Procedure Code.

(5) Finding on a preliminary issue which has the effect of disposing of the suit.[24]

(6) Order varying or amending a decree.[25]

(7) Order dismissing a claim petition under O. 21, R. 58 of the Civil Procedure Code. *See* Note 24 to O. 21, R. 58. The High Court of Rangoon has, however, held that such an order does not prevent the determination of the rights of the parties in a separate suit and that, therefore, it is not a *judgment*.[26] It is submitted that this view is not correct. So far as the Court in which the claim proceeding is pending is concerned, the order clearly puts an end to the proceeding.

(8) Order rejecting an application to set aside an abatement of a suit or refusing the application of the assignee of the plaintiff to be allowed to continue the proceedings. *See* Note 14 to O. 22, R. 9 and Note 21 to O. 22, R. 10.

(9) Order allowing the withdrawal of a suit with liberty to bring a fresh suit or refusing to set aside an order allowing such withdrawal. *See* Note 40 to O. 23, R. 1.

(10) Order refusing leave to sue in *forma pauperis*. *See* Note 8 to O. 33, R. 5. The decision in the case cited below[27] that an order allowing an application for leave to sue in *forma pauperis* is a judgment as against the principle of *Tuljaram Rao's* case and cannot be accepted as correct.

(11) Order dismissing application praying that the Court may receive a sum of money as security for the costs of an appeal. *See* Note 14 to O. 41, R. 10.

(12) Order refusing to set aside a dismissal of an appeal for default.[28]

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(21) *Ramendra Nath Ray* v. *Brojendra Nath Das*, (1917) 41 Ind Cas 944 (947, 948): 21 Cal W N 794: 27 Cal L Jour 158: 45 Cal 111 [The test laid down in 35 Mad 1 was applied in this case].

(22) *O E Dooply* v. *M E Moolla*, 1927 Rang 180 (180): 5 Rang 263: 103 Ind Cas 261.

(23) *P M Chettiar Firm* v. *Ma Shwe Pon*, 1927 Rang 154 (155): 5 Rang 115: 6 Bur L Jour 49: 101 Ind Cas 628.

(24) *Secretary of State* v. *Mansey Lakhamsey*, 1930 Bom 262 (263, 265): 32 Bom L R 285: 127 Ind Cas 195; *Kanalal Bhoya* v. *Balaram Parama Sukdoss*, 1923 Mad 44 (44): 43 Mad L Jour 480: 16 Mad L W 608: 31 Mad L Tim 284: 68 Ind Cas 921; *Tar Mohamad Ully Mohamad* v. *Mt Zulai Kha Bai*, 1928 Rang 20 (21): 6 Bur L Jour 205: 105 Ind Cas 472: 5 Rang 782 [Order deciding question of jurisdiction on a preliminary issue].

(25) *Govinda Chetty* v. *Rangammal*, 1929 Mad 261 (263): 106 Ind Cas 172: 1927 Mad W N 411; *Sir Jehangir Cowasji* v. *The Hope Mills, Ltd*, (1909) 2 Ind Cas 294 (295): 33 Bom 216: 10 Bom L R 488. See also *Hirjee Jina* v. *Narran Mulji*, (1875) 12 Bom H C R 129 [An order by a single Judge of the High Court reversing a decision of Commissioner for taking accounts is appealable].

(26) See Note 24 to O. 21, R. 58.

(27) *P Baba Sah* v. *V M Purshotama Sah*, 1925 Mad 167 (168): 47 Mad L Jour 932: 20 Mad L W 845: 35 Mad L Tim 136: 85 Ind Cas 201: 48 Mad 700 [Reasons not clearly given].

(28) *Nanakchand* v. *Sajjad Hussain*, 1924 Lah 412 (412): 71 Ind Cas 824; *Mohar Chand* v. *Habib*, 1925 Lah 617 (617): 89 Ind Cas 795 [Order rejecting an application under O 41, R 19].

(13) Order rejecting an application for leave to file a memorandum of cross-objections in *forma pauperis*.[29]

(14) Order remanding the whole case to the lower Court for disposal.[30]

(15) Order refusing leave to appeal in *forma pauperis*.[31]

(16) Order transmitting[32] or refusing to transmit[33] a decree of the Privy Council for execution.

(17) Order refusing to extend time to furnish security under O. 45, R. 7. *See* Note 10 to that rule.

(18) Order dismissing a suit for want of prosecution.[34]

(19) Order of transfer under Clause 13 of the Letters Patent.[35] According to the High Court of Calcutta such an order is not a judgment inasmuch as it does not affect the merits of the case which is necessary according to the definition of judgment as accepted by that Court.[36]

(20) Order refusing to set aside an award.[37]

Orders which have been held to be "judgments" and which can be supported on the ground that the non-compliance therewith will have the effect of putting an end to the suit or proceeding:—

(1) Order asking plaintiff to elect to proceed against some only of the defendants. *See* Note 14 to O. 1, R. 3.

(2) Order asking plaintiff to furnish security for the costs of the suit. *See* Note 14 to O. 25, R. 1.

(3) Order imposing conditions for granting leave to defend a summary suit under O. 37.[38] *See also* Note 5 to O. 37, R. 3.

Orders which have been held to be "judgments" and which can be supported on the ground that they are passed on ancillary proceeding instituted with a view to rendering the judgment in the suit or proceeding effective when obtained:—

(1) Order appointing a receiver. *See* Note 52 to O. 40, R. 1.

(2) Order refusing to discharge a receiver appointed in the suit.[39]

(3) Order on application for temporary injunction.[40] According to the High Court of Bombay an order refusing to grant a temporary injunction is not a judgment. *See* Note 20 to O. 39, R. 1.

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(29) *Parvati Ammal* v. *Venkateswara Ayyar*, 1926 Mad 656 (656): 50 Mad L Jour 426: 23 Mad L W 511: 1926 Mad W N 255: 94 Ind Cas 45 [Right of appeal assumed].

(30) *Ishwari Prasad* v. *Sheotalal Rai*, 1926 All 669 (669): 96 Ind Cas 666: 48 All 684: 24 All L J 892; *Kumar Chandra Kishore Roy* v. *Basat Ali*, (1918) 44 Ind Cas 763 (767): 27 Cal L Jour 418: 22 Cal W N 627; *Ruldu Singh* v. *Sanwal Singh*, 1922 Lah 380 (382, 384): 3 Lah 188: 67 Ind Cas 388 [Remand after reversing a preliminary decision on the question of limitation]; *Vanangamudi* v. *Ramasami*, (1891) 14 Mad 406 (407); *Ajit Chaudhuri* v. *Janaki Lal*, 1924 Pat 336 (339): 1923 Pat H C C 332: 75 Ind Cas 946. See also Note 23 to O 41, R 23.

(31) See Note 11 to O 44, R. 1. See also In re *Peram Chennamma*, 1931 Mad 198 (198): 31 L W 76: 58 Mad L Jour 195: 122 Ind Cas 387: 53 Mad 245 [Right of appeal assumed].

(32) *Rikhi Ram* v. *Dhanpat Rai*, 1930 Lah 674 (675): 123 Ind Cas 277: 31 Pun L R 182: 12 Lah L Jour 98: 11 Lah 365 [Order transmitting order in council for execution].

(33) See Note 16 to O 45, R 15.

(34) *Udoy Chand* v. *Khetsidas*, 1924 Cal 1025 (1026): 51 Cal 905: 28 Cal W N 916: 81 Ind Cas 1048.

(35) *Krishna Reddy* v. *Thanickachala*, 1924 Mad 90 (91): 45 Mad L Jour 153: 1923 Mad W N 681: 73 Ind Cas 1054: 47 Mad 136; *Kanyalal* v. *Paramasukdas*, 1928 Mad 44 (44): 43 Mad L Jour 480: 16 Mad L W 608: 31 Mad L Tim 284: 68 Ind Cas 921; *Kongandra Appaya* v. *Kongandra Kuttappa*, 1921 Mad 687 (687): 1922 Mad W N 830; *Maharajah of Jeypore* v. *Papayyamma*, (1900) 23 Mad 329 (341).

(36) *Khatizan* v. *Sonairam*, 1920 Cal 797 (798): 60 Ind Cas 963: 47 Cal 1104; *Paran Kumar Pal Chowdhury* v. *Darpahari Pal Chowdhury*, 1927 Cal 281 (282): 54 Cal 126: 31 Cal W N 254: 100 Ind Cas 797 [Order transferring probate proceedings 60 Ind Cas 963 followed].

(37) *Shivaji Poonja Kothari* v. *Ramjimal Babulal*, 1931 Bom 125 (127, 128): 32 Bom L R 1650: 129 Ind Cas 886: 55 Bom 452; *Campbell and Co* v. *Jeshraj Girdhari Lal*, (1918) 46 Ind Cas 687 (688): 45 Cal 502.

(38) *Chatlu Lal* v. *Marwari Commercial Bank, Ltd*, 1926 Cal 668 (670): 30 Cal W N 298: 96 Ind Cas 839.

(39) *Baidyanath Sein* v. *Rajendranath Sein*, 1930 Cal 803 (804): 52 Cal L Jour 66: 129 Ind Cas 879.

(40) *Venkata Chinnayamma* v. *Subbamma*, 1925 Mad 586 (587): 21 Mad L W 310: 95 Ind Cas 956.

L. P. Cal. Cl. 15, Notes 2—3.

(4) Order directing payment of a certain sum as maintenance to a party pending suit.[41]

(5) Order under S. 10 of the Code refusing to stay a suit.[42]

(6) Order granting or refusing stay of execution of a decree.[43] *See also* Note 20 to O. 41, R. 5.

An order which amounts to a decree in effect or which forms part of a judgment will of course be a "judgment" within the meaning of the clause and appealable as such.[44]

3. **Orders which are not "judgments".**—The following are among the orders which have been held not appealable as a "judgment" under this clause:—

(1) An order granting leave to sue as a pauper.[1]

(2) An order granting leave to defend on summons under Chapter 13-A of the Original Side Rules, Calcutta.[2]

(3) An order refusing to revoke leave to sue which has been granted.[3]

(4) An order refusing to direct the Receiver in insolvency to give security for the continuance of suit filed by the debtor.[4]

(5) An order refusing to frame an issue[5] or to try an issue as a preliminary issue.[6]

(6) An order refusing leave to file written statement after expiry of the time allowed.[7]

(7) An order allowing or refusing amendment of a plaint.[8]

(8) An order transposing defendant as plaintiff.[9]

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(41) *Syed* v. *Subhan*, 1925 Mad 448 (443): 48 Mad L Jour 895: 21 Mad L W 308: 1925 Mad W N 109: 86 Ind Cas 909.

(42) *Jivan Lal* v. *Pirojshaw R Vakharia and Co*, 1933 Bom 85 (87): 35 Bom L R 15.

(43) *Firm Badri Das* v. *Mathanmal*, 1922 Lah 185 (186): 77 Ind Cas 327 [Order refusing stay]; *Shibba Mal* v. *Rup Narain*, 1928 Lah 904 (905): 29 Pun L R 571: 111 Ind Cas 274 [Order restricting the passing of a final decree]; *Sankar Das* v. *Shamba Nath*, 1926 Lah 174 (174): 8 Lah L Jour 35: 93 Ind Cas 351: 27 Pun L R 109 [Order confirming an order of *ad interim* stay]; *Bulaqui Mal* v. *Shamas Din*, 1923 Lah 428 (428): 5 Lah L Jour 287: 84 Ind Cas 24 [Order granting stay].

[But see *Vairavan Chettiar* v. *Ramanathan Chettiar*, 1921 Jour 84 (3): 14 Mad L W 701: 95 Ind Cas 808; *Mooljee Dharsey and Co* v. *Moolla*, 1925 Rang 225 (226): 4 Bur L Jour 61: 3 Rang 255: 88 Ind Cas 740 [No appeal lies as to sufficiency of security]; *Palaniappa Chetty* v. *Chidambaram Pillai*, (1915) 30 Ind Cas 942 (942): 18 Mad L Tim 312; *Nageswara Ayyar* v. *M L M Ramanathan Chettiar*, 1929 Mad 197 (198): 56 Mad L Jour 197: 29 Mad L W 510: 117 Ind Cas 123 [Appeal against preliminary decree—Further proceedings in suit on certain terms—Judgment debtor, dissatisfied by terms imposed, appealing—*Appeal is not maintainable*].

(44) *Ma Hamana* v. *Official Receiver*, 1928 Rang 301 (301) [Order construed as being in effect a decree]; *Namberumal* v. *Krishnajee*, 1914 Mad 416 (419): 26 Mad L Jour 356: 1914 Mad W N 310: 15 Mad L Tim 263: 22 Ind Cas 919 [Order as to costs incidental to a judgment]; *Kulasekara Naicker* v. *Jagadambal Ammal*, (1919) 50 Ind Cas 14 (15): 9 Mad L W 322: 36 Mad L Jour 351: 25 Mad L Tim 292: 42 Mad 352 F B [Order passed on a review of taxation by the taxing officer]; *Nathier Saheb* v. *Kadir Moideen Rowther*, (1914) 22 Ind Cas 551 (552) Mad [An order awarding costs].

Note 3.

(1) *Babu Sah* v. *Purushothama*, 1925 Mad 167 (168): 47 Mad L Jour 982: 20 Mad L W 845: 35 Mad L Tim 136: 85 Ind Cas 201: 48 Mad 700; *Ma Than Mynt* v. *Mg Ba Thein*, 1926 Rang 110 (111): 4 Rang 20: 5 Bur L Jour 6: 95 Ind Cas 523; *S M Mitra* v. *Corporation of the Royal Exchange Assurance*, 1930 Rang 259 (262): 126 Ind Cas 650.

(2) *Maghaee Mansing* v. *Kalooram Lachmi Narain*, 1926 Cal 842 (848): 96 Ind Cas 182: 53 Cal 776: 30 Cal W N 706.

(3) *Raja Surya Rao* v. *Raja Gangadhara Rama Rao*, 1927 Mad 846 (848): 53 Mad L Jour 329: 26 Mad L W 227: 50 Mad 770: 39 Mad L Tim 339: 105 Ind Cas 159.

(4) *O De Joidon* v. *Maung Ba Chit*, 1931 Rang 286 (286): 9 Rang 473: 134 Ind Cas 750.

(5) *Tuljaram* v. *Alagappa*, (1910) 8 Ind Cas 340 (342): 1910 Mad W N 697: 8 Mad L Tim 453: 21 Mad L Jour 1: 35 Mad 1; *Ebrahim* v. *Fuckhrunissa*, (1878) 4 Cal 531 (534): 3 Cal L Rep 311.

(6) *Jehangir* v. *The Secretary of State*, (1909) 2 Ind Cas 150 (152): 11 Bom L R 245.

(7) *Muralidhar Chamaria* v. *M R Dalmia*, (1919) 49 Ind Cas 120 (122): 45 Cal 818.

(8) *Upendra Narayan Roy* v. *Rai Janaki Nath Roy*, (1918) 47 Ind Cas 129 (132): 22 Cal W N 611: 45 Cal 305; *Mahalingam* v. *Natesa Ayyar*, (1916) 32 Ind Cas 423 (428): 3 Mad L W 107: (1916) 1 Mad W N 146 [Refusing leave to amend]; *Mani Lal Chunni Lal Choksi* v. *Mani Lal Dhamodar Das Mody*, 1925 Bom 159 (160): 86 Ind Cas 100: 27 Bom L R 99 [Amending title of plaint—Relates only to procedure].

(9) *Official Assignee of Madras* v. *Ramalingappa*, 1926 Mad 554 (555): 50 Mad L Jour 361: 23 Mad L W 592: 1926 Mad W N 366: 94 Ind Cas 456: 49 Mad 589.

(9) An order adding a party.[10]

(10) An order refusing to restrain defendant by injunction from prosecuting a suit in a *foreign Court*.[11]

(11) An order directing a party to produce and allow inspection of documents.[12]

(12) An order refusing to allow inspection.[13]

(13) An order refusing to strike off certain allegations in pleadings as scandalous.[14]

(14) An order refusing directions under Rr. 130 and 131 of the High Court Rules, Bombay.[15]

(15) An order directing security under O. 38, R. 5.[16] This would be a "judgment" according to the test applied by White, C. J., in *Thuljaram Rao's* case, inasmuch as it is an order in an ancillary proceeding instituted with a view to render the judgment effective. In view of the Full Bench decision in A.I.R. 1929 Rang. 41 adopting the Madras view, the correctness of this decision is open to question.

(16) An order directing[17] or refusing[18] the issue of a commission for the examination of witnesses.

(17) An order directing the Official Referee to ascertain the share of the plaintiff and take accounts[19] or referring back the report to the Official Referee for a further consideration.[20]

(18) An order giving directions to the Commissioner.[21]

(19) An order directing a receiver to advance money to the guardian *ad litem* of a minor defendant.[22]

(20) An order directing the suit to proceed dismissing an application to take the plaint off the file of the Court.[23]

(21) A finding on a preliminary issue *allowing the suit to proceed* after disallowing an objection as to stamp[24] or as to the maintainability of the suit.[25]

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(10) *Ramaswami Chettiar* v. *Kanniappa Mudaliar*, 1930 Mad 987 (987): 1930 Mad W N 971: 32 Mad L W 766: 129 Ind Cas 44: 60 Mad L Jour 287: 54 Mad 491.

(11) *Vant Chand Raj Pal* v. *Laxmi Chand Maneck Chand*, (1919) 53 Ind Cas 895 (896, 897): 21 Bom L R 955: 44 Bom 272.

(12) *Sonabai* v. *Ahmedbhai*, (1872) 9 Bom H C R 398: *Ahmed* v. *Ayeshabai*, (1909) 2 Ind Cas 167 (167): 11 Bom L R 248.

(13) *D K Asher* v. *V C Gopalaratnam*, 1927 Mad 409 (410): 52 Mad L Jour 192: 25 Mad L W 483: 1927 Mad W N 162: 100 Ind Cas 642.

(14) *Durga Bai Ammal* v. *Ramanatha Rao*, 1926 Mad 64 (64): 49 Mad L Jour 682: 1925 Mad W N 785: 22 Mad L W 868: 91 Ind Cas 566.

(15) *Charandas Chaturbhuj* v. *Pitambar Das*, 1921 Bom 320 (321): 45 Bom 428: 59 Ind Cas 533: 22 Bom L R 1169.

(16) *Mengha* v. *Sucha*, 1925 Rang 267 (268): 4 Bur L Jour 108: 3 Rang 307: 90 Ind Cas 995.

(17) *Muja Mahomed* v. *Zarafar*, (1909) 2 Ind Cas 157 (158): 11 Bom L R 241.

[But see *Veerabadran Chetty* v. *Nataraja Desikar*, (1905) 28 Mad 28 (31): 14 Mad L Jour 329 (Dissented from in 35 Mad 1 F B)].

(18) *Toremull Dilsook Roy* v. *Kunj Lal Monohar Dass*, (1920) 55 Ind Cas 766 (766): 31 Cal L Jour 162; *Mohammad Hussain* v. *Hussain Hamadanee and Co*, 1925 Rang 290 (291): 90 Ind Cas 967: 4 Bur L Jour 103: 3 Rang 293: *Abdul Gaffor* v. *Official Assignee*, 1926 Rang 64 (64): 4 Bur L Jour 254: 3 Rang 605: 93 Ind Cas 211.

[But see *Maruthamuthu* v. *Krishnamachariar*, (1907) 30 Mad 143 (144) (Dissented from in 35 Mad 1 F B)].

(19) *Abdul Wahab* v. *Rokia Bibi*, 1924 Mad 406 (407): 73 Ind Cas 903.

(20) *Maneckji Rustomji* v. *Wadia*, 1928 Mad 470 (471, 472): 54 Mad L Jour 136: 27 Mad L W 172: 107 Ind Cas 639: 51 Mad 235: 1928 Mad W N 45.

(21) *Yeo Eng Byan* v. *Beng Seng and Co*, 1925 Rang 43 (45): 2 Rang 469: 84 Ind Cas 291.

(22) *Kuppuswami* v. *Rathnavelu*, (1901) 24 Mad 511 (513).

(23) *Gour Mohan* v. *Noyan Manjuri*, 1922 Cal 172 (174): 26 Cal W N 242: 69 Ind Cas 915.

(24) *Chidambaram* v. *N A Chettiar Firm*, 1929 Rang 41 (53, 54): 6 Rang 703: 114 Ind Cas 524 (F B).

(25) *Shri Goverdhanlalji* v. *Shri Chandraparbhavati*, 1926 Bom 136 (136): 27 Bom L R 1496: 92 Ind Cas 552; *Raman Chettiar* v. *Bank of Chettinad*, 1933 Rang 15 (15, 16): 11 Rang 19: 142 Ind Cas 58.

(22) An order admitting evidence.[26]

(23) An order refusing to extend time under S. 148 for giving security in an interlocutory application. It may be noted that the main proceeding before the Court in this case would not be affected by the dismissal of the interlocutory application for failure to give security in time.[27]

(24) An order refusing to exercise inherent powers under S. 151, C.P.C.[28]

(25) An order setting aside an *ex parte* decree.[29]

(26) An order restoring a suit dismissed for default.[30]

(27) An order granting or refusing a certificate for leave to appeal to the Privy Council.[31]

(28) An order refusing stay of execution under O. 45, R. 13.[32]

(29) An order postponing sale.[33]

(30) An order refusing to alter the terms of a sale proclamation.[34]

(31) An order refusing to transfer a case.[35]

(32) An order directing the issue of notice to respondents in Europe.[36]

(33) An order of remand in appeal directing the trial of a *particular issue* keeping the case in file.[37]

NOTE.—An order of remand of the *whole* case is a "judgment"—*See* Note 2 above.

(34) An order made at the settlement of issues fixing a distant date for the hearing of the suit was held to be appealable in the undermentioned case by the High Court of Madras.[38] But this decision has been dissented from in the later Full Bench in I.L.R. 35 Mad. 1 and is not good law. Such an order would not be appealable as it merely relates to procedure.

4. **Orders in proceedings other than suits and appeals.**—The following are among the orders in miscellaneous proceedings which have been held to be appealable as judgments under this clause. As to whether and how far these decisions can be regarded as correct or principle, see the discussion as to the meaning of the word "judgment" in Note 2 above:—

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(26) *Subbiah Thevar* v. *Ponnuswami Thalavar,* 1927 Mad 1021 (1021): 105 Ind Cas 720.

(27) *Balakrishna Ayyar* v. *Parvathammal,* 1928 Mad 154 (155): 53 Mad L Jour 494: 26 Mad L W 333: 39 Mad L Tim 146: 1927 Mad W N 809: 105 Ind Cas 124.

(28) *Banwari Lal* v. *Shukurullah,* 1933 Pat 139 (142): 12 Pat 202: 14 Pat L Tim 1: 142 Ind Cas 455.

(29) *Baldeo Das* v. *Shubchurn Das,* 1926 Cal 327 (328, 331): 91 Ind Cas 965: 30 Cal W N 104.

(30) *Maharaja Kishore* v. *Kiran Sashi,* 1922 Cal 407 (407): 49 Cal 616: 69 Ind Cas 820.

(31) *Lutf Ali Khan* v. *Ashgur Reza,* (1890) 17 Cal 455 (457, 458): *Mowla Buksh* v. *Kishen Protab Sahu,* (1875-76) 1 Cal 102 (103): *Amirunnessa* v. *Behari Lal,* (1876) 25 Suth W R 529 (531): *Mowla Buksh* v. *Hodgkinson,* (1875) 24 Suth W R 150 (151); Refusing certificate—Submitted not correct; *Tarachand Biswas* v. *Radha Jeebhan Mustafee,* (1876) 24 Suth W R 148 (149); *Manly* v. *Taterson,* (1881) 7 Cal 339 (342): 9 Cal L Rep 166.

(32) *Prosad Singh* v. *Adhikari Kunwar,* (1894) 21 Cal 473 (475).

(33) *Kaveri Bai Ammal* v. *B Mehta and Sons,* 1924 Mad 234 (235): 46 Mad L Jour 71: 18 Mad L W 615: 1923 Mad W N 894: 75 Ind Cas 901; *Ibrahimbhai Fazalbhai Jooma Bhai Laljee.* v. *Yoosuf Ismail Bhai Abdullah Bhai Laljee,* 1932 Bom 134 (135, 136): 34 Bom L R 12: 56 Bom 237: 137 Ind Cas 456.

(34) *Kaverbai* v. *Mehta and Sons,* 1924 Mad 234 (235): 46 Mad L Jour 71: 18 Mad L W 615: 1923 Mad W N 894: 75 Ind Cas 901; *Tawker* v. *Harsookdoss,* 1924 Mad 386 (386): 45 Mad L Jour 611: 18 Mad L W 647: 33 Mad L Tim 72: 1923 Mad W N 834: 76 Ind Cas 124.

(35) *Narasa Reddi* v. *Hajee Tar Mohammad Ayub Sait,* 1928 Mad 209 (209): 27 Mad L W 264: 107 Ind Cas 806: 51 Mad 330: 54 Mad L Jour 710; *Sankaralinga Reddiar* v. *Ramasami Reddiar,* 1928 Mad 232 (233): 39 Mad L Tim 605: 1927 Mad W N 804: 106 Ind Cas 890; *Pahlad Rai* v. *Shiv Ram,* 1927 Lah 540 (540): 102 Ind Cas 843: 8 Lah 681: 29 Pun L R 16.

(36) *Shankar Das* v. *Shambu Nath,* 1926 Lah 174 (174): 93 Ind Cas 851: 8 Lah L Jour 35: 27 Pun L R 109.

(37) *Punnayya* v. *Parandamayya,* 1927 Mad 317 (318): 25 Mad L W 95: 99 Ind Cas 585: 38 Mad L Tim 206; *Gooroo Prasanno* v. *Ambikamoya Dasya,* (1909) 2 Ind Cas 636 (637) Cal; *Bara Estate* v. *Anup Chandra,* (1917) 41 Ind Cas 337 (340): 2 Pat L W 71: 1917 Pat H C C 342: 2 Pat L Jour 663.

(38) *R* v. *R,* (1891) 14 Mad 88 (93).

(1) An order passed by a single Judge of a Chartered High Court in the exercise of *Admiralty or Vice-Admiralty jurisdiction.*[1]

(2) An order refusing leave[2] or refusing to set aside an order granting leave[3] to sue under *Cl. 12 of the Letters Patent.*

(3) An order granting[4] or refusing[5] an application to commit for *contempt*, not being an order passed in the exercise of criminal jurisdiction.[5-a]

(4) An order deciding the claim of relatives to the custody of a minor on a *writ of habeas corpus.*[6]

(5) An order refusing to excuse the delay in filing an appeal under S. 5 of the *Limitation Act.*[7] But a contrary view has been taken by the Calcutta High Court.[8]

(6) An order allowing the Administrator-General commission at a certain rate under S. 27 of *Act II of* 1874.[9]

(7) An order under S. 90 of the *Probate and Administration Act*, 1881[10] (corresponding to S. 307 of the Succession Act, XXXIX of 1925) as also an order granting probate.[11]

(8) An order refusing to set aside an order for the examination of witnesses passed by the Registrar in *insolvency* under S. 36 of the *Presidency Towns Insolvency Act*[12] or an order dismissing an application by a judgment creditor praying for payment of a certain sum of money by the Official Assignee.[13]

(9) An order under S. 215 of the *Companies Act* depriving creditor of all rights to take advantage of winding up proceedings[14] or an order directing a fresh meeting to be held rejecting the proxy forms used under S. 153 of the same Act.[15] S. 169 of the (old) Act does not contravene the right of appeal conferred by the provisions of this clause.[16]

(10) An order refusing to enlarge the time for the submission of an award on an application under S. 13 of the *Arbitration Act* (1899);[17] or an order refusing to set aside an award;[18] or an order dismissing an application to

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Note 4.

(1) *Champion*, In the matter of *ship*, (1890) 17 Cal 66 (83).

(2) *De Souza* v. *Coles*, (1867) 3 Mad H C R 384.

(3) *Hadjee Ismail* v. *Hadjee Mahomed*, (1874) 13 Beng L R 91 (101): 21 Suth W R 303.

(4) *Navivahoo* v. *Narotam Das*, (1883) 7 Bom 5 (12).

(5) *Mohendra Lal* v. *Anundo Coomar*, (1897) 25 Cal 236 (239).

(5-a) *Narayan Rao Vithal* v. *Solomon Moses*, 1933 Bom 108 (109): 35 Bom L R 9 [Explaining 7 Bom 5].

(6) In the matter of *Narrondas Dhanji*, (1890) 14 Bom 555 (555).

(7) *Ramchandra Gangadhar* v. *Mahadeo Moreshwer*, (1918) 44 Ind Cas 913 (914): 42 Bom 260: 20 Bom L R 172; *Nagindas* v. *Nilaji*, 1924 Bom 399 (403): 48 Bom 442: 26 Bom L R 395: 80 Ind Cas 862.

(8) *Gobinda Lal* v. *Shiba Das*, (1906) 33 Cal 1323 (1341): 10 Cal W N 986: 3 Cal L Jour 545. See also *Prosonno Kumar Baidya* v. *Ramachandra De*, (1918) 47 Ind Cas 677 (679): 28 Cal L Jour 205 [Question left open].

(9) *Somasundaram* v. *Administrator-General*, (1876) 1 Mad 148 (151): 11 Mad L Jour 408.

(10) In the goods of *Indrachandra Singh*, (1896) 23 Cal 580 (590).

(11) *Umrao Chand* v. *Bindraban*, (1895) 17 All 475 (477, 478).

(12) *Rai Sukhlal Karnani Bahadur* v. *Official Assignee of Calcutta*, 1921 Cal 58 (62): 48 Cal 1089: 25 Cal W N 750: 66 Ind Cas 715.

(13) *Punithavelu* v. *Bhashyam*, (1902) 25 Mad 406 (409): 12 Mad L Jour 282.

(14) *Levy Brothers* v. *Subodh Kumar Dey*, 1927 Cal 689 (690, 691): 31 Cal W N 894: 103 Ind Cas 659.

(15) *Lal Dawson* v. *J Hormasji*, 1932 Rang 96 (97): 10 Rang 189: 137 Ind Cas 444.

(16) In re *Lakhamidas Khaimji Spinning Co*, (1911) 11 Ind Cas 562 (564): 13 Bom L R 558.

(17) *G Martirosi* v. *A K C T Subramanian Chettiar*, 1928 Mad 69 (70, 71): 27 Mad L W 51: 54 Mad L Jour 49: 1928 Mad W N 107: 51 Mad 103: 109 Ind Cas 70 F B.

(18) *Campbell* v. *Jeshraj*, (1918) 46 Ind Cas 687 (688): 45 Cal 502; *Toolse Money Dasi* v. *Sudevi*, (1899) 26 Cal 361 (368): 3 Cal W N 347; *Howard* v. *Wilson*, (1879) 4 Cal 231 (235): 2 Cal L Rep 488 [Order refusing to file an award in a pending suit is appealable].

L. P. Cal. Cl. 15, Notes 4—5.

revoke a submission to arbitration;[19] or an order remitting the award to arbitrators to make a fresh award.[20] An order under S. 19 of the Act refusing to stay proceedings is appealable according to the High Court of Calcutta[21] but not appealable according to the High Court of Rangoon.[22]

(11) In the undermentioned case[23] it has been held by the High Court of Bombay that in proceedings under the *Guardian and Wards Act*, 1890, it has *inherent jurisdiction* to hear an appeal apart from the provision of this clause.

The following orders have been held not appealable:—

(1) An order directing the issue of a *Mandamus*.[24] A contrary opinion has been however expressed in the Madras Full Bench case cited below.[25]

(2) An order admitting an appeal under S. 5 of the *Limitation Act*.[26]

(3) The decision of the High Court in a *Land Acquisition* appeal is not appealable under this clause according to the High Court of Madras.[27] But the High Court of Lahore[28] has taken a contrary view.

(4) An order returning an award for complying with the formalities prescribed by S. 11 (2) of the *Arbitration Act*.[29]

(5) An order refusing an application under S. 169 of the *Indian Companies Act*;[30] or an order under S. 195 of that Act directing the directors of a company to appear in Court for examination as to their dealings.[31]

(6) A decision of the single Judge of the High Court on a point of law referred to it by the Commissioner of Income-tax under S. 66 of the *Income-tax Act*.[32]

(7) An order dismissing an application to adjudge a person as a lunatic under the *Lunacy Act*.[33]

5. **Orders made in the exercise of Revisional Jurisdiction.**—Orders made by a single Judge in the exercise of revisional jurisdiction are not appealable under this clause. A right of appeal is expressly excluded in such cases.[1] Where it is doubtful whether the

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(19) *The Bombay Fire Insurance Co* v. *Ahmedbhoy Habibhoy*, (1909) 1 Ind Cas 14 (19): 34 Bom 1: 11 Bom L R 1.

(20) *Saya Pye* v. *Kundinnya*, 1924 Rang 47 (48): 2 Bur L Jour 198: 1 Rang 661: 76 Ind Cas 525.

(21) *Joy Lal and Co* v. *Gopirancy Bhotica*, (1920) 55 Ind Cas 778: 24 Cal W N 612: 31 Cal L Jour 167: 47 Cal 611.

(22) *Ah Kway* v. *Administrator-General, Burma*, 1929 Rang 287 (288, 289): 7 Rang 481: 120 Ind Cas 226.

(23) *Jalbhai* v. *Jerbhai*, 1931 Bom 193 (194, 195): 32 Bom L R 1301: 128 Ind Cas 431: 55 Bom 145.

For a criticism of the soundness of this decision.

See 60 Mad L Jour (N I C) 31.

(24) *Justices of Peace for Calcutta* v. *Oriental Gas Co*, (1872) 8 Beng L R 433 (434): 17 Suth W R 364.

(25) *Tulja Ram* v. *Alagappa*, (1910) 8 Ind Cas 340 (343): 35 Mad 1: 1910 Mad W N 697: 8 Mad L Tim 453: 21 Mad L Jour 1 F B.

(26) *Brojo Gopal* v. *Amarchandra*, 1929 Cal 214 (216): 32 Cal W N 935: 56 Cal 135: 114 Ind Cas 88 F B. See, however, *Tin Nyp* v. *Maung Ba Saing*, 1924 Rang 148 (152): 1 Rang 584: 77 Ind Cas 385 [11 All 176, foll].

(27) *Manavikraman* v. *The Collector of the Nilgiris*, (1919) 49 Ind Cas 27 (29): 41 Mad 943: 8 Mad L W 261: 24 Mad L Tim 155: 35 Mad L Jour 110: 1918 Mad W N 540.

(28) *Har Dial* v. *Secretary of State*, 1928 Lah 275 (277): 8 Lah 420: 69 Ind Cas 428.

(29) *Abowath* v. *Abowath*, 1928 Rang 110 (111): 6 Rang 25.

(30) *Wall* v. *Howard*, (1895) 17 All 438 (446): 1895 All W N 89.

(31) *Madan Gopal Daga* v. *Sachindra Nath Sen*, 1928 Cal 295 (296): 55 Cal 262: 109 Ind Cas 764.

(32) *Bulaqi Shah* v. *Collector of Lahore*, 1925 Lah 336 (336): 6 Lah 30: 88 Ind Cas 570: 26 Pun L R 144 [Following 1923 P C 148]; *Prabhat* v. *Emperor*, 1925 Cal 598 (599): 29 Cal W N 398: 52 Cal 546: 87 Ind Cas 658.

(33) *Aishabai* v. *Ismail Sakhi*, 1933 Bom 112 (113): 35 Bom L R 88.

Note 5.

(1) *Mahomed Valli* v. *Valli Asmal*, 1924 Bom 324 (325): 26 Bom L R 171: 79 Ind Cas 723; *Hira Lal* v. *Baisai*, (1898) 22 Bom 891 (892, 893); *Byomkes Seth* v. *Bhut Nath Pal*, 1921 Cal 217 (218): 34 Cal L Jour 489: 64 Ind Cas 689; *Peary Lal Daw* v. *Banamali Dey*, (1915) 30 Ind Cas 862: 22 Cal L Jour 40; *Baijnath* v. *Raja Jung*, (1915) 30 Ind Cas 906 (907): 22 Cal L Jour 113; *Asharam* v. *Kesri Chand*, (1916) 33 Ind Cas 247 (249): 22 Cal L Jour 22; *Praja Mal Chandi Mal* v. *Mulchand Murari Lal*, 1925 Lah 624 (625): 6 Lah 250: 94 Ind Cas 521; *Sadaka Muhammad* v. *Hayath Bacha Sahib*, 1928

decision appealed from is in revision or in second appeal, but the party aggrieved has a right of second appeal, it must be deemed to be one passed in the exercise of appellate jurisdiction.[2]

6. **Orders made in the exercise of powers of superintendence.**—This clause excludes a right of appeal in the case of orders passed in the exercise of the powers of superintendence under S. 107 of the Government of India Act, such orders are, therefore, not appealable under this clause.[1]

7. **Orders passed in the exercise of criminal jurisdiction.**—No appeal lies under this clause against an order passed by a single Judge of the High Court in the exercise of its criminal jurisdiction.[1] An order of sanction to prosecute under S. 195, Cr. P. Code, is an order made in the exercise of criminal jurisdiction and not appealable under this clause.[2] Similarly, an order of a Judge of the High Court staying a criminal trial is not a "judgment" appealable under this clause.[3]

8. **Appeal to Privy Council.**—A decision of the High Court in an appeal under this clause is appealable to the Privy Council.[1]

9. **Appeal in cases of disagreement among Judges of a Division Bench—See also S. 98.**—Prior to the amendment of this clause in 1928, there was a right of appeal from the decision of the senior Judge where the Judges of a Division Bench were equally divided in opinion. As noticed in Note 1, *ante*, such a right of appeal has now been taken away. The cases cited below[1] which were decided under the old clause prior to the amendment in 1928, are now no longer law, and are only of academic interest.

Mad 169 (169): 27 Mad L W 18: 1928 Mad W N 30: 51 Mad 165: 54 Mad L Jour 323: 107 Ind Cas 813; *Palaniappa Chettiar* v. *Venkatachala Konan*, (1909) 3 Ind Cas 953 (954): 6 Mad L Tim 345; *Venkatarama Ayyar* v. *Madalai Ammal*, (1900) 23 Mad 169 (170); *Chinnasami Mudali* v. *Arumuga*, (1904) 27 Mad 432 (434); *Raghubans Lal* v. *Solano*, 1931 Pat 292 (293): 10 Pat 428: 12 Pat L Tim 599: 133 Ind Cas 676; *Nisar Ali* v. *Ali*, (1906) 28 All 133 (134, 135): 1905 All W N 218; *Gauri Dutta* v. *Parsotan Das*, (1893) 15 All 373 (374): 1893 All W N 122; **The contrary view taken in the undermentioned cases prior to the amendment of the Letters Patent in 1919, that an appeal lies is not now good law.** *Aiya Goundan* v. *Jeyan Mandalathipathi Gopanna Manradiyar*, (1915) 26 Ind Cas 57 (59): 1 Mad L W 726: 16 Mad L Tim 253: 27 Mad L Jour 480: 1914 Mad W N 832; *Srinivasa Ayyangar* v. *Ramasami Chettiar*, (1915) 29 Ind Cas 846 (847): 29 Mad L Jour 12: 18 Mad L Tim 46: 39 Mad 235 F B; *Rama Ayyar* v. *Venkalachala*, (1907) 30 Mad 311 (312): 2 Mad L Tim 84: 17 Mad L Jour 123; *Chappan* v. *Moidin Cutti*, (1899) 22 Mad 68 (80, 84, 99) F B; *Sriramulu* v. *Ramasam*, (1899) 22 Mad 109 (109); *Venkata Reddi* v. *Taylor*, (1894) 17 Mad 100 (102): 3 Mad L Jour 259; *Vanangamudi* v. *Ramasami*, (1891) 14 Mad 406 (407); *Sheo Prasad* v. *Ramchander*, (1914) 23 Ind Cas 977 (978): 41 Cal 323.

(2) *Meyappan Servai* v. *Sellappa Chettiar*, 1930 Mad 489 (489): 127 Ind Cas 142.

Note 6.

(1) See *Chariar* v. *Sellappa Nattan*, (1913) 20 Ind Cas 633 (634): 1913 Mad W N 595 [Case before the amendment of 1919—Not good law under the present clause].

Note 7.

(1) In re *Adapala Venkata Narasa*, (1915) 29 Ind Cas 96 (96): 2 Mad L W 363; *Muthuswami* v. *Kadinga Moopan*, (1917) 40 Ind Cas 715 (715): 33 Mad L Jour 78; *Nissankarao* v. *Coola Ramaya*, (1915) 28 Ind Cas 733 (733): 39 Mad 537: 1915 Mad W N 240; *Raghava Appadu* v. *Ragava Appamma*, (1915) 28 Ind Cas 662 (663): 39 Mad 472: 28 Mad L Jour 483: 17 Mad L Tim 330 [Order under S. 488, Cr P Code]; *Venkatagiri Ayyar* v. *N M Firm*, (1920) 54 Ind Cas 172 (172): 43 Mad 361: 37 Mad L Jour 652: 10 Mad L W 568 [Question left open]; In re *Kandasami Pillai*, (1918) 43 Ind Cas 624 (624) Mad [Order under S 250, Cr P Code]; *Adur Desikachari* v. *Emperor*, (1915) 28 Ind Cas 527 (528): 39 Mad 539: 28 Mad L Jour 307: 1915 Mad W N 224 [Order in revision against order of Magistrate under S. 118, Cr P Code]; In re *Ramasami Chetty*, (1904) 27 Mad 510 (512): 1 Weir 787: 14 Mad L Jour 394 [Order under S. 107, Cr P Code]; *G Subramania Ayyar* v. *Emperor*, (1909) 4 Ind Cas 871 (871): 19 Mad L Jour 478; *Wallajapet Rajammal* v. *Emperor*, (1911) 12 Ind Cas 653 (653): 22 Mad L Jour 44: (1911) 2 Mad W N 479: 10 Mad L Tim 502; *Kali Kinkar* v. *Dinobandhu*, (1905) 32 Cal 379 (384): 9 Cal W N 321 [Order granting sanction to prosecute]; In the matter of *Horace Lyall*, (1902) 29 Cal 286 (295, 299, 300): 6 Cal W N 254 F B [Order refusing an application under Ss. 456 and 491, Cr P Code].

(2) *Muniswami* v. *Rajaratnam*, 1922 Mad 495 (496): 16 Mad L W 365: 43 Mad L Jour 375 1922 Mad W N 594: 31 Mad L Tim 287: 45 Mad 928: 71 Ind Cas 126 [But such an order can be *revoked* by the authority to which the Judge granting sanction is subordinate]; *Srinivasa* v. *Queen-Empress*,. (1894) 17 Mad 105 (105): 1 Weir 786; *Bapu* v. *Bapu*, (1917) 38 Ind Cas 994 (995): 39 Mad 768 [Question doubted]; *Ramjas* v. *Mahadeo Pershad*, (1916) 36 Ind Cas 585 (588): 39 All 147: 14 All L J 1230; *Abdul Latiff Usman* v. *Haji Tar Mohammad*, 1922 Bom 455 (456): 24 Bom L R 817: 68 Ind Cas 33: 47 Bom 270 [Question left open]. See however *Budhu Lal* v. *Chattu Gopa*, (1917) 39 Ind Cas 465 (467, 468): 44 Cal 804: 21 Cal W N 269: 25 Cal L Jour 193 [Order remanding a case to the Small Cause Judge who refused to grant a sanction under S. 195, Cr P Code, to make a further investigation and pass orders thereon is a "judgment"].

(3) *Babujan Misser* v. *Sheo Sahay Chaudhury*, (1918) 48 Ind Cas 348 (349): 3 Pat L Jour 509: 5 Pat L W 153: 1919 Pat H C C 218.

Note 8.

(1) *Hurdeo Narain* v. *Girdhari Singh*, (1872) 13 Beng L R 103: 21 Suth W R 263.

Note 9.

(1) *Suresh Chunder* v. *Shiti Kanta*, 1924 Cal 855 (856): 51 Cal 669: 28 Cal W N 687: 78

L. P. Cal. Cl. 15, Notes 10—11.

10. S. 175 of Agra Tenancy Act, if precludes appeal.—Section 175 of the N. W. P. Tenancy Act does not effect or preclude the right of appeal conferred by this clause.[1]

11. "Declares that the case is a fit one for appeal."—Under the present clause an appeal lies from the decision of a single Judge of the High Court passed in second appeal only where the *Judge who passed the judgment* declares that the case is a fit one for appeal.[1] No hard and fast rule can be laid down as to when a Judge should grant or refuse leave to appeal. The mere fact that the decision of the lower appellate Court is reversed by the High Court or the fact that the valuation of the appeal is beyond a particular figure, does not by itself entitle the petitioner to a grant of leave to appeal. The jurisdiction to grant leave should not, however, be exercised arbitrarily or capriciously but in a judicial manner having regard to all the circumstances of the case.[2] The High Court of Bombay in a recent decision[3] has held that in the matter of granting leave under this clause the Court should be guided by the same principles as those governing leave to appeal to the Privy Council. It has accordingly refused to grant leave holding that the case is not one of great public or private importance or involving questions which may be important precedents governing numerous other cases.

An order refusing leave to appeal under this clause is not appealable.[4]

In the case cited below, the High Court of Rangoon[5] rejected an application for leave to appeal which was filed four months after the judgment in second appeal.

Ind Cas 679; *Chandra Kishore* v. *Basrat Ali*, (1918) 44 Ind Cas 763 (767): 22 Cal W N 627: 27 Cal L Jour 418; *Panchumoni Dasi* v. *Chandra Kumar*, (1915) 31 Ind Cas 319 (320): 22 Cal L Jour 298; *Jadhu Natha* v. *Harikar*, (1913) 18 Ind Cas 253 (254): 17 Cal W N 308: 17 Cal L Jour 206; *Girdharijі* v. *Romanlalji*, (1890) 17 Cal 2 (11); *Girdhariji* v. *Purushottam*, (1884) 10 Cal 814 (816) F B; *Hurbuns Sahay* v. *Thakoor Pershad*, (1884) 10 Cal 108 (109): 13 Cal L Rep 285; *Hurish Chander Mitter*, Petitioner, (1872) 18 Suth W R 209 (210): 10 Beng L R 79; In re *Omrao Begam*, (1870) 13 Suth W R 310 (311); *Ranee Shurno Moyee* v. *Lachmeput Doogur*, (1867) 7 Suth W R 512 (512): Beng L R Supp Vol 674 F B; *Nandipat* v. *Urquhart*, (1869) 4 Beng L R A C 181: 13 Suth W R 209; *Shahabadee* v. *Khaja Hossain*, (1870) 4 Beng L R 86: 12 Suth W R 498; *Punjab Akhbarat and Press Co* v. *Ogilire*, 1926 Lah 65 (67, 68): 27 Pun L R 50: 8 Lah L Jour 13: 93 Ind Cas 344: 7 Lah 179 [Right of appeal given by cl 10 is not destroyed merely because the Judges, though differing on merits, made a joint order regarding decree to be passed]; *Official Assignee of Madras* v. *Lupprian*, (1910) 6 Ind Cas 387 (388): 84 Mad 121: 8 Mad L Tim 101; *Narayanaswami* v. *Osuru Reddi*, (1902) 25 Mad 548 (550); *Venkatasubbiah* v. *Chutti Venkatasubbama*, 1925 Mad 1032 (1033): 86 Ind Cas 857: 21 Mad L W 721; *Hossaine Begam* v. *Collector* of *Muzufurnagar*, (1887) 9 All 655 (657): 6 All W N 245; *Ghazi Ram* v. *Nuraj Begam*, (1875-76) 1 All 31 (33): 1 Mad Jur 221 [*Held*, that in order to be appealable under this clause there must be such a judgment on the part of all the Judges who may compose the Division Court as disposes of the appeal or suit before it]; *Jivan Ram* v. *Tandi Ram*, (1911) 11 Ind Cas 305 (306): 34 All 13: 8 All L J 1072. **In the following cases it was held that in an appeal under this clause the appellate Court is not confined only to the points on which the Judges differed but the whole case is open to appeal:**—*Ram Dial* v. *Ram Das*, (1876) 1 All 181 (190, 191); *Velji Bhumsey and Co* v. *Bachoo*, 1925 Bom 118 (120): 48 Bom 691: 28 Bom L R 349: 87 Ind Cas 199; *Umraochand* v. *Bindraban Chand*, (1895) 17 All 475 (477, 478): 1895 All W N 104; *Gopeswara Pyne* v. *Hemchandra Bose*, (1920) 57 Ind Cas 226 (234): 31 Cal L Jour 447; *Upendra Nath Bose* v. *Bundeshri Prosad*, (1916) 32 Ind Cas 468 (474, 478): 20 Cal W N 210: 22 Cal L Jour 452; *Punjab Akhbarat and Press Co* v. *Ogilvie*, 1926 Lah 65 (68, 69): 27 Pun L R 50: 8 Lah L Jour 13: 93 Ind Cas 344: 7 Lah 179; *Mahomad Ravuthar* v. *British India Steam Co, Ltd*, (1909) 1 Ind Cas 977 (984): 32 Mad 95: 18 Mad L Jour 497: 4 Mad L Tim 110.

Note 10.

(1) *Zamin Ali Khan* v. *Genda*, (1904) 26 All 375 (379): 1903 All W N 79.

Note 11.

(1) *Ma Than* v. *Mg Ba Gyaw*, 1926 Rang 1 (2): 3 Rang 546: 4 Bur L Jour 185: 93 Ind Cas 124 F B; *Maung Po Myit* v. *Maung Po Sin*, 1931 Rang 147 (148): 9 Rang 31: 131 Ind Cas 729 F B; *Sheiklal Shaikh Sharif* v. *Ahmed Khan Sharif Khan*, 1930 Bom 366 (366): 32 Bom L R 624: 125 Ind Cas 710; *Mathurbhai Garbadhbai* v. *Nadiad City Municipality*, 1929 Bom 241 (241): 31 Bom L R 478: 118 Ind Cas 798; *Badruddin Abdul Rahim* v. *Sitaram Vinayak*, 1928 Bom 371 (374): 30 Bom L R 942: 52 Bom 753 [Application for leave can be made orally]; In re *Kondalu Ayyar*, 1930 Mad 427 (428): 53 Mad 158: 30 Mad L W 976: 1929 Mad W N 878: 57 Mad L Jour 783: 124 Ind Cas 304.

(2) *Bulliraju* v. *Satyanarayanamurthi*, 1931 Mad 202 (203, 206): 1930 Mad W N 65: 58 Mad L Jour 388: 124 Ind Cas 7: 53 Mad 405: 31 Mad L W 254. See also *Sita Ram* v. *Thakur Prasad*, 1929 All 429 (430): 117 Ind Cas 619 [Leave to appeal refused in a suit for malicious prosecution].

(3) *Sadashiv Vishnu Simon* v. *Sakhonam Raghunath*, 1932 Bom 218 (221): 34 Bom L R 398: 138 Ind Cas 454.

(4) *Balu Harshet* v. *Sri Krishna*, 1930 Bom 224 (225): 32 Bom L R 185: 54 Bom 331: 125 Ind Cas 431; *Harendrachandra* v. *Kailashchandra*, 1931 Cal 571 (571, 572): 58 Cal 342: 134 Ind Cas 574; *Ramannayya* v. *Kottayya*, 1930 Mad 75 (78): 121 Ind Cas 621: 52 Mad 952: 30 Mad L W 886: 57 Mad L Jour 398.

(5) *Maung Hman* v. *M Shein*, 1924 Rang 45): 79 Ind Cas 744 and 441: 2 Bur L Jour 164.

L. P. Cal., Cl. 15, Notes 12—15.

12. **Cross objections.**—It has been held that the provisions of the Code of Civil Procedure relating to cross objections do not apply to appeals under this clause.[1]

13 **Security for costs.**—In an appeal under this clause, the High Court has power to direct the appellant to furnish security for costs, and on his failure to comply therewith it can reject the appeal under the provisions of O. 41, R. 10 (2) of the Code.[1]

14 **Points on which appeal may be heard.**—It is not ordinarily open to the parties to raise in an appeal under this clause a contention which has not been urged before the Court from the judgment of which the appeal is preferred[1] unless the point is one relating to jurisdiction or raises a pure question of law.[2] But the Court is not, however, confined to facts and circumstances as disclosed on the judgment appealed against; it is entitled to look into the judgment of the lower appellate Court.[3]

Wrong exercise of discretion—Whether may be a ground of appeal.—The High Court of Allahabad[4] has held that an order passed in the exercise of judicial discretion vested in a single Judge of the High Court is not appealable as a "judgment" under this Clause. The High Court of Madras[5] has, on the other hand, held that "the fact of a matter being within the discretion of the original Judge is not a ground for refusing to entertain the appeal but a sufficient reason for declining to interfere with that discretion".

15. **Limitation.**—Provision has been made in the rules framed by various High Courts as to the period within which an appeal under this clause is to be filed. Under the rules framed by the High Courts of Allahabad,[1] Lahore,[2] Patna[3] and Rangoon[4] the

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Note 12.

(1) *Brojendro* v. *Prosanna*, 1920 Cal 776 (777): 24 Cal W N 1016: 59 Ind Cas 589: 32 Cal L Jour 48; *Kausalia* v. *Gulab Kuar*, (1899) 21 All 297 (300): 1899 All W N 72; *Mt Purna Kuar* v. *Mangat Rai*, 1922 All 55 (55): 70 Ind Cas 488 [Following 21 All 297].

Note 13.

(1) *Sabitre* v. *Savi*, 1921 P C 80 (82): 48 Cal 481: 48 Ind App 76: 19 All L J 281: 23 Bom L R 681: 33 Cal L Jour 307: 40 Mad L Jour 308: 14 Mad L W 362: 1921 Mad W N 159: 60 Ind Cas 274 P C; *Ratanchand* v. *Damji*, 1923 Bom 399 (399): 25 Bom L R 468: 73 Ind Cas 474.

[But see *Sesha Ayyar* v. *Nagarathna*, (1904) 27 Mad 121 (123): 13 Mad L Jour 362 (Not approved in 1921 P C 80).]

Note 14.

(1) *Ahmad Shah* v. *Faujidar Khan*, (1920) 55 Ind Cas 983 (984): 2 Lah L Jour 1: 1920 Pun W R 11: 1920 Pun L R 1920; *Teja Singh* v. *Gurcharan Singh*, 1930 Lah 632 (633): 31 Pun L R 281: 128 Ind Cas 57: 11 Lah 535; *Jai Pershad* v. *Chartered Bank*, 1929 Lah 536 (537): 120 Ind Cas 284: 30 Pun L R 433: 11 Lah L Jour 425; *Bhup Singh* v. *Prem Singh*, 1925 Lah 281: 6 Lah L Jour 584; *Wazir Chand* v. *Nathu Ram*, 1924 Lah 468 (469): 6 Lah L Jour 151: 80 Ind Cas 321; *Ram Singh* v. *Waryam Singh*, 1924 Lah 251 (252): 5 Lah L Jour 450: 77 Ind Cas 585; *Brij Raj* v. *Joti Pershad*, 1923 Lah 657: 6 Lah L Jour 395: 73 Ind Cas 799; *Muhammad Taqi* v. *Abdul Rahman*, 1923 Lah 151 (152, 153): 79 Ind Cas 281; *Ratanchand* v. *Asa Singh*, 1922 Lah 188 (188, 189): 4 Lah L Jour 217: 62 Ind Cas 898; *Basant Ram* v. *Muhammad Ali*, 1921 Lah 326 (327): 4 Lah L Jour 293; *Ayyanars and Kaniyala Swamigal Koil Devastanam, Koohdai* v. *Peria Karuppa Thevan*, 1929 Mad 617 (620): 118 Ind Cas 279: 30 Mad L W 583; *Debi Charan* v. *Sheikh Medhi*, (1916) 35 Ind Cas 888 (891): 1 Pat L Jour 485: 20 Cal W N 1303: 1 Pat L W 209; *Hazara Begam* v. *Hussain Ali*, (1869) 12 Suth W R 498 (499, 500): 4 Beng L R A C 86; *Brij Bhushan* v. *Durga Dut*, (1898) 20 All 258 (261): 1898 All W N 41.

(2) *Secretary of State* v. *Sukhdeo*, (1899) 21 All 341 (345): 1899 All W N 151 F B; *Harbans Singh* v. *Bur Singh*, 1931 Lah 144 (144): 31 Pun L R 381: 132 Ind Cas 379 [Decision of a single Judge in second appeal interfering with the findings of fact—Set aside in Letters Patent appeal as being without jurisdiction]. See also *Munshi Lal* v. *Ramasis Puri*, 1922 Pat 384 (385): 1 Pat 246: 65 Ind Cas 175: 3 Pat L Tim 343; *Sada Singh* v. *Kupala*, (1920) 58 Ind Cas 768 (769): 1920 Lah 237: 1 Lah 387: 2 Lah L Jour 269.

(3) *Jogesh Chandra Roy* v. *Sasi Kumar*, 1930 Cal 321 (323): 34 Cal W N 97: 126 Ind Cas 782.

(4) *R Well* v. *J E Howard*, (1895) 17 All 438 (446): 1895 All W N 89.

(5) *Tulja Ram* v. *Alagappa*, (1910) 8 Ind Cas 340 (347): 35 Mad 1: 1910 Mad W N 697: 8 Mad L Tim 453: 21 Mad L Jour 1 F B. **The following cases in Madras prior to 8 Ind Cas 340 P C taking a contrary view are not good law. Dissented from in the Full Bench**:—*Natti Goundan* v. *Gurunada Goundan*, (1910) 7 Ind Cas 695 (695): 8 Mad L Tim 288: 1910 Mad W N 423; *Chinnasami* v. *Arumugam*, (1904) 27 Mad 432 (434); *Pathukudi Abdu* v. *Pucakha*, (1904) 27 Mad 340 (342); *Maruthamuthu* v. *Krishnamachariar*, (1907) 30 Mad 143 (144); *Appasami* v. *Somasundaram*, (1903) 26 Mad 437 (438).

Note 15.

(1) *Fazal Mohammad* v. *Phul Kuar*, (1879) 2 All 192 (192) F B. See also *Naubat Ram* v. *Harnam Das*, (1887) 9 All 115 (117): 1886 All W N 306 F B [*Held*, period of limitation is 90 days from date of judgment].

(2) *Dial Singh* v. *Budha Singh*, 1921 Lah 26 (27): 2 Lah 127: 3 Lah L Jour 415: 74 Pun L R 1921: 61 Ind Cas 327; *Fatteh Mohammad* v. *Chothu Ram*, 1921 Lah 237 (238): 3 Lah L Jour 361: 60 Ind Cas 737.

(3) *Deokilal* v. *Ramnand Lal*, 1921 Pat 365 (366) 5 Pat L Jour 701: 59 Ind Cas 179: 2 Pat L Tim 42: 2 U P L R (Pat) 235: 1920 Pat H C C 333.

(4) *J N Surety* v. *T S Chettiar Firm*, 1927 Rang 20 (27): 4 Rang 265: 98 Ind Cas 417:

L. P. Cal., Cl. 15, Notes 15—18.

memorandum of appeal under this clause need not be accompanied by a copy of the judgment or decree appealed from. Hence it has been held that an appellant is not entitled to claim the benefit of an extension or exclusion of time under Ss. 4 and 12 of the Limitation Act.

See also the undermentioned cases.[5]

16. **Court-fee.**—Prior to the amendment of S. 4 of the Court Fees Act by Act XXXIX of 1922, it was held in the undermentioned cases[1] that a memorandum of appeal under this clause was not liable to any Court-fee inasmuch as S. 4 did not provide for appeals under this clause. But under the amended Court Fees Act, it is liable for payment of Court-fee under Sch. I, Art. 1.

17. **Review.**—See Note 1 to S. 114 of the Code of Civil Procedure and the case cited below.[1]

18. **Practice.**—Section 117 of the Code of Civil Procedure provides that the provisions of the Code shall apply to High Courts save as otherwise provided, and O. 49, R. 3 exempts only certain provisions of the Code as not being applicable to the High Courts. Hence in a Letters Patent Appeal under this Clause the High Court can apply the provisions of O. 41, R. 11[1] or proceed under O. 41, R. 10.[2] But as already noticed in Note 10 to S. 105, the provisions of this Clause are not controlled by S. 105 and an order of remand though not appealed against can be challenged in an appeal under this Clause against the final judgment.[3]

An appeal under this Clause cannot be proceeded with if necessary parties are not impleaded.[4] In the undermentioned case[5] the High Court of Madras allowed an appeal under this Clause against an order rejecting an application for leave to appeal as a pauper under O. 44, R. 1 *without issuing notice to the respondent* observing that such a procedure was in conformity with the practice of that Court.

Cl. 16.

Appeal from Courts in the provinces.

16. And We do further ordain that the said High Court of Judicature at [Madras], [Bombay], Fort William in Bengal shall be a Court of Appeal from the Civil Courts of the Presidency of [Madras,] [Bombay], Bengal Division of the Presidency of Fort William and from all other Courts, subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force.

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5 Bur L Jour 187. See however *M H Arif* v. *Perumal*, 1926 Rang 143 (144): 5 Bur L Jour 75: 98 Ind Cas 689 [Rule 5 of High Court rules requiring copy of decree to be filed along with appeal memo applies to Letters Patent appeals also].

(5) Period of limitation 30 days:—*Huruck Singh* v. *Tulsi Ram Sahu*, (1870) 5 Beng L R 47: 13 Suth W R 216; *Adwaitya Charan* v. *Sorajranjan*, (1916) 34 Ind Cas 584 (585): 23 Cal L Jour 592; *Huruck Singh, Petitioner*, (1869) 11 Suth W R 107 (108); *Huruck Singh* v. *Tulsee Ram Sahoo*, (1869) 12 Suth W R 458 (459): 13 Suth W R 216.

Note 16.

(1) *Bhadul* v. *Manni*, 1922 All 164 (165): 44 All 13: 19 All L J 677: 63 Ind Cas 318; *Raghubar Singh* v. *Jethu Mahton*, 1922 Pat 13 (13): 3 Pat L Tim 194: 1922 Pat H C C 88: 65 Ind Cas 675: 1 Pat 384; *Har Dial* v. *Secretary of State*, 1923 Lah 275 (276): 3 Lah 420: 69 Ind Cas 428; *Balli Rai* v. *Mahabir Rai*, (1899) 21 All 178 (180): 1899 All W N 23. See also *Mahomed Ishaqi Sahib* v. *Md Moideen*, 1922 Mad 421 (422): 1922 Mad W N 511: 16 Mad L W 210: 43 Mad L Jour 436: 70 Ind Cas 813: 45 Mad 849.

Note 17.

(1) *Kalyan Singh* v. *Allah Diya*, (1918) 48 Ind Cas 476 (476): 16 All L J 964 [Allahabad view following 1 All L J 509].

Note 18.

(1) *Jagdis Chandra Das* v. *Chandra Das*, (1920) 54 Ind Cas 230 (231, 232): 1919 Pat H C C 146: 4 Pat L J 695.

(2) *Sabitri Thakurani* v. *Savi*, 1921 P C 80 (82, 83): 48 Cal 481: 19 All L J 281: 23 Bom L R 681: 33 Cal L Jour 307: 40 Mad L Jour 308: 14 Mad L W 362: 1921 Mad W N 159: 48 Ind App 76: 60 Ind Cas 274 P C.

(3) See cases cited in Note 10 to S. 105 and also *Srinivasa Varadachariar* v. *Runganaykì Ammal*, 1929 Mad 349 (351): 118 Ind Cas 291: 30 Mad L W 787.

(4) *Chajju Ram* v. *Singh Ram*, 1925 Lah 392 (392): 89 Ind Cas 298: 7 Lah L Jour 182: 26 Pun L R 150.

(5) In re *Peram Chennamma*, 1931 Mad 198 (198, 199): 31 Mad L W 76: 58 Mad L Jour 195: 122 Ind Cas 337: 53 Mad 245.

L. P. Cal., Cl. 16, Notes 1—3.

Synopsis.

1. Appeal from Courts in Provinces.
2. "Civil Courts."
3. "Subject to its superintendence."

1. **Appeal from Courts in Provinces.**—The constitution of the High Court as a Court of appeal is quite different from its jurisdiction to hear appeals from every decree or order passed by a Subordinate Court. If there is no law or regulation which allows an appeal to the High Court in a particular case, it cannot assume appellate jurisdiction in respect of that matter.[1]

2. **"Civil Courts."**—The terms "Civil Courts" in this clause does not cover a tribunal created under a particular statute for a particular purpose. Thus, no appeal will lie to the High Court against the decision of a commissioner acting as an election Court under the provisions of the United Provinces Municipalities Act (II of 1916).[1]

3. **"Subject to its superintendence."**—This clause provides that every Civil Court of a Province is subject to the appellate jurisdiction of the High Court and S. 107 of the Government of India Act provides that every Court subject to the appellate jurisdiction of the High Court is subject to its powers of superintendence. Reading these two together, it follows that every civil Court in a province or Presidency is subject to the High Courts right of superintendence.[1]

The High Court of Madras has held that a Revenue Divisional Officer exercising jurisdiction under S. 7 of the Madras Hereditary Village Offices' Act (III of 1895) is not a Court subject to the superintendence of the High Court within the meaning of this Clause.[2]

Cl. 17, Notes 1—2.

Jurisdiction as to infants and lunatics.

17. And We do further ordain that the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Presidency of [Madras,] [Bombay], Bengal Division of the Presidency of Fort William as that which is now vested in the said High Court immediately before the publication of these presents.

Synopsis.

1. Jurisdiction as to infants and lunatics.
2. Power of High Court to appoint guardian in the case of minor members of Hindu joint families.

1. **Jurisdiction as to infants and lunatics.**—The High Court as the successor and inheritor of the powers of the Old Supreme Court, has no jurisdiction under this Clause over natives of India with respect to the persons and estates of infants, idiots and lunatics, who reside outside the ordinary original jurisdiction of the High Court.[1] But in respect of European British Subjects the High Court could exercise jurisdiction under this Clause even though these parties reside outside of and have no property within the limits of its ordinary original jurisdiction.[2]

2. **Power of High Court to appoint guardian in the case of minor members of Hindu joint families.**—Although a guardian cannot be appointed under the Guardians

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Cl. 16—Note 1.

(1) *Kehri Singh* v. *Thirpal*, 1926 All 113 (113): 92 Ind Cas 282: 48 All 104: 23 All L J 965: L R 6 All 213 (Rev).

Note 2.

(1) *Abdul Rahman* v. *Abdul Rahim*, 1925 All 380 (382): 23 All L J 385: 6 L R All (Civ) 191: 87 Ind Cas 51: 47 All 513 F B.

Note 3.

(1) *Raghunadha* v. *Govinda*, 1928 Mad 1032 (1044): 55 Mad L Jour 798.

(2) *Palanakumara Chinnayya*, In re, 1922 Mad 887 (888, 841): 66 Ind Cas 566: 41 Mad L Jour 577: 14 Mad L W 548: 1921 Mad W N 757.

Cl. 17—Note 1.

(1) In re *Phanindra Chandra*, 1932 Cal 91 (92): 58 Cal 919: 35 Cal W N 1045: 133 Ind Cas 188; In the matter of *Sirish Chunder*, (1894) 21 Cal 206 (211); In the matter of *Jaundha Kuar*, (1882) 4 All 159 (163): 1881 All W N 172 [The Allahabad High Court has the same powers as those of the Calcutta High Court].

[But see In re *Tarunchandra Ghosh*, 1930 Cal 598 (599): 57 Cal 533: 128 Ind Cas 329].

(2) *Ellen Ramm* v. *Charles Spencer*, (1905) 2 All L J 81 (82) [The Allahabad High Court has the same powers as that of the Calcutta High Court].

L. P. Cal., Cl. 17, Note 2. Cl. 18, Notes 1—2.

and Wards Act, 1890 for a minor, belonging to an undivided Mitakshara family, yet, under its general and inherent jurisdiction, conferred by this Clause the High Court has power to make such an appointment.[1]

Provision with respect to the Insolvent Court.

18. And We do further ordain that the Court for relief of Insolvent Debtors at [Madras] [Bombay], Calcutta shall be held before one of the Judges of the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal and the said High Court, and any such Judge thereof, shall have and exercise, within the Presidency of [Madras] [Bombay], Bengal Division of the Presidency of Fort William such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India.

Synopsis.

1. Scope of the Clause.
2. Laws relating to insolvent-debtors.

1. **Scope of the Clause.**—The insolvency jurisdiction and the original civil jurisdiction of the High Court are separately dealt with in the Letters Patent. Therefore Cl. 12 of the Letters Patent, *ante*, does not control the provisions of this Clause so as to limit the insolvency jurisdiction of the Court. Thus the High Court has jurisdiction to adjudicate in insolvency proceedings on claims relating to immovable property situated outside the limits of its ordinary original civil jurisdiction.[1]

2. **Laws relating to insolvent debtors.**—The law of insolvency applicable to the High Courts is now laid down in the Presidency Towns Insolvency Act (III of 1909). Prior to that Act, The Insolvent Debtor's Act (Stat. 11 and 12, Vict., c. 21) was applicable. As to cases under the latter Act, *see* undermentioned cases.[1]

Law to be administered by the High Court.

Cl. 19, Note 1.

By the High Court in the exercise of ordinary original civil jurisdiction.

19. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at [Madras,] [Bombay]. Fort William in Bengal in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.

Synopsis.

1. Law or equity to be applied to each case.
2. Applicability of English Law.

Questions relating to Muhammadan mosque—Whether Muhammadan law could be applied. See Note 1, F.-N. (3).

1. **Law or equity to be applied to each case.**—The Letters Patent of 1862 which were revoked by the present Letters Patent of 1865 provided in Cl. 18 thereof that the law

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Note 2.

[1] In re *Bijaykumar Singh Buder*, 1932 Cal 502 (503): 59 Cal 570: 138 Ind Cas 739; *Narsi Tokesey and Co* v. *Sachindranath Gajanar Gidh*, 1929 Bom 475 (477): 31 Bom L R 1009; In the matter of *Gobind Prasad*, 1928 All 709 (709): 50 All 709: 26 All L J 595: 112 Ind Cas 873 [The jurisdiction as regards infants still exists in the Court, but the High Court is reluctant to exercise it in the case of joint Hindu families].

Clause 18—Note 1.

[1] In the matter of *Kancherla Krishna Rao*, 1928 Mad 732 (734): 112 Ind Cas 149: 51 Mad 540: 55 Mad L Jour 171: 28 Mad L W 285 F B; *Abdul Khader* v. *Official Assignee of Madras*, (1916) 36 Ind Cas 524 (526, 528): 40 Mad 810: 20 Mad L Tim 811: 4 Mad L W 425.

Note 2.

[1] In re *Blackwell*, (1885) 9 Bom H C R 461 [European British Subject residing in Bombay Presidency outside the town of Bombay is entitled to apply to the High Court for adjudicating himself as insolvent]; In re *James Currie*, (1897) 21 Bom 405 (411) [By virtue of Act V of 1872, High Court ceased to have jurisdiction in the case of European British Subjects residing in Sind]; In the matter of *Tietkins*, (1868) 1 Beng L R O C 84 [The jurisdiction of the Insolvent Court has been narrowed to the Bengal Division of the Presidency of Fort William].

L. P. Cal., Cl. 19, Notes 1—2.

or equity to be applied to the cases coming before the High Court shall be the law or equity which would have been applied by the Supreme Courts at Calcutta, Bombay and Madras respectively.[1] By the Charters constituting the Supreme Courts, they were expressly made Courts of equity and given equitable jurisdiction corresponding to that of the Court of Chancery in England. And the High Courts of Calcutta, Bombay and Madras have now succeeded to the jurisdiction conferred upon their predecessors, the supreme Courts and exercise the same equitable jurisdiction.[2] But such jurisdiction cannot be employed to subvert the native substantive laws. It only affords a means of continually ameliorating them and so preventing their desuetude by a system of rules borrowed from the English Courts of equity.[3]

2. **Applicability of English law.**—According to the Charter Acts "Justice, equity and good conscience" are the true guides and therefore the High Court on the original side is not bound to decide questions on the basis of English precedents and English Common Law Procedure, where the following of such precedents and procedure may be against "justice, equity and good conscience".[1]

Cl. 20.

In the exercise of extraordinary original civil jurisdiction.

20. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

Cl. 21, Note 1.

By the High Court in the exercise of appellate jurisdiction.

21. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction and also in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William, and beyond such limits and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India as the said High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these presents.

1. **Scope.**—It has been held by the High Court of Madras in the undermentioned case[1] that the principle of S. 119, Transfer of Property Act, 1882, is a rule of equity and can be applied to a case not governed by that Act.

Cl. 19—Note 1.

(1) *Madhub Chunder* v. *Rajcoomar*, (1875) 22 Suth W R 370 (374): 14 Beng L R 76. See also *Uderam* v. *Hyderally*, (1909) 3 Ind Cas 990 (990, 991): 33 Bom 469: 10 Bom L R 1141.

(2) *Hatimbhai* v. *Framroz*, 1927 Bom 278 (286): 29 Bom L R 498: 51 Bom 516: 104 Ind Cas 8 F B [The Court must first acquire jurisdiction under Cls 11 and 12 before applying the Law or equity applicable under Cl 19].

(3) In re *Kahandas Narrandas*, (1880-81) 5 Bom 154 (173): 5 Ind Jur 589. See also *Advocate General of Bombay* v. *Yusufalli*, 1921 Bom 338 (346): 24 Bom L R 1060: 84 Ind Cas 759 [Muhammadan Law applied in deciding questions relating to a Muhammadan Mosque].

Note 2.

(1) *Mool Chand* v. *Alwar Chetty*, (1915) 29 Ind Cas 303 (305): 17 Mad L Tim 449: 39 Mad 548.

[But see *Guruswami Chetty* v. *Mannar Chetti*, (1882) 5 Mad 37 (46)].

Cl. 21—Note 1.

(1) *Balusu* v. *Boppanna*, (1916) 35 Ind Cas 92 (95): 31 Mad L Jour 380: 20 Mad L Tim 329.

L. P. Cal., Cl. 22.

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

22. And We do further ordain that the said High Court of Judicature at Calcutta, [Madras,] [Bombay] shall have ordinary original criminal jurisdiction, within the local limits of its ordinary original civil jurisdiction, and also in respect of all such persons, beyond such limits, over whom the said High Court of Judicature at Calcutta [Madras,] [Bombay] shall have criminal jurisdiction at the date of the publication of these presents.

Cl. 23.

Jurisdiction as to persons.

23. And We do further ordain that the said High Court of Judicature at [Madras,] [Bombay,] Fort William in Bengal in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Cl 24, Notes 1—3.

Extraordinary original criminal jurisdiction.

24. And We do further ordain that the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate-General, or by any Magistrate or other officer specially empowered by the Government in that behalf.

Synopsis.

1. **Extraordinary criminal jurisdiction.**
2. **Subject to the superintendence of the High Court.**
3. **Practice in the Calcutta High Court.**

1. **Extraordinary criminal jurisdiction.**—The High Court can under this Clause remove a criminal case from the moffusil and have it before itself.[1] Where a commitment is made to the High Court Sessions in a case in which the Sessions Court of a division has local jurisdiction, the High Court can, on grounds of expediency and convenience, direct the trial to proceed in the High Court itself and the commitment is not liable to be quashed for want of jurisdiction.[2]

2. **Subject to the superintendence of the High Court.**—The Court of the Judicial Superintendent of Railways in the Nizam's Dominions is subordinate to the High Court of Bombay in respect of all criminal matters relating to European British Subjects.[1] The Criminal Courts in Santal Parganas subordinate to the Sessions Court have been declared by Regulation V of 1893 to be not subordinate to the High Court and therefore are not subject to its superintendence.[2]

3. **Practice in the Calcutta High Court.**—An application to exercise the jurisdiction under this Clause must be made, according to Ch. 37, R. 2 of the Crown Side Rules of the Calcutta High Court, on the appellate side.[1]

Cl. 24—Note 1.

(1) *Sashadhar Acharjya* v. *Sir Charles Tagart*, 1932 Cal 229 (230): 35 Cal W N 1082: 136 Ind Cas 598: 33 Cr L Jour 322.

(2) In re *Ganapathy Chetty*, (1919) 51 Ind Cas 468 (470): 42 Mad 791: 1919 Mad W N 808: 37 Mad L Jour 60: 26 Mad L Tim 64: 10 Mad L W 263.

Note 2.

(1) *Queen-Empress* v. *Morton*, (1885) 9 Bom 288 (295) [Per Sargent, C J per Contra Bayley, J].

(2) *Sailendra Nath Chakerverty* v. *Emperor*, 1928 Pat 241 (242): 108 Ind Cas 419: 7 Pat 337: 9 Pat L Tim 468: 29 Cr L Jour 427.

Note 3.

(1) *Sashadhar Acharjya* v. *Charles Tegart*, 1932 Cal 394 (395): 35 Cal W N 1086: 1932 Cr C 341: 137 Ind Cas 674.

L. P. Cal., Cl. 25.

No appeal from High Court exercising original jurisdiction—Court may reserve points of law.

25. And We do further ordain that there shall be no appeal to the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

Cl. 26, Notes 1—3.

High Court to review on certificate of the Advocate-General.

26. And We do further ordain that, on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

Synopsis.

1. Scope of Clauses 25 and 26.
2. The certificate of the Advocate-General.
3. Procedure at the hearing.
4. Power of Court on review.
5. Decision under the Criminal Law Amendment Act.

1. **Scope of Clauses 25 and 26.**—The High Court may review a decision of the High Court in its original criminal jurisdiction in the two following cases:—

(1) Where the trial Court reserves any point or points of law for the opinion of the High Court (Cl. 25).

(2) Where the Advocate-General certifies, that in his judgment there is an error in the decision of a point or points of law decided by the trial Court, or that a point or points of law so decided should be further considered (Cl. 26).

The point or points of law on which the Advocate-General certifies an error in the decision thereof is not confined to the point reserved by the Trial Court under Cl. 25, *ante*.[1]

2. **The certificate of the Advocate-General.**—The certificate is presumably granted in the interests of justice after a careful consideration of all available materials. It should not be a mere surmise, but should reflect the judgment of the Advocate-General.[1] But whether the certificate is granted after careful consideration of the materials or not, when once it is granted, the High Court is bound to deal with the case.[2]

3. **Procedure at the hearing.**—At the hearing of the case on review, the counsel for the accused should begin and have a right of reply.[1] When a Court is called upon to review

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Cls. 25 & 26—Note 1.

(1) *C K N Sundaresa Iyer* v. *Emperor*, 1930 Mad W N 249 (279) [*See* the words 'a point' as contrasted with the words 'Such point'].

Note 2.

(1) *Emperor* v. *Upendra Nath*, (1915) 30 Ind Cas 113 (115, 116): 21 Cal L Jour 377: 19 Cal W N 653 F B; *Emperor* v. *Barendra Kumar*, 1924 Cal 257 (261): 28 Cal W N 170: 38 Cal L Jour 411: 81 Ind Cas 353 F B [The Advocate-General must hear not only counsel for prisoner but also counsel for the Crown].

(2) *Emperor* v. *Upendra Nath*, (1915) 30 Ind Cas 113 (115, 116): 21 Cal L Jour 377: 19 Cal W N 653. See *Empress* v. *Mc Guire*, (1899) 4 Cal W N 433 (439) [It is not compulsory on Court to deal with a certificate in which the Advocate-General thinks that the trial Judge has not properly exercised his discretion in not granting an adjournment].

Note 3.

(1) *Emperor* v. *Panchu Das*, (1920) 58 Ind Cas 929 (933): 31 Cal L Jour 402: 24 Cal W N 501: 47 Cal 671 F B.

L. P. Cal., Cl. 26, Notes 3—5.

a case under this Clause, it will accept as unquestionable the statement of the trial Judge as to what actually took place before him.2

4. **Power of Court on review.**—The High Court is empowered, after deciding the point reserved or certified to pass such judgment or sentence as it may think right. In other words it can upon reviewing the whole case either quash or confirm the conviction.1 But this can however be done only when the High Court decides that there has been an error of law; if there has been no such error there is no power to deal with the case further.2 Otherwise, an accused person who could obtain a certificate under this clause could, in effect, obtain an *appeal* on the severity of his sentence, while an accused who could not obtain such a certificate, would not have the same privilege.

The High Court has no power under this clause to remit the case for a fresh trial3 or to reopen any question decided by the trial Judge other than the one reserved or certified.4

5. **Decision under the Criminal Law Amendment Act.**—The judgment of a special Criminal Bench constituted under S. 6 of the Indian Criminal Law Amendment Act of 1908 is open to review under this clause on a certificate granted by the Advocate-General.1

Cl. 27, Note 1.

Appeal from Criminal Courts in the Provinces.

27. And We do further ordain that the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal shall be a Court of appeal from the Criminal Courts of the Presidency of [Madras,] [Bombay], Bengal division of the Presidency of Fort William and from all other Courts, subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

Subject to its superintendence. See Note 1, Pt. (2).

1. **Criminal appellate jurisdiction.**—The High Court has been declared under this clause to be a general Court of Criminal appeal, the actual exercise of the appellate jurisdiction being defined by the concluding portion of this clause.1

It has been held in the undermentioned case2 that the general power of superintendence conferred by S. 107 of the Government of India Act is different from the superintendence spoken of in this clause.

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(2) *Emperor* v. *Upendra Nath,* (1915) 30 Ind Cas 113 (116, 121): 21 Cal L Jour 377: 19 Cal W N 653; *Emperor* v. *Barendra,* 1924 Cal 257 (306): 28 Cal W N 170: 38 Cal L Jour 411: 81 Ind Cas 353 F B.

Note 4.

(1) *Reg* v. *Haribole Chandra Ghose,* (1876) 1 Cal 207 (218): 25 Suth W R Cr 36; *Emperor* v. *Panchu Das,* (1920) 58 Ind Cas 929 (931, 937, 941): 31 Cal L Jour 402: 24 Cal W N 501: 47 Cal 671 F.B.; *King-Emperor* v. *Peary,* (1919) 50 Ind Cas 348 (349, 350): 23 Cal W N 426; *Fateh Chand* v. *Emperor,* (1917) 38 Ind Cas 945 (952): 44 Cal 477: 24 Cal L Jour 400: 21 Cal W N 33 F B; *Queen-Empress* v. *O'hara,* 1890) 17 Cal 642 (667, 668); *Queen-Empress* v. *Barton,* (1889) 16 Cal 238 (244, 245); *Emperor* v. *Charu Chunder,* (1923) 76 Ind Cas 966: 38 Cal L Jour 309; *Emperor* v. *Narayan,* (1908) 32 Bom 111 (120): 9 Bom L R 789: 2 Mad L Tim 414 [High Court has power to review the whole case and not only qua the wrongly admitted evidence]; *Imperatrix* v. *Pitamber Jina,* (1877-78) 2 Bom 61 (65); *C K N Sundaresa Iyer* v. *Emperor,* 1930 Mad W N 249 (280) [Misdirection to jury may amount to a point of law and may be reviewed provided the accused was really prejudiced thereby].

(2) *King-Emperor* v. *Barendra Kumar Ghose,* 1924 Cal 257 (285, 315): 28 Cal W N 170: 81 Ind Cas 353: 38 Cal L Jour 411; *Emperor* v. *Upendra Nath,* (1915) 30 Ind Cas 113 (119, 121, 123): 21 Cal L Jour 377: 19 Cal W N 653.

(3) *Emperor* v. *Panchu Das,* (1920) 58 Ind Cas 929 (931): 31 Cal L Jour 402: 24 Cal W N 501: 47 Cal 671 F B.

(4) *Emperor* v. *Narayan,* (1908) 32 Bom 111 (132, 145): 9 Bom L R 789: 2 Mad L Tim 414 [*Per* Davar and Beaman, JJ]; *Muthukumaraswamy* v. *Emperor,* (1912) 14 Ind Cas 896 (901, 902): 12 Mad L Tim 1: 35 Mad 397: 1912 Mad W N 549.

Note 5.

(1) *Muthukumaraswamy* v. *Emperor,* (1912) 14 Ind Cas 896 (898, 908, 923, 940): 35 Mad 397: 12 Mad L Tim 1: 1912 Mad W N 549.

Cl. 27—Note 1.

(1) *Gobordhone Das* v. *Dooli Chand,* 1921 Cal 708 (715): 48 Cal 955: 33 Cal L Jour 551: 25 Cal W N 661: 61 Ind Cas 210.

(2) *Sheonandan* v. *King-Emperor,* (1918) 46 Ind Cas 977 (992): 3 Pat L Jour 581: 1918 Pat H C C 1: 5 Pat L W 324 F B.

L. P. Cal., Cl. 28, Note 1.

Hearing of referred cases and revision of criminal trials.

28. And We do further ordain that the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other Officers now authorized to refer cases to the said High Court, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction, as are now subject to reference or to revision by the said High Court.

1. **Criminal revisional jurisdiction.**—The High Court has a general power of Superintendence under this clause over the Criminal Courts subject to its appellate jurisdiction. It can revise the decisions of such Courts. It is also a Court of reference empowered to determine references made by the Sessions Judges or by any such officer as is referred to in this clause. The High Court of Bombay has, thus, power to quash proceedings before a village *Patil* under its powers of superintendence.[1] It cannot under this clause revise an order of the Secretary to the Bengal Government issuing a warrant under the *Goondas Act* (I of 1923), inasmuch as such person was not an officer possessing criminal jurisdiction at the time of the issue of the Letters Patent.[2]

The High Court hearing a reference under S. 307 of the Criminal Procedure Code hears it as a Court of reference in the exercise of the jurisdiction vested in it under this clause and not in its original criminal jurisdiction.[3]

As to whether the High Court can revise an order of discharge passed by a Presidency Magistrate, *see* the undermentioned cases.[4]

Cl. 29, Note 1.

High Court may direct the transfer of a case from one Court to another.

29. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs, in ordinary course, to the jurisdiction of some other officer or Court.

Synopsis.

1 **Transfer of criminal case.**	2. **Practice of the Calcutta High Court.**

Equal or inferior jurisdiction. See Note 1, Pt. (1).

Power of High Court to stay proceedings. See Note 1, Pt. (4).

1. **Transfer of Criminal Case.**—Under this clause the High Court is empowered to direct the transfer of any criminal case to any other Court of equal or superior jurisdiction[1] The words "from any Court" must be read as "from any Court subordinate to the High Court's authority". Thus the Allahabad High Court has no jurisdiction to transfer a case from a panchayat constituted under the provisions of the United Provinces Act VI of 1920.[2]

Cl. 28—Note 1.

(1) In re *Vasudeo Pundli K Samant*, (1919) 50 Ind Cas 491 (491): 21 Bom L R 274.

(2) *Bhimraj Bania* v. *Emperor*, 1924 Cal 698 (700): 51 Cal 460: 83 Ind Cas 500.

(3) In the matter of *Lyall*, (1902) 29 Cal 286 (297, 303): 6 Cal W N 254 F B [The Bench hearing the reference has power to send the accused to a jail outside the Presidency Town].

(4) *Charoobala Dabee* v. *Barendra Nath*, (1900) 27 Cal 126 (130): 3 Cal W N 601 [Cl 28 does not apply, but only S 15 of the High Courts' Act]; *Colville* v. *Kristo Kishore*, (1899) 26 Cal 746 (748): 3 Cal W N 598 [Clause 28 applies].

Cl. 29—Note 1.

(1) Single Judge of the High Court has power to make this transfer.—*Emperor* v. *Robert Comley*, (1905) 29 Bom 575 (579): 7 Bom L R 104; *Reg* v. *Ameer Khan*, (1871) 15 Suth W R Cr 69 (70): 7 Beng L R 240; *Queen-Empress* v. *Budaro Jauni*, (1912) 14 Mad 121 (125): 2 Weir 7; *Sitapati* v. *Queen*, (1883) 6 Mad 32 (35); *Venkateswara Sastri*, In re, (1911) 11 Ind Cas 795 (796): 35 Mad 739: 10 Mad L Tim 518: 22 Mad L Jour 114: (1911) 2 Mad W N 50

(2) *Sat Narain* v. *Sarju*, 1924 All 265 (266): 46 All 167: 21 All L J 925: 83 Ind Cas 850 [*Per* Stuart, J's prevailing judgment, Kanhayalal, J, *contra*].

The word "Criminal Case" in this clause will include proceedings under S. 145 of the Criminal Procedure Code.[3]

The power of superintendence conferred by this clause includes by implication the power to send for the record of any case pending in the Lower Courts; this must necessarily have the effect of staying further proceedings in the case in that Court. The High Court has power, therefore, to stay criminal proceedings instituted on a sanction by a Civil Court under S. 476 of the Criminal Procedure Code till the disposal of the appeal from the Civil Court.[4]

See also the undermentioned case.[5]

2. **Practice of the Calcutta High Court.**—An application to exercise the jurisdiction conferred by this clause must be made according to Ch. 37, R. 2 of the Crown Side Rules on the appellate side of the Calcutta High Court.[1]

Criminal Law.

Cl. 30, Note 1.

Offenders to be punished under Indian Penal Code.

30. And We do further ordain that all persons brought for trial before the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

1. **Offenders to be punished under the Indian Penal Code.**—The offenders brought for trial before the High Court should be punished only under the provisions of the Indian Penal Code; the High Court cannot engraft thereon the rules of the Common Law of England.[1]

Exercise of jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

Cl. 31.

Judges may be authorised to sit in any place by way of circuit or special commission.

31. And We do further ordain that whenever it shall appear to the Governor in Council convenient that the jurisdiction and power by these Our Letters Patent or by the recited Act, vested in the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto, which has been or may be made by competent legislative authority for India.

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[3] *Lolit Mohan* v. *Sarja Kanta,* (1901) 28 Cal 709 (720): 5 Cal W N 749 [*Per* Taylor, J].

[4] *Jogiah* v. *Emperor,* (1908) 31 Mad 510 (511): 18 Mad L Jour 466: 4 Mad L Tim 186.

[5] *Sailendra Nath Chakravarty* v. *Emperor,* 1928 Pat 241 (242): 108 Ind Cas 419: 7 Pat 337: 9 Pat L Tim 468: 29 Cr L Jour 427 [Application for transfer from one Criminal Court to another in Santal Parganas—High Court has no jurisdiction as it has no powers of superintendence over intermediate Criminal Courts in Santal Parganas].

Note 2.

[1] *Sashadhar Acharju* v. *Charles Tegart,* 1932 Cal 394 (395): 35 Cal W N 1086: 1932 Cr C 341: 137 Ind Cas 674. See *Seshadhar Acharyya* v. *Charles Tegart,* 1932 Cal 128 (128): 35 Cal W N 1088: 1932 Cr C 108: 135 Ind Cas 880: 33 Cr L Jour 219 [Application upon a complaint for taking proceedings against a person not in India does not lie under this clause].

Cl. 30—Note 1.

[1] *Satish Chandra* v. *Ram Doyal,* 1921 Cal 1 (6): 48 Cal 388: 22 Cr L Jour 81: 59 Ind Cas 143 S B.

L. P. Cal., Cl 32, Notes 1—2.

Admiralty and Vice-Admiralty Jurisdiction.

Civil.

32. And We do further ordain that the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty, or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as may now be exercised by the said High Court.

Synopsis.

1. **Civil and maritime jurisdiction.**
2. **Necessaries supplied to a ship.**

1. Civil and maritime jurisdiction.—The effect of this clause is to vest the High Courts with such civil and maritime jurisdiction as might have been exercised by the Supreme Courts under their respective charters.[1]

2. Necessaries supplied to a ship.—Before the passing of the statute 3 and 4 Vict., Ch., 65, it was held in England that the Court of Admiralty in England "had no jurisdiction in the case of necessaries supplied to a ship, though perhaps it occasionally purported to exercise the jurisdiction where, not prohibited."[1] The same view was also held in India.[2] It was also held subsequently in the undermentioned cases[3] that the powers conferred by the above statute as extended by 24 Vict., Ch., 10 (the Admiralty Courts Act of 1861), did not become vested in the High Courts by virtue of their several Letters Patents. But, at present, the jurisdiction of the High Court in relation to necessaries surplied to a ship rests on the Colonial Courts of Admiralty Act, 1890, 53 and 54 Vict., Ch. 27, which vests in it *inter alia* the powers described in S. 5 of 24 Vict., Ch. 10. And under S. 5 of the latter statute the High Court, in its Admiralty side has jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the part to which the ship Court belongs.[4]

Cl. 33.

Criminal.

33. And We do further ordain that the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal shall have and exercise all such criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty, or of Vice-Admiralty, or otherwise in connection with maritime matters, or matters of prize.

Testamentary and Intestate Jurisdiction.

Cl. 34,

Testamentary and intestate jurisdiction.

34. And We do further ordain that the said High Court of Judicature at [Madras,] [Bombay,] Fort William in Bengal shall have the like power and authority as that which may now be lawfully exercised by the said High Court, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, within or without the Presidency of [Madras,] [Bombay], Bengal Division of the Presidency of Fort William: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority

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Cl. 32—Note 1.

(1) *Madras Steam Navigation Co* v. *Shalimar Works, Ltd,* (1915) 28 Ind Cas 463 (467): 42 Cal 85.

Note 2.

(1) *The Two Ellens,* (1872) 4 P C 116 [cited in 28 Ind Cas 463]; *The Henrich Bjron,* (1886) 11 A C 270, (Do.).

(2) *Murray* v. *Langford,* (1843) 1 Fulton 131: 1 Ind Dec O C 723, Ref in 42 Cal 85.

(3) *Bardot* v. *The Angusta,* (1873) 10 Bom H C R 110; *Hormusji* v. *Ukarji,* (1868) 5 Bom H C R O C 64. See also In the matter of the ship *Portugal,* (1871) 6 Beng L R 323 [But after the issue of Letters Patent of 1865 the Vice Admiralty Court's Act of 1863 applied to the High Courts].

(4) *Madras Steam Navigation Co* v. *Shalimar Works,* (1915) 28 Ind Cas 463 (467): 42 Cal 85; *Falls of Ettrick,* In the matter of, (1895) 22 Cal 511 (515).

L. P. Cal., Cl. 34, Notes 1—2.

for India, by which power is given to any other Court to grant such probates and letters of administration.

Synopsis.

1. Letters Patent, Bombay and Madras.
2. Testamentary and intestate jurisdiction.

Jurisdiction of High Court to grant Probate or Letters of Administration. See Note 2, Pt. (1).

1. **Letters Patent, Bombay and Madras.**—For Bombay and Madras after the words "exercised by the said High Court" read as follows:—

"In relation to the granting of Probates of last wills and testaments and letters of administration of the goods, chattels, credits, and all other effects of persons dying intestate whether within or without the Presidency of Bombay, Madras)."

2. **Testamentary and intestate jurisdiction.**—The High Court of Madras has held that it has no jurisdiction to grant probate of the will of a testator, or letters of administration to the estate of an intestate, who did not dwell and who did not leave assets within the limits of the Madras Presidency.[1]

The High Court acting under S. 302 of the Indian Succession Act, XXXIX of 1925 acts in pursuance of the jurisdiction vested in it under this clause and not in its ordinary Original Civil jurisdiction.[2]

Matrimonial Jurisdiction.

Cl. 35, Notes 1—2.

Matrimonial jurisdiction.

35. And We do further ordain that the said High Court of Judicature at [Madras,] [Bombay,] Fort William in Bengal shall have jurisdiction, within the Presidency of [Madras,] [Bombay,] Bengal Division of the Presidency of Fort William in matters matrimonial between Our subjects professing the Christian religion: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof.

Synopsis.

1. "Between our subjects professing the Christian religion."
2. Both parties other than Christians.
3. Respondent not within the Presidency.
4. Matters matrimonial.

1. **"Between our subjects professing the Christian religion."**—This clause was intended to replace, in a wider and modern form, the ecclesiastical jurisdiction of the Supreme Court, and its scope was confined to proceedings in which both the parties were Christians.[1] *See also* Paragraph 33 of the Despatch from the Secretary of State, dated 14th May, 1862 accompanying the first Letters Patent of the Calcuatta High Court.[1-a] But the limitation has now been removed by the enactment of the Indian Divorce Act, IV of 1869 which does not require that both parties should profess the Christian relegion. The High Court has therefore, jurisdiction to entertain a suit for restitution of conjugal rights instituted by a Christian woman against her husband who is a Parsee.[2]

2. **Both parties other than Christians.**—It was held by the Privy Council in the undermentioned case[1] that the Supreme Court of Bombay had no jurisdiction to entertain a suit, on its ecclesiastical side, by a parsee wife against a Parsee husband for the

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Cl. 34—Note 2

(1) In the matter of *Learmouth,* (1901) 24 Mad 120 (121).

(2) *Provas Chandra* v. *Ashutosh Mukerjee,* 1930 Cal 258 (261): 56 Cal 979: 122 Ind Cas 197.

Cl. 35—Note 1.

(1) *Benjamin* v. *Benjamin,* 1926 Bom 169 (173): 28 Bom L R 328: 94 Ind Cas 59: 50 Bom 369.

(1-a) Appendix III.

(2) *Nina Dalal* v. *Merwanji Pherozshaw Dalal,* 1930 Bom 385 (389, 390, 392): 32 Bom L R 1046: 54 Bom 877: 128 Ind Cas 37 F B [Overruling 20 Ind Cas 492].

Note 2.

(1) *Ardeseer Oursetjee* v. *Peruzeboye,* (1856) 6 Moo Ind App 348 (390): 4 Suth W R P C 91: 1 Suth 265: 1 Sar 548: 10 Moo P C 375 P C.

L. P. Cal., Cl. 35, Notes 2—4.

restitution of conjugal rights. Their Lordships of the Privy Council also observed as follows:—

"But we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life against them." Clause 12, *ante* was intended to remove this difficulty and by virtue of that clause the High Court has jurisdiction to entertain a suit arising out of matrimonial disputes between persons other than Christians, for instance, between Jews.[2]

3. **Respondent not within the Presidency.**—The High Court has no jurisdiction to grant relief by way of restitution of conjugal rights against a respondent who is absent from the presidency at the time the suit is instituted and remains absent subsequently also.[1]

4. **Matters matrimonial.**—The jurisdiction of the High Court in matters matrimonial is only such jurisdiction as is comprised within the provisions of the Indian Divorce Act, IV of 1869; therefore, a suit for a declaration that a marriage was a valid and lawful marriage does not lie.[1]

Powers of Single Judges and Division Courts.

Cl. 36, Note 1.

Single Judges and Division Courts.

36. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at [Madras,] [Bombay,] Fort William in Bengal in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, in pursuance of section 108 of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges if there shall be a majority, but if the Judges should be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

S. N. D[illegible], LL. B.
Vakil, High Court
SRINIVAS[illegible]

Synopsis.

1. **Amendment of the Clause.**
2. **"May be performed by any Judge or by any Division Bench thereof."**
3. **When the Judges are equally divided.**
4. **Reference.**

1. **Amendment of the clause.—**

(1) The words "in pursuance of S. 108 of the Government of India Act, 1915" were substituted for the words "under the provisions of the 13th section of the aforesaid Act of the Twenty-fourth and Twenty-fifth years of our reign" by the amended Letters Patent of 11th March 1919.

(2) By the amendment of the Letters Patent in 1928 the words following the words "equally divided" till the end of the clause were substituted for the words "the opinion of the Senior Judge shall prevail." As to the effect of this amendment, *see* Note 12 to S. 98, Civil Procedure Code.

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(2) *Benjamin* v. *Benjamin*, 1926 Bom 169 (173, 174): 28 Bom L R 328: 94 Ind Cas 59: 50 Bom 369. See also *R K Samuel* v. *F H T Samuel*, 1930 Cal 558 (558, 559): 34 Cal W N 319: 57 Cal 1089: 127 Ind Cas 559 [Suit for judicial separation—Parties professing Jewish religion—Wife praying for order against her husband to pay her costs—Clause 35 does not apply but clause 12 and case is governed by S. 35, C P Code].

Note 3.

(1) *Nusserwanjee Wadia* v. *Eleanora Wadia*, (1913) 20 Ind Cas 492 (494): 1914 Bom 211: 38 Bom 125: 15 Bom L R 593.

Note 4.

(1) *Adelaide Christania Lish* v. *David Lish*, 1923 Pat 301 (302): 1923 Pat H C C 127: 1 Pat L R 129: 72 Ind Cas 657.

L. P. Cal., Cl. 36, Notes 2—4.

2. **"May be performed by any Judge or by any Division Bench thereof".**—Where the Court takes action in contempt proceedings, the rule need not be issued by the Court as an entire body. A single Judge or Division Bench has jurisdiction to issue the rule.[1]

The fact that a matter coming before second appellate Court constituted by a single Judge in High Court, is one of difficulty does not necessitate its being referred to a Bench of two Judges.[2]

3. **When the Judges are equally divided.**—The amendment of this clause made in 1928 mentioned in Note 1, *ante* applies to all cases pending on the date of such amendment.[1]

As to the effect of S. 98, C. P. Code upon this clause and the procedure in such cases, *see* Note 12 to that section and also the undermentioned cases.[2]

Before the amendment of 1928 it was held in the following cases that the opinion of the Senior Judge prevailed on a difference of opinion between the Judges of the Division Bench.[3]

4. **Reference.**—In order that a reference may be made under this clause it is not necessary that there must be a difference on a particular point. It may be made even when there is a difference as to the result of the appeal heard by the High Court.[1]

A single Judge of the High Court is competent to hear a reference under this clause.[2]

Civil Procedure.

Cl. 37.

Regulation of proceedings.

37. And We do further ordain that it shall be lawful for the said High Court of Judicature at [Madras,] [Bombay,] Fort William in Bengal from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, testamentary, intestate and matrimonial juris-

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Cl. 36—Note 2.

(1) *Emperor* v. *Murali Manohar*, 1929 Pat 72 (73): 9 Pat L Tim 837: 8 Pat 328: 117 Ind Cas 180: 30 Cr L Jour 741 F B.

(2) *Brij Mohan Das* v. *Bhikhuji*, 1931 All 207 (207): 129 Ind Cas 717: 1931 All L J 267.

Note 3.

(1) *Guruswami Pillai* v. *Veerabadra Tavulkaran*, 1929 Mad 497 (498): 57 Mad L Jour 22: 29 Mad L W 874: 52 Mad 584: 1929 Mad W N 564: 119 Ind Cas 160 F B.

(2) *Debi Prasad Pandey* v. *Gandham Rai*, 1933 Pat 67 (68, 69): 11 Pat 772: 141 Ind Cas 369 [Addition of S. 98, sub-S. (3) removes Chartered High Courts from the operation of S. 98 and this clause will apply—Following 1929 Mad 641]; *Fazlur Rahman* v. *Haji Abdulla*, 1932 All 195 (196): 1931 All L J 1157: 137 Ind Cas 58 [Appeals under Letters Patent only governed by this clause. Appeals under Code governed by S. 98. It is submitted that this case cannot be accepted as correct in view of the reasoning in 1921 P C 6]. **See also the following cases decided before the amendment of S. 98 and of this clause:**—*Ram Das* v. *Secretary of State*, (1912) 16 Ind Cas 922 (926): 18 Cal W N 106: 17 Cal L Jour 75 [This clause applies to appeals under the Code also]; *K K N K Chokkalingam Chetty* v. *S P S T R M Raman Chetty*, 1925 Rang 155 (164): 2 Rang 587: 84 Ind Cas 824 F B, (Do.); *T Manavikaraman Tirumal Pad* v. *The Collector of the Nilgiris*, (1919) 49 Ind Cas 27 (30): 41 Mad 943: 8 Mad L W 261: 24 Mad L Tim 155: 35 Mad L Jour 110: 1918 Mad W N 540 [Appeal under S. 54 of the Land Acquisition Act—Governed by S. 98]; *Appaji* v. *Shivlal*, (1879) 3 Bom 204 (205) [Appeal under Code, S. 98 applies]; *Hussaini* v. *Collector of Muzaffarnagar*, (1889) 11 All 176 (182): 1889 All W N 27: 13 Ind Jur 316 [A case not coming under S 98—Cl 27 of the Allahabad Letters Patent applies]; *Hill Sawyers & Co* v. *The Secretary of State*, 1921 Lah 1 (3): 2 Lah 133: 3 Lah L Jour 297: 75 Pun L R 1921: 61 Ind Cas 926 F B [Senior Judge not pressing his view but submitting case to Chief Justice for reference to Full Bench—Cl 26 does not apply].

(3) *Probhat Chandra* v. *Emperor*, 1924 Cal 668 (686): 51 Cal 480: 28 Cal W N 513: 84 Ind Cas 31 [Reference under Income Tax Act]; *Nagappa Pillai* v. *Arunachallam Chetty*, 1925 Mad 281 (285, 286): 47 Mad L Jour 876: 85 Ind Cas 1016 [Revision under S 25 of Provincial Small Cause Courts Act]. **Rule under S 115, C P Code to set aside sanction granted under S 195, Cr P Code**:—*Mathura Sahu* v. *Damri Ram*, (1912) 14 Ind Cas 755 (757): 15 Cal L Jour 337; In re *Karri Venkanna Patrudu*, (1916) 32 Ind Cas 330 (333): 18 Mad L Tim 591; *Bapu* v. *Bapu*, (1912) 14 Ind Cas 305 (314): 22 Mad L Jour 419: 39 Mad 750: 11 Mad L Tim 367: 1912 Mad W N 499 F B; *Motiram* v. *Mrijan Sardar*, (1920) 54 Ind Cas 169 (172): 1920 Cal 417: 21 Cal L Jour 183: 24 Cal W N 97: 47 Cal 438 [Revision against an order under S 145, Cr P Code]. See *Queen-Empress* v. *Dada Ana*, (1891) 15 Bom 452 (475) [Reference to High Court by Session Judge under S 307, Cr P Code. *Held* S 429, Cr P overrides Cl 36].

Note 4.

(1) *Debi Prasad Pandey* v. *Gandham Rai*, 1933 Pat 67 (68): 11 Pat 772: 141 Ind Cas 369.

(2) *Debi Prasad Pandey* v. *Gandham Rai*, 1933 Pat 67 (69): 11 Pat 772: 141 Ind Cas 369.

diction respectively: Provided always that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India.

Power to delegate. See Note 1, Pt. (2).

1. **Rules and Orders.**—This clause gives the High Court the power to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court.[1] But it does not authorise the High Court to frame a rule delegating a judicial function to one of its officers. Thus R. 515-A of the rules and orders of the Calcutta High Court delegating to the registrar the function of granting leave under Cl. 12, *ante*, is *ultra vires*.[2]

Where a rule of the Civil Procedure Code is inconsistent with the rules of the High Court made in pursuance of the power conferred by this clause the latter must prevail.[3]

See also the undermentioned case.[4]

Criminal Procedure.

Cl. 38.

Regulation of proceedings.

38. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

Cl. 39.

Power to appeal.

39. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal made on appeal,

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Cl. 37—Note 1.

(1) *Kepilachari* v. *Vannathankandiyil*, (1915) 31 Ind Cas 74 (76): 29 Mad L Jour 784: 2 Mad L W 999: 18 Mad L Tim 383: 1915 Mad W N 817 [Rule 105 of Appellate Side Rules of Madras High Court directing dismissal of appeal for non-payment of printing charges is not *ultra vires*]; *Namberumal* v. *Narasimhachari*, (1917) 37 Ind Cas 699 (704): 31 Mad L Jour 698: (1916) 2 Mad W N 529 [Rule 533 of the Original Side Rules of the Madras High Court giving right of audience on the original side to vakils and withholding it from attorneys is not *ultra vires* —Following 1 Mad 24].

(2) *Lalliteshwar Singh* v. *Rameshwar Singh*, (1907) 34 Cal 619 (625): 11 Cal W N 649: 5 Cal L Jour 405: 2 Mad L Tim 406.

(3) In re *Ram Dayal De*, 1932 Cal 1 (2): 35 Cal W N 1100: 135 Ind Cas 789: 59 Cal 370 [Order 3, R 4, sub-R (5) is inconsistent with rules made by the Calcutta High Court].

(4) *Sabapathy* v. *Narayanasamy*, (1862-63) 1 Mad H C R 115 (120) [This clause does not render S 187 of Act VIII of 1859 a repeal of S 101 of Act IX of 1850].

and from any final judgment, decree or order made in exercise of original jurisdiction by Judges of the said High Court, or of any Division Court from which an appeal shall not lie to the said High Court under the provisions contained in the 15th clause of these presents: Provided, in either case, that the sum or matter at issue is of the amount or value of not less than Rs. 10,000 or that such judgment, decree or order shall involve, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than Rs. 10,000; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or Their Privy Council, subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency, except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Synopsis.

1. Scope of the clause.
2. In any matter not being of criminal jurisdiction.
3. Judgment, decree or order made on appeal.
4. Appellate order made in land acquisition cases—See S. 109, Note 2, Pts. (11) and (11-a).
5. Decree passed by High Court in pursuance of directions by Privy Council.
6. Orders passed on review—See S. 109, Note 5, Pt. (4).
7. Orders passed in revision—See S. 109, Note 5, Pts. (16) and (17) and also S. 111, Note 3, Pt. (1).
8. Order rejecting application for amendment of decree. See S. 109, Note 5, Pt. (8)
9. Orders in insolvency.
10. Decrees on appeal made by High Court under Special Acts.
11. Judgment, decree or order made in the exercise of original jurisdiction.
12. Decision under the Income-tax Act.
13. Order made in the exercise of disciplinary jurisdiction under Cl. 10, ante.
14. Order refusing to quash proceedings by writ of certiorari.
15. Judgment, decree or order must be final.
16. Appeal from order granting certificate.

Order under Specific Relief Act whether appealable. See Note 12, F.-N. (2).

1. **Scope of the clause.**—The right of appeal to the Privy Council rests upon this clause and is elaborated in Ss. 109 to 112 of the Civil Procedure Code.[1] This clause deals with two categories of cases; (*a*) judgment, decrees or orders made *on appeal* and, (*b*) judgments, decrees or orders made in the exercise of *original* jurisdiction, whether by individual Judges or by division Courts.[2]

There was a conflict of opinion as to whether a party desirous of appealing against a judgment was bound to appeal under Clause 15, *ante* before appealing to Privy Council, where the Judges hearing an appeal were equally divided in opinion.[3] In view of the amendment of Clause 36 of the Letters Patent made in 1928 this difficulty cannot now occur.

2. **"In any matter not being of Criminal Jurisdiction."**—The words "in any matter not being of Criminal jurisdiction" govern both the classes of judgments, decrees or orders which are mentioned in this clause.[1] Thus the High Court has no jurisdiction to grant leave to appeal to Privy Council against a judgment of High Court sitting in Criminal appeal from the judgment of a Court of Sessions.[2] Such leave cannot be granted even

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Cl. 39—Note 1.

[1] *Chatraput Dugar* v. *Kharaj Singh*, (1913) 19 Ind Cas 435 (436): 17 Cal W N 752: 17 Cal L Jour 547: 40 Cal 685.

[2] *Bai Mangu* v. *Bharat Khand Cotton Mills Co, Ltd*, 1932 Bom 90 (92): 55 Bom 785: 33 Bom L R 1476: 136 Ind Cas 183.

[3] *Court of Wards* v. *Leelanund*, (1870) 14 Suth W R 298 (299) [No appeal to Privy Council if appeal lies under Cl 15]; *The Court of Wards* v. *Rajah Leelanund Singh*, (1871) 16 Suth W R 191 (192): 7 Beng L R 730 [Decree on appeal—Appeal to Privy Council lies whether appeal under Cl 15 lies or not].

Note 2.

[1] *Hemayetuddin Ahmed* v. *Emperor*, 1931 Cal 526 (527): 58 Cal 344: 1931 Cr C 678: 32 Cr L Jour 1188: 134 Ind Cas 544.

[2] *Hemayuttuddin Ahmed* v. *Emperor*, 1931 Cal 526 (527): 58 Cal 344: 1931 Cr C 678: 32 Cr L Jour 1183: 134 Ind Cas 544.

by virtue of the words "when the said High Court shall declare that the case is a fit one for appeal".

3. **Judgment, decree or order made on appeal.**—Where a decree is passed by the High Court on appeal from another tribunal, in order that the decree of the High Court may be appealable to the Privy Council, the said tribunal must be a Court subject to the superintendence of the High Court within the meaning of Clause 16, *ante*.[1]

See Notes 4 to 9, *infra*.

4. **Appealable order made in Land Acquisition cases.**—*See* S. 109, Note 2, points (11) and (11-a).

5. **Decree passed by High Court in pursuance of directions by Privy Council.**—*See* S. 109, Note 5, point (9) and also the undermentioned case.[1]

6. **Orders passed on review.**—*See* S. 109, Note 5, point 4.

7. **Orders passed in revision.**—*See* S. 109, Note 5, points (16) and (17) and also S. 111, Note 3, point (1).

8. **Order rejecting application for amendment of decree.**—*See* S. 100, Note 5, point (8).

9. **Orders in insolvency.**—An appeal will lie to the Privy Council against an order of the High Court under S. 8 of the Presidency Towns Insolvency Act made on appeal[1] or against an appellate order of the High Court dismissing an Insolvency petition under the Provincial Insolvency Act, V of 1920.[2]

10. **Decrees on appeal made by High Court under special Acts.**—*See* S. 109, Note 2, points (9) and (10) and also the undermentioned case.[1]

11. **Judgment, decree or order made in the exercise of original jurisdiction.**—The words "original jurisdiction" are only used in contra-distinction to the words "made on appeal" occurring earlier in this clause.[1] *See also* Notes 12 to 14, *infra*.

12. **Decision under the Income-tax Act.**—It was held by the Privy Council in the undermentioned case[1] that a judgment of the High Court passed on a reference under S. 51 of the Income-tax Act of 1918 was only advisory and, therefore, not appealable to the Privy Council. But it is now provided by S. 66-A of the Act amended by the Act XXIV of 1926 that an appeal to the Privy Council will lie in such a case.

Section 66-A of the Income-tax Act does not, however, provide for an appeal from an order of the High Court under S. 66, sub-S. (3) refusing to require the Commissioner to state a case. The High Court of Lahore has held that such an order is *final* judgment

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Note 3.

[1] *Secretary of State* v. *Hindustan Co-operative Insurance Society, Ltd*, 1931 P C 149 (153): 54 Cal L Jour 14: 1931 All L J 475: 61 Mad L Jour 864: 35 Cal W N 794: 59 Cal 55: 33 Bom L R 1006: 1931 Mad W N 695: 58 Ind App 259: 132 Ind Cas 748 P C.

Note 5.

[1] *Guru Prasanno Lahiri* v. *Jotindra Mohan Lahiri*, (1905) 32 Cal 963 (965): 9 Cal W N 566 [Remand by Privy Council directing accounts to be taken—Division Bench made a final decree—Appeal lies to Privy Council under Cl 39].

Note 9.

[1] *Annamalai Chetty* v. *Official Assignee of Madras*, 1925 Mad 243 (244): 35 Mad L Tim 57: 22 Mad L W 362: 91 Ind Cas 126.

[2] *Chatrapat Dugar* v. *Kharaj Singh*, (1913) 19 Ind Cas 435 (436): 17 Cal W N 752: 17 Cal L Jour 547: 40 Cal 685.

Note 10.

[1] *Secretary of State* v. *Hindustan Co-operative Insurance Society, Ltd*, 1931 P C 149 (153): 1931 All L J 475: 35 Cal W N 794: 33 Bom L R 1006: 1931 Mad W N 695: 58 Ind App 259: 132 Ind Cas 748: 54 Cal L Jour 14: 61 Mad L Jour 864: 59 Cal 55 P C [Award of tribunal under Calcutta Improvement Act (Bengal Act (V of 1911)—Provision for finality in S 71 excludes further appeal from High Court].

Note 11.

[1] *Tata Iron and Steel Co, Ltd* v. *The Chief Revenue Authority of Bombay*, 1923 P C 148 (150): 1923 Mad W N 603: 25 Bom L R 908: 21 All L J 675: 50 Ind App 212: 45 Mad L Jour 295: 18 Mad L W 372: 47 Bom 724: 39 Cal L Jour 16: 28 Cal W N 307: 33 Mad L Tim 301: 4 L R P C 170: 74 Ind Cas 469 P C.

Note 12.

[1] *Tata Iron & Steel Co, Ltd* v. *The Chief Revenue Authority*, 1923 P C 148 (153): 1923 Mad W N 603: 25 Bom L R 908: 21 All L J 675: 50 Ind App 212: 45 Mad L Jour 295: 18 Mad L W 372: 47 Bom 724: 39 Cal L Jour 16: 28 Cal W N 307: 33 Mad L Tim 301: 4 L R P C 170: 74 Ind Cas 469 P C [Overruling 1921 Bom 128].

L. P. Cal. Cl. 39, Notes 12—16.

passed in the exercise of original jurisdiction and is, therefore, appealable.[2] But the High Court of Rangoon has held that it has no jurisdiction to grant leave to appeal in such a case.[3]

13. **Order made in the exercise of disciplinary jurisdiction under Clause 10,** *ante.*—*See* S. 109, Note 2, points (5) and (6) and also the undermentioned case.[1]

14. **Order refusing to quash proceedings by writ of Certiorari.**—No appeal lies to Privy Council under this clause against an order of a Division Bench of the High Court refusing to quash, by writ of *certiorari*, the proceedings of Deputy Collector who, as an Income-tax officer, directed the prosecution of a person under S. 193, Indian Penal Code.[1] The reason is that the order is neither one passed on appeal nor one passed in the exercise of original jurisdiction.

15. **Judgment, decree or order must be final.**—*See* Note 4 to S. 109 and the undermentioned cases.[1]

16. **Appeal from order granting certificate.**—An order of a Judge of a High Court granting a certificate that a case is a fit and proper one for appeal to the Privy Council is not a "judgment" within the meaning of Clause 15, *ante* and is, therefore, not appealable under that clause.[1]

Cl. 40, Note 1.

Appeal from interlocutory judgment.

40. And We do further ordain that it shall be lawful for the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal at its discretion, on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order or sentence of the said High Court in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations and limitation as are herein expressed respecting appeals from final judgments, decrees, orders and sentences.

Order refusing the appointment of a receiver in a suit. See Note 1, Pt. (6).

1. **Appeal from interlocutory judgment.**—There is no appeal to the Privy Council, as of right, in interlocutory matters and; but for the provisions of this clause an appeal in such a matter would be incompetent.[1] This clause only contemplates orders which have been made on appeal by the High Court under Clause 15, *ante*, and such orders as are, by reason of the number of Judges who have taken part in the decision, not

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(2) *Feroze Shah Kaka* v. *Income-tax Commissioner, Punjab*, 1931 Lah 138 (139): 12 Lah 166: 32 Pun L R 234: 132 Ind Cas 704 F B. See also *Alcock Ashdown* v. *Chief Revenue Authority*, 1921 Bom 878 (878, 879): 23 Bom L R 1132: 64 Ind Cas 959 [Appeal lies from order of High Court refusing to direct the Chief Revenue Authority, under S 45 of Specific Relief Act, to state a case under S 51 of the Income-tax Act (1918)].

(3) *Chettiar E M Firm* v. *Commissioner of Income-tax*, 1930 Rang 274 (277): 127 Ind Cas 473: 8 Rang 435.

Note 13.

(1) *G S D* v. *Govt Pleader*, (1902) 32 Bom 106 (107): 10 Bom L R 21 [No appeal lies—The applicant may, however, apply to His Majesty the King for leave to appeal]; *Hume* v. *Poresh Chandra*, (1914) 22 Ind Cas 324 (333): 1914 Cal 557: 41 Cal 784: 19 Cal W N 593 [No appeal lies].

[But see *R*, a pleader in *Re* 1933 All 225 (226): 1933 All L J 278: 1933 Cr C 387 (It is the practice of the Allahabad High Court to grant leave to appeal in such cases—Following, 1938 All 18)].

Note 14.

(1) In re *Nataraja Iyer*, (1918) 21 Ind Cas 896 (897): 14 Mad L Tim 421: 25 Mad L Jour 565.

Note 15.

(1) *Tan Ma Shwe Tin* v. *Tan Ma Ngwe Zin*, 1932 Rang 189 (189): 10 Rang 499: 141 Ind Cas 275 [Order of remand, when may be final, *see also* Pts 9 and 10, Note 4, S 109]; *Aisha Bee Bee* v. *Noor Mohamed*, 1932 Rang 192 (192): 10 Rang 504: 141 Ind Cas 277 [Order refusing leave to appeal in *forma pauperis* is not final order—*See also* S 109, Note 4, Pt 12].

Note 16.

(1) *Lutf Ali Khan* v. *Asgur Reza*, (1890) 17 Cal 455 (458).

Clause 40—Note 1.

(1) *Tata Iron and Steel Co, Ltd* v. *The Chief Revenue Authority of Bombay*, 1923 P C 148 (150): 1923 Mad W N 608: 25 Bom L R 908: 21 All L J 675: 50 Ind App 212: 45 Mad L Jour 295: 18 Mad L W 872: 47 Bom 724: 39 Cal L Jour 16: 28 Cal W N 307; 33 Mad L Tim 301: 4 L R P C 170: 74 Ind Cas 469 [Citing *Goldring* v. *La Banque D'Hochelaga*, (1886) 5 A C 371].

L. P. Cal.
Cl. 40,
Note 1.

appealable to the High Court.[2]

The granting of the permission to appeal under this clause is entirely discretionary with the Court or Judge empowered to give it.[3] "As a general rule and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory orders is one which is not a suitable subject for review".[4] Thus no leave to appeal to the Privy Council will be granted under this clause against an order relating to a question of practice such as an order for inspection of documents[5] or against an order refusing an appointment of a receiver.[6] But where the order complained of involves a matter of real importance, such as a question of jurisdiction to make a particular order, leave to appeal will be granted.[7]

Cl. 41,
Note 1.

Appeal in criminal cases, etc.

41. And We do further ordain that from any judgment, order or sentence of the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or successors, in Council, provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

1. **Appeal in criminal cases.**—In a criminal case the Court's power to grant leave to appeal to the Privy Council is only under this Clause. Thus the High Court has no power to grant leave to appeal from a judgment passed by it in a criminal appeal[1] or against an order made by it under S. 118 of the Criminal Procedure Code.[2]

As to whether an appeal lies against the decision of the High Court after a hearing in pursuance of a certificate granted by the Advocate-General under Cl. 26, *ante, see* the undermentioned case.[3]

Cl. 42.

Rule as to transmission of copies of evidence and other documents.

42. And We do further ordain that, in all cases of appeal made from any judgment, order, sentence or decree of the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal to Us, Our heirs or successors, in Our or Their Privy Council, such High Court shall

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(2) *Sonbai* v. *Ahmedbhai*, (1871) 9 Bom H C R 398.

(3) *Tata Iron and Steel Co, Ltd* v. *The Chief Revenue Authority of Bombay*, 1923 P C 148 (150): 1923 Mad W N 603: 25 Bom L R 908: 21 All L J 675: 50 Ind App 212: 45 Mad L Jour 295: 18 Mad L W 872: 47 Bom 724: 39 Cal L Jour 16: 28 Cal W N 307: 33 Mad L Tim 301: 4 L R P C 170: 74 Ind Cas 469 P C.

(4) *Benoy Krishna Mukerjee* v. *Satish Chandra Giri*, 1928 P C 49 (50): 27 Mad L W 338: 5 Oudh W N 272: 55 Ind App 131: 54 Mad L Jour 423: 26 All L J 481: 47 Cal L Jour 424: 108 Ind Cas 348: 30 Bom L R 815: 32 Cal W N 681: 55 Cal 720 P C. See *Siva Prosad* v. *Prayag Kymari*, 1922 Cal 130 (135): 26 Cal W N 819: 70 Ind Cas 519: 49 Cal 967 [Leave will be granted, if otherwise grave injury might result].

(5) *Sonbai* v. *Ahmedbhai*, (1871) 9 Bom H C R 398.

(6) *Chundi Dutt* v. *Pudmanand Singh*, (1895) 22 Cal 928 (931).

(7) *Municipal Officer, Aden* v. *Abdul Karim*, (1904) 28 Bom 292 (293): 6 Bom L R 85 [Order by the Bombay High Court under Cl 13 transferring to itself a suit from the Court of the Resident at Aden].

Clause 41—Note 1.

(1) *Bellingurst* v. *Emperor*, 1924 Cal 338 (340, 341): 38 Cal L Jour 406: 25 Cr L Jour 1371: 82 Ind Cas 763; *Chintamon Singh* v. *Emperor*, (1913) 21 Ind Cas 470 (471): 18 Cal L Jour 119: 14 Cr L Jour 598 [Judgment of a third Judge on a reference in consequence of difference of opinion between two Judges of the High Court].

(2) *Ataur Singh* v. *King-Emperor*, (1913) 21 Ind Cas 912 (912): 14 Cr L Jour 672: 18 Cal L Jour 121.

(3) *Barendra* v. *Emperor*, 1925 P C 1 (11): 29 Cal W N 181: 1925 Mad W N 26: 3 Pat L R Cr 1: 6 L R P C Cr 1: 27 Bom L R 148: 6 Pat L Tim 169: 52 Ind App 40: 52 Cal 197: 23 All L J 314: 41 Cal L Jour 240: 48 Mad L Jour 543: 26 Cr L Jour 431 : 85 Ind Cas 47: 26 Pun L R 50 P C [Not decided].

L. P. Cal., Cl. 42, Note 1.

certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Ours heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We Our heirs or successors, in Our or Their Privy Council, shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed.

1. **Transmission of records.**—This Clause expressly requires that the reasons for the decisions of the High Court should be recorded by the Judges and transmitted to the Privy Council for its information.[1] Where an appeal to the Privy Council against a decree has been admitted such proceedings as applications for review of the judgment and the order of the Court thereon ought not to form part of the records to be transmitted to England.[2]

Calls for Records, etc., by the Government.

Cl. 43.

High Court to comply with requisition from Government for records, etc.

43. And it is Our further will and pleasure that the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal shall comply with such requisitions as may be made by the Government for records, returns and statements, in such form and manner as such Government may deem proper.

Cl. 44, Notes 1—2.

Powers of the Indian Legislature preserved.

44. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section 71 of the Government of India Act, 1915, and also of the Governor-General, in cases of emergency under section 72 of the Act, and may be in all respects amended and altered thereby.

Synopsis.

1. **Alterations in the Clause.**
2. **Scope of the Clause.**
3. **Legislative powers of the Governor-General in Council.**

1 **Alterations in the Clause.**—The material alteration made by the amending Letters Patent, dated 11th March, 1919, is that the words "Governor-General in Legislative Council, and also of the Governor-General in Council" have been substituted for the words "powers of the Governor-General in Council".

2. **Scope of the Clause.**—This Clause makes the provisions of the Letters Patent subject to the legislative powers of the Governor-General in Legislative Council and also the Governor-General in Council. *See* the undermentioned cases[1] as to instances of

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Clause 42—Note 1.

(1) *Rungappa* v. *Rungappa,* (1869) 12 Moo Ind App 495 (502): 2 Beng L R P C 72: 11 Suth W R P C 33: 2 Suth 206: 2 Sar 461.

(2) *Raja Enaet Hossein* v. *Rani Roushun Jehan,* (1868) 1 Beng L R 1: 10 Suth W R 1 F B.

Clause 44—Note 2.

(1) *Empress* v. *Burah,* (1879) 4 Cal 172 (177-178): 5 Ind App 178: 3 Cal L Rep 197: 3 Sar 834: 3 Suth 556: 2 Shome L R 63: 2 Ind Jur 618 P C [Removal of territory from the jurisdiction of the High Court]; In re *James Currie,* (1897) 21 Bom 405 (408), (Do.); *Advocate-General of Madras* v. *Arunachallam Chettiar,*

L. P. Cal. Cl. 44, Notes 2—3.

exercise of the power conferred by this Clause. But the Letters Patent cannot be varied by mere resolutions either of the local Government or of the Government of India.[2]

Section 9 of the High Courts Act (now S. 106 of the Government of India Act, 1915) gives power to Her Majesty to direct by Her Letters Patent that they may be subject to the powers of the Indian Legislature and, therefore, this Clause is not *ultra vires* of the powers of Her Majesty.[3]

3. Legislative powers of the Governor-General in Council.—Section 22 of the Indian Councils Act, 1861 (24 & 25, Vict., C. 67) gives power to the Governor-General in Council to make laws or regulations for repealing, amending, or altering any laws or regulations then in force, or thereafter to be in force in the Indian territories. It is also provided by that section that the Governor-General in Council has no power to make any laws or regulations which shall repeal or in any way affect any of the provisions of the Act or of any provisions of certain other Acts named therein or of any Act passed in that session of Parliament. Thus the Governor-General in Council has no power to make any alteration in regard to the qualification of Judges prescribed in S. 2 or in regard to powers of the superintendence of the High Court given by S. 106 of the Government of India Act, 1915.[1] Similarly, Governor-General in Council has no power to legislate so as to deprive a British Subject of his right of suit against the Secretary of State for India in Council in such cases as are allowed by S. 65 of the Government of India Act, 1858, which Act is mentioned in the proviso to S. 22 of the Indian Councils Act.[2]

Cl. 45.

Provisions of former Letters Patent, inconsistent with these Letters Patent, to be void.

45. And it is Our further will and pleasure that these Letters Patent shall be published by the Governor in Council, and shall come into operation from and after the date of such publication; and that from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent granted by His Majesty, King George the Third as was not revoked or determined by the said Letters Patent of the Twenty-sixth of June, One thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine, and be utterly void, to all intents and purposes whatsoever.

In witness whereof, We have caused these Our Letters to be made Patent. Witness Ourself, at Westminster, the Twenty-eighth day of December in the Twenty-ninth year of Our Reign.

By warrant under the Queen's Sign Manual. (Sd.) C. ROMILLY.

(1910) 5 Ind Cas 729 (730): 20 Mad L Jour 387: 7 Mad L Tim 292: 1910 Mad W N 14 [Conferring jurisdiction on the High Court in a class of suits arising outside its jurisdiction]; *Feda Hossein*, In the matter of, (1896) 1 Cal 431 (450) [S 5 of Act, VI of 1874—Providing that in cases of concurrent decisions there must be a substantial question of Law to give a right of appeal to the Privy Council is not *ultra vires* the Letters Patent, Clause 39]; *Venkata Subbarayudu* v. *Sri Rajah Krishen Yachendrulu Varu*, (1916) 32 Ind Cas 878 (874): 40 Mad 651: 3 Mad L W 172: 19 Mad L Tim 126: (1916) 1 Mad W N 135: 32 Mad L Jour 144 [S 117, C P Code]: *Satyanarayana* v. *Venkata*, 1924 Mad 399 (399): 46 Mad 958: 46 Mad L Jour 117: 18 Mad L W 655: 1928 Mad W N 719: 75 Ind Cas 604 [S 111, C P Code overrides Cl 39, Letters Patent]; *Abdullah Hossein* v. *Ananda Chandra*, (1914) 24 Ind Cas 273 (275): 42 Cal 35: 1914 Cal 679 [The enactment of S 12, Limitation Act, 1908 so far as it relates to applications for leave to appeal to Privy Council]; *Balakrishna Hari Phansalkar* v. *Emperor*, 1933 Bom 1 (3, 4): 34 Bom L R 1528: 1933 Cr Cas 1: 141 Ind Cas 720: 34 Cr L J 199 S B [Powers of revision and appeal of High Courts taken away by S 51 of Ordinance No II of 1932]; *Sheonandan* v. *King-Emperor*, (1918) 46 Ind Cas 977 (985, 991, 998, 1004): 3 Pat L Jour 581: 1919 Pat H C C 1: 5 Pat L W 324 F B [S 8 of the Defence of India Act IV of 1915 takes away right of appeal or revision to the High Court against the decision of the commissioners]; *Soundararajan* v. *Natarajan*, 1921 Mad 258 (260, 261): 44 Mad 446: 40 Mad L Jour 354: 13 Mad L W 662: 1921 Mad W N 210: 62 Ind Cas 987 [Madras Legislative Council has no power to alter any law applicable to the Presidency Town of Madras under the Letters Patent—Madras Act, I of 1914 is *ultra vires* the powers of the Legislative Council]; *The Queen* v. *Mears*, (1874) 22 Suth W R (Cr) 54 (61, 62): 14 Beng L R 106.

(2) *Sheriff of Bombay* v. *Hokmaji Motoji and Co*, 1927 Bom 521 (524): 104 Ind Cas 685: 51 Bom 749: 29 Bom L R 1071.

(3) *Sheo Nandan Prasad Singh* v. *Emperor*, (1918) 46 Ind Cas 977 (985, 996): 3 Pat L Jour 581: 1919 Pat H C C 1: 5 Pat L W 324.

Note 3.

(1) *Queen* v. *Mears*, (1874) 22 Suth W R (Cr) 54 (60): 14 Beng L R 106.

(2) *Secretary of State* v. *Moment*, (1912) 18 Ind Cas 22 (24): 40 Cal 891: 40 Ind App 48: 7 L B R 10: 17 Cal W N 169: 1913 Mad W N 45: 15 Bom L R 27: 11 All L J 49: 17 Cal L Jour 194: 6 Bur L Tim 1: 13 Mad L Tim 53: 24 Mad L Jour 459 P C.

LETTERS PATENT (ALLAHABAD).

CONTENTS.

CLAUSES.

Recital of Acts 24 and 25, Vict., C. 104.

1. Establishment of High Court for the North-Western Provinces.

2. Constitution and first Judges of the High Court.

3. Declaration to be made by Judges.

4. Seal.

5. Writs, etc., to issue in name of the Crown and under Seal.

6. Appointment of officers.

Admission of Advocates, Vakeels and Attorneys.

7. Powers of High Court in admitting Advocates, Vakeels and Attorneys.

8. In making rules for the qualifications, etc., of Advocates, Vakeels and Attorneys.

Civil Jurisdiction of the High Court.

9. Extraordinary original civil jurisdiction.

10. Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.

11. Appeal from Courts in the Provinces.

12. Jurisdiction as to infants and lunatics.

13. In the exercise of extraordinary original civil jurisdiction.

14. By High Court in the exercise of appellate jurisdiction.

Criminal jurisdiction.

15. Ordinary original jurisdiction of the High Court.

16. Jurisdiction as to persons.

17. Extraordinary original criminal jurisdiction.

18. No appeal from High Court exercising original jurisdiction—Court may reserve points of law.

19. High Court to review cases on points of law reserved by one or more Judges of the said High Court.

20. Appeals from Criminal Courts in the Provinces.

21. Hearing of referred cases, and revision of criminal trials.

22. High Court may direct the transfer of a case from one Court to another.

Act under which Punishments to be inflicted.

23. Indian Penal Code.

24. Judges may be authorized to sit in any places by way of circuit, or special commission.

Testamentary and Intestate Jurisdiction.

25. Testamentary and Intestate jurisdiction.

Matrimonial Jurisdiction.

26. Matrimonial Jurisdiction.

Powers of Single Judges and Division Courts.

27. Single Judges and Division Courts.

Civil Procedure.

28. Regulation of proceedings.

Criminal Procedure.

29. Regulation of proceedings.

Appeals to Privy Council.

30. Power to appeal.

31. Appeal from interlocutory judgment.

32. Appeal in criminal cases, etc.

33. Rule as to transmission of copies of evidence and other documents.

Calls for Records, etc., by the Government.

34. High Court to comply with requisition from Government for records, etc.

35. Powers of Indian Legislature preserved.

Establishing a High Court in the North-Western Provinces of the Bengal Presidency, dated 17th March, 1866.

[The first two paragraphs of the Preamble are similar to those in Calcutta Letters Patent of 1865.]

And whereas it is further declared by the said recited Act that it shall be lawful for Us by Letters Patent, to erect, and establish a High Court of Judicature in and for any portion of the territories, within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of

L. P. All.

another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts, established at the said Presidencies, as We from time to time might think fit and appoint: and that, subject to the directions of the Letters Patent, all the provisions of the said recited Act, relative to High Courts and to the Chief Justice and other Judges of such Courts, and to the Governor-General or Governor of the Presidency, in which such High Courts were established, shall, as far as circumstances may permit, be applicable to any new High Court which may be established in the said territories, and to the Chief Justice and other Judges thereof, and to the persons administering the Government of the said territories:

And whereas We did, upon full consideration of the premises, think fit to erect and establish, and by Our Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster, the fourteenth day of May, in the twenty-fifth year of Our Reign, in the year of Our Lord one thousand eight hundred and sixty-two did accordingly, for Us, Our heirs and successors, erect and establish, at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William, aforesaid, a High Court of Judicature which should be called the High Court of Judicature at Fort William in Bengal, and did thereby constitute the said Court to be a Court of Record:

Cl. 1.

Establishment of High Court for the North-Western Provinces.

1. Now know Ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents, We do accordingly, for Us, Our heirs and successors, erect and establish, for the North-Western Provinces of the Presidency of Fort William aforesaid, a High Court of Judicature, which shall be called the High Court of Judicature, for the North-Western Provinces, and We do hereby constitute the said court to be a Court of Record.

Cl. 2, Note 1.

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the said High Court of Judicature for the North-Western Provinces shall, until further or other provision shall be made by Us, of Our heirs and successors in that behalf, in accordance with the said recited Act, consist of a Chief Justice and five Judges, the first Chief Justice being Walter Morgan, Esquire, and the five Judges being Alexander Ross, Esquire; William Edwards, Esquire; William Roberts, Esquire; Francis Boyle Pearson, Esquire; and Charles Arthur Turner, Esquire, being respectively qualified as in the said Act is declared.

1. **Appointment of sixth Judge.**—The appointment of a sixth Puisne Judge, by the Sovereign, to the High Court of Allahabad is not invalid.[1]

Cl. 3.

Declaration to be made by Judges.

3. And We do hereby ordain that the Chief Justice and every Judge of the said High Court of Judicature, for the North-Western Provinces, previously to entering upon the execution of the duties of his office, shall make and sub-

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(1) *Emperor* v. *Ghure,* 1914 All 85 (85): 22 Cr L Jour 200. Ind Cas 984: 36 All 168: 12 All L J 231: 15

L. P. All. Cl. 3. scribe the following declaration before such authority, or person as the Governor-General in Council may commission to receive it:—

"I, *A.B.*, appointed Chief Justice (*or* Judge) of the High Court of Judicature, for the North-Western Provinces, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

4. *See* Calcutta Cl. 6.
5. *See* Calcutta Cl. 7.

Admission of Advocates, Vakils and Attorneys.

6. *See* Calcutta Cl. 8.
7. *See* Calcutta Cl. 9.
8. *See* Calcutta Cl. 10.

Civil Jurisdiction of High Court.

9. *See* Calcutta Cl 13.
10. *See* Calcutta Cl. 15.
11. *See* Calcutta Cl. 16.

Cl. 12.

Jurisdiction as to infants and lunatics.

12. And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the North-Western Provinces, as that which is exercised in the Bengal Division of the Presidency of Fort William, by the High Court of Judicature at Fort William in Bengal, but subject to the provisions of any laws or regulations now in force.

See Notes to Cl. 17 of the Calcutta Letters Patent.

13. *See* Calcutta Cl. 20.
14. *See* Calcutta Cl. 21.

Criminal Jurisdiction.

Cl. 15.

Ordinary original jurisdiction of the High Court.

15. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have ordinary original criminal jurisdiction in respect of all such persons within the said Provinces as the High Court of Judicature at Fort William in Bengal, shall have criminal jurisdiction over at the date of the publication of these presents; and the criminal jurisdiction of the said last mentioned High Court over such persons shall cease at such date: Provided, nevertheless, that criminal proceedings which shall at such date have been commenced in the said last mentioned High Court shall continue as if these presents had not been issued.

16. *See* Calcutta Cl. 23.

Cl. 17.

Extraordinary original criminal jurisdiction.

17. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other officer specially empowered by the Government in that behalf.

18. *See* Calcutta Cl. 25.

L. P. All., Cl. 19.

High Court to review cases on points of law reserved by one or more Judges of the said High Court.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

Cl. 20.

Appeals from Criminal Courts in the Provinces.

20. And We do further ordain, that the said High Court of Judicature, for the North-Western Provinces, shall be a Court of Appeal from the Criminal Courts of the said Provinces and from all other Courts from which there is now an appeal to the Court of Sudder Nizamut Adawlut for the said Provinces, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlut by virtue of any law now in force.

Cl. 21.

Hearing of referred cases, and revision of criminal trials.

21. And We do further ordain that the said High Court shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other officers now authorized to refer cases to the court of Sudder Nizamut Adawlut of the North-Western Provinces, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference or to revision by the said Court of Sudder Nizamut Adawlut.

22. *See* Calcutta Cl. 29.

Act, under which punishments to be inflicted.

23. *See* Calcutta Cl. 30.

Cl. 24.

Judges may be authorized to sit in any places by way of circuit or special commission.

24. And We do further ordain that whenever it shall appear to the Lieutenant-Governor of the North-Western Provinces, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court, should be exercised in any place within the jurisdiction of any Court, now subject to the superintendence of any Sudder Dewanny Adawlut or the Sudder Nizamut Adawlut of the North-Western Provinces other than the usual places of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court, at such place or places, shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Testamentary and Intestate Jurisdiction.

Cl. 25.

Testamentary and intestate jurisdiction.

25. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have the like power and authority as that which is now lawfully exercised within the said Provinces, by the said High Court of Judicature at Fort William in Bengal, in relation to the granting of

L. P. All., Cl. 25. probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate; and that the jurisdiction of the said last mentioned High Court in relation thereto shall cease from the date of the publication of these presents: Provided always that any proceedings already commenced in relation to any of the matters aforesaid in the said last mentioned High Court shall continue as if these presents had not been issued: Provided also that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial jurisdiction.

26. *See* Calcutta Cl. 35.

Powers of Single Judges and Division Courts.

27. *See* Calcutta Cl. 36.

Civil Procedure.

Cl. 28.

Regulation of proceedings.

28. And We do further ordain that it shall be lawful for the said High Court of Judicature for the North-Western Provinces from time to time to make rules and orders for the purpose of adopting, as far as possible, the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council and being Act No. VIII of 1859, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdictions, respectively.

Criminal Procedure.

Cl. 29.

Regulation of proceedings.

29. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court in the exercise of its ordinary original criminal jurisdiction, shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal, immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

30. *See* Calcutta Cl. 39.

31. *See* Calcutta Cl. 40.

32. *See* Calcutta Cl. 41.

Cl. 33.

Rule as to transmission of copies of evidence and other documents.

33. And We do further ordain that, in all cases of appeal made from any judgment, order, sentence or decree of the said High Court of Judicature for the North-Western Provinces, to Us, Our heirs or successors, in Our or Their Privy Council, such High Court shall certify and

transmit to Us, Our heirs and successors, in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court, and that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any such Judges, for or against the judgment or determination appealed against. **L. P. All., Cl. 33.**

And We do further ordain that the said High Court, shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or Their Privy Council, shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders or other order or rule of the said High Court, should or might have been executed.

Calls for Records, etc., by the Government.

34. *See* Calcutta Cl. 43.

Powers of Indian Legislature preserved.

35. *See* Calcutta Cl. 44.

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the seventeenth day of March in the twenty-ninth year of Our reign. **Cl. 35.**

By warrant under the Queen's Sign Manual.

(Sd.) C. ROMILLY.

LETTERS PATENT CONSTITUTING THE HIGH COURT OF JUDICATURE AT PATNA.

L. at.

CONTENTS.

CLAUSES.

Recital of Act 24 and 25 Vict., c. 104.

Recital of establishment of High Courts at Fort William and Allahabad.

Recital of Act 1 and 2 Geo. 5, c. 18.

Recital of Act 5 and 6 Geo. 5, c. 61.

Recital of creation of Province of Bihar and Orissa.

1. Establishment of High Court at Patna.

2. Constitution and first Judges of the High Court.

3. Declaration to be made by Judges.

4. Seal.

5. Writs, etc., to issue in name of the Crown and under Seal.

6. Appointment of officers.

Admission of Advocates, Vakeels and Attorneys.

7. Powers of High Court in admitting Advocates, Vakeels and Attorneys.

8. Powers of High Court in making rules for the qualifications, etc., of Advocates, Vakils and Attorneys.

Civil Jurisdiction of the High Court.

9. Extraordinary original civil jurisdiction.

10. Appeal to the High Court from Judges of the Court.

11. Appeal from other Civil Courts in the Province of Bihar and Orissa.

12. Jurisdiction as to infants and lunatics.

Law to be administered by the High Court.

13. By the High Court in the exercise of extraordinary original civil jurisdiction.

14. By the High Court in the exercise of appellate jurisdiction.

Criminal Jurisdiction.

15. Ordinary original criminal jurisdiction of the High Court.

16. Jurisdictions as to persons.

17. Extraordinary original criminal jurisdiction.

18. No appeal from High Court exercising original jurisdiction—Court may reserve points of law.

19. High Court to review cases on points of law reserved by one or more Judges of the High Court.

20. Appeals from other Criminal Courts in the Province of Bihar and Orissa.

21. Hearing of referred cases, and revision of criminal trials.

22. High Court may direct the transfer of a case from one Court to another.

Criminal Law.

23. Offenders to be punished under Indian Penal Code.

Admiralty Jurisdiction.

24. Civil.

25. Criminal.

Testamentary and Intestate Jurisdiction

26. Testamentary and intestate jurisdiction.

27. Matrimonial jurisdiction.

Powers of single Judges and Division Courts.

28. Single Judges and Division Courts.

Civil Procedure.

29. Regulation of proceedings.

Criminal Procedure.

30. Regulation of proceedings.

Appeals to Privy Council.

31. Power to appeal in civil cases.

32. Appeal from interlocutory judgments.

33. Appeal in criminal cases.

34. Rule as to transmission of copies of evidence and other documents.

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.

35. Judges to visit Orissa by way of circuit.

36. Special commissions and circuits.

37. Proceedings of Judges on special commission or circuit.

Delegation of Duties to Officers.

38. Power to delegate duties.

Cessation of Jurisdiction of the High Court of Judicature at Fort William in Bengal.

39. Cessation of jurisdiction of the High Court of Judicature at Fort William over the Provinces of Bihar and Orissa.

CLAUSES.

Calls for Records, etc., by the Government.

40. High Court to comply with requisitions from Government for records, etc.

CLAUSES.

Powers for Indian Legislatures.

41. Powers of Indian Legislatures preserved.

LETTERS PATENT CONSTITUTING THE HIGH COURT OF JUDICATURE AT PATNA.

Dated the 9th February, 1916.

Recital of Act 24 and 25 Vict., c. 104.

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India. To all to whom, these Presents shall come, greeting: Whereas by an Act of Parliament passed in the Twenty-fourth and Twenty-fifth Years of the Reign of Her late Majesty Queen Victoria, and called the Indian High Courts Act, 1861, it was, amongst other things, enacted, by section one, that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William;

and, by section two, that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who should be selected from among persons qualified as in the said Act was declared;

and, by section eight, that upon the establishment of such High Court as aforesaid the Supreme Court and the Court of Sadar Diwani Adalat and Sadar Nizamat Adalat at Calcutta, in the said Presidency, should be abolished;

and, by section nine, that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the said Presidency, as Her Majesty might by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations, as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency-town, as might be prescribed thereby; and that, save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts:

And whereas it was further declared by section sixteen of the said recited Act that it should be lawful for Us by Letters Patent to erect and establish a High Court of Judicature in and for any portion of territories within Our Dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts established at the Presidencies of Fort William in Bengal, of Madras, and of Bombay, as We from time to time

L. P. Pat.

might think fit and appoint; and that it should be lawful for Us, by such Letters Patent, to confer on any new High Court which might be so established any such jurisdiction, powers and authority as under the same Act was authorized to be conferred on or would become vested in the High Court established in any of the said Presidencies; and that subject to the directions of the Letters Patent, all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges of such Courts, and to the Governor-General or Governor of the Presidency in which such High Courts were established in any of the said Presidencies; and that subject to the directions of the High Court which might be established in the said territories, and to the Chief Justice and other Judges thereof, and to the Persons administering the Government of the said territories:

Recital of establishment of High Courts at Fort William and Allahabad.

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Fourteenth day of May, in the Twenty-fifth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-two, did erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency, of Fort William aforesaid, and did constitute that Court to be a Court of Record:

And whereas Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-eigth day of December, in the Twenty-ninth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-five, did revoke the said Letters Patent bearing date the Fourteenth day of May in the Year of Our Lord One thousand eight hundred and sixty-two, but notwithstanding that revocation did continue the said High Court of Judicature at Fort William in Bengal and declared that the Court should continue to be a Court of Record:

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Seventeenth day of March, in the Twenty-ninth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-six, did erect and establish a High Court of Judicature for the North-Western Provinces, which said Court is situated at Allahabad in the Province of Agra and is now called the High Court of Judicature at Allahabad, and did constitute that Court to be a Court of Record:

Recital of Act 1 & 2, Geo. 5, c. 18.

And whereas by an Act of Parliament passed in the First and Second Years of Our Reign, and called the Indian High Courts Act, 1911, it was enacted, amongst other things, by section one, that the maximum number of Judges of a High Court of Judicature in India including the Chief Justice, should be twenty;

and, by section two, that Our power under section sixteen of the Indian High Courts Act, 1861, might be exercised from time to time and that a High

Court might be established under the said section sixteen in any portion of the territories within Our Dominions in India, whether or not included within the limits of the local jurisdiction of another High Court; and that, where such a High Court was established in any part of such territories included within the limits of the local jurisdiction of another High Court, it should be lawful for us, by Letters Patent to alter the local jurisdiction of that other High Court and to make such incidental consequential and supplemental provisions as might appear to be necessary by reason of the alterations of those limits:

Recital of Act 5 & 6, Geo. 5, c. 61.

And whereas the said Indian High Courts Acts, 1861 and 1911, have been repealed and re-enacted by an Act of Parliament passed in the Fifth and Sixty Years of Our Reign, and called the Government of India Act, 1915:

Recital of creation of Province of Bihar and Orissa.

And whereas certain territories formerly subject to and included within the limits of the Presidency of Fort William in Bengal were, by proclamation made by the Governor-General of India on the Twenty-second day of March in the Year of Our Lord One thousand nine hundred and twelve, constituted a separate Province, called the Province of Bihar and Orissa, and are now governed by Lieutenant-Governor in Council.

Cl. 1.

Establishment of High Court at Patna.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our heirs and successors, erect and establish, for the Province of Bihar and Orissa aforesaid, with effect from the date of the publication of these presents in the Bihar and Orissa Gazette, a High Court of Judicature, which shall be called the High Court of Judicature at Patna, and We do hereby constitute the said Court to be a Court of Record:

Cl. 2.

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the High Court of Judicature at Patna shall, until further or other provision be made by Us, or Our heirs and successors, in that behalf in accordance with section One hundred and one of the said recited Government of India Act, 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Edward Maynard Des Chames Chamier Knight, and the six other Judges being Saiyid Shurf-ud-din, Esquire; Edmund Pelly Chapman, Esquire; Basanta Kumar Mullick, Esquire; Francis Reginald Roe, Esquire; the Hon'ble Cecil Atkinson, and Jowala Prasad, Esquire; being respectively qualified as in the said Act is declared.

3. *See* Calcutta Cl. 5.

4. *See* Calcutta Cl. 6.

5. *See* Calcutta Cl. 7.

6. *See* Calcutta Cl. 8

Admission of Advocates, Vakils and Attorneys.

7. *See* Calcutta Cl. 9.

8. *See* Calcutta Cl. 10.

L. P. Pat., Cl. 11.

Civil Jurisdiction of the High Court.

9. *See* Calcutta Cl. 13.

10. *See* Calcutta Cl. 15.

Appeal from other Civil Courts in the Province of Bihar and Orissa.

11. And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Civil Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India.

12. *See* Calcutta Cl. 17.

Law to be administered by the High Court.

13. *See* Calcutta Cl. 20.

14. *See* Calcutta Cl. 21.

Criminal Jurisdiction.

Cl. 15.

Ordinary original criminal jurisdiction of the High Court.

15. And We do further ordain that the High Court of Judicature at Patna shall have ordinary original criminal jurisdiction in respect of all such persons within the Province of Bihar and Orissia as the High Court of Judicature at Fort William in Bengal had such criminal jurisdiction over immediately before the publication of these presents.

16. *See* Calcutta Cl. 23.

17. *See* Calcutta Cl. 24.

18. *See* Calcutta Cl. 25.

Cl. 19.

High Court to review cases on points of law reserved by one or more Judges of the High Court.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Patna shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right.

20. *See* Calcutta Cl. 27.

Cl. 21.

Hearing of referred cases, and revision of criminal trials.

21. And We do further ordain that the High Court of Judicature at Patna shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers in the Province of Bihar and Orissa, who were, immediately before the publication of these presents, authorized to refer cases to the High Court of Judicature at Fort William in Bengal, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Province of Bihar and Orissa,

as were, immediately before the publication of these presents, subject to reference to or revision by the High Court of Judicature at Fort William in Bengal. **L. P. Pat.**

22. *See* Calcutta Cl. 29.

Criminal Law.

23. *See* Calcutta Cl. 27.

Admiralty Jurisdiction.

Cl. 24.

Civil.

24. And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa, all such civil and maritime jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal, as a Court of Admiralty, and also such jurisdiction for the trial and adjudication of prize cases and other maritime question as was so exercisable by the High Court of Judicature at Fort William in Bengal.

Cl. 25.

Criminal.

25. And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such criminal jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, or otherwise in connection with maritime matters or matters of prize.

Testamentary and Intestate Jurisdiction.

26. *See* Calcutta Cl. 34.

Matrimonial Jurisdiction.

27. *See* Calcutta Cl. 35.

Powers of Single Judges and Division Courts.

28. *See* Calcutta Cl. 36.

Civil Procedure.

Cl. 29, Note 1.

Regulation of proceedings.

29. And We do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting, as far as possible, the provisions of the Code of Civil Procedure, being an Act, No. V of 1908, passed by the Governor-General in Council, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively.

1. **Civil Procedure Code, S. 122.**—As to whether S. 122, Civil Procedure Code applies to the High Court of Patna, *see* Note 4 to S. 122 and Note 1 to S. 124, *ante.*

Criminal Procedure.

30. *See* Calcutta Cl. 38.

Appeals to Privy Council.

31. *See* Calcutta Cl. 39.

Cl. 32.

Appeal from interlocutory judgments.

32. And We do further ordain that it shall be lawful for the High Court of Judicature at Patna, at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the peti-

L.P. Pat. Cl. 32. tion, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

33. *See* Calcutta Cl. 41.

34. *See* Calcutta Cl. 42.

Exercise of jurisdiction elsewhere than at the usual place of sitting of the High Court.

Cl. 35, Note 1.

Judges to visit Orissa by way of circuit.

35. And We do further ordain that, unless the Governor-General in Council otherwise directs, one or more Judges of the High Court of Judicature at Patna shall visit the Division of Orissa, by way of circuit, whenever the Chief Justice from time to time appoints, in order to exercise in respect of cases arising in that Division the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the said High Court: Provided always that such visits shall be made not less than four times in every year, unless the Chief Justice, with the approval of the Lieutenant-Governor in Council, otherwise directs: Provided also that the said High Court shall have power from time to time to make rules, with the previous sanction of the Lieutenant-Governor in Council, for declaring what cases or classes of cases arising in the Division of Orissa shall be heard at Patna and not in that Division, and that the Chief Justice may, in his discretion, order that any particular case arising in the Division of Orissa shall be heard at Patna or in that Division.

1. **Vacation Judge in Patna—Powers of.**—A vacation Judge of the High Court of Patna sitting at Patna has no jurisdiction, under this Clause read with R. 5 of Chap. 22 of the Patna High Court Rules, to hear an application in revision against the order of a Subordinate Judge in Orissa granting time to a party to move the Privy Council for review of judgment.[1] Such an application could be heard only in Orissa.

Cl. 36.

Special commission and circuits.

36. And We do further ordain that whenever it appears to the Lieutenant-Governor in Council, subject to the control of Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the High Court of Judicature at Patna should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly.

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(1) *Rajendra Prosad Bode* v. *Gopal Prasad Sen*, 1931 Pat 61 (63): 11 Pat L Tim 862: 130 Ind Cas 262.

L. P. Pat. Cl. 37.

Proceedings of Judges on special commission or circuit.

37. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Patna visit any place under the 35th or the 36th clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Delegation of Duties to Officers.

Cl. 38.

Power to delegate duties.

38. The High Court of Judicature at Patna may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties.

Cessation of Jurisdiction of the High Court of Judicature at Fort William in Bengal.

Cl. 39.

Cessation of jurisdiction of the High Court of Judicature at Fort William over the Province of Bihar and Orissa.

39. And We do further ordain that the jurisdiction of the High Court of Judicature at Fort William in Bengal in any matter in which jurisdiction is by these presents given to the High Court of Judicature at Patna shall cease from the date of the publication of these presents, and that all proceedings pending in the former Court on that date in reference to any such matter shall be transferred to the latter Court:

Provided, first, that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction—

(*a*) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order, other than an order of an interlocutory nature, has been passed or made by that Court, or in which the validity of any such decree or order is directly in question; and

(*b*) in all proceedings [not being proceedings referred to in paragraph (*a*) of this clause] pending in that Court, on the date of the publication of these presents, under the 13th, 15th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 32nd, 33rd, 34th, or 35th clause of the Letters Patent bearing date at Westminster the twenty-eighth day of December, in the Year of Our Lord One thousand eight hundred and sixty-five, relating to that Court; and

(*c*) in all proceedings instituted in that Court, on or after the date of the publication of these presents, with reference to any decree or order passed or made by that Court:

Provided, secondly, that if any question arises as to whether any case is covered by the first proviso to this clause, the matter shall be referred to the Chief Justice of the High Court of Judicature at Fort William in Bengal, and his decision shall be final.

NOTE.

The High Court of Patna has no jurisdiction to execute an order of His Majesty in Council in an appeal from a decree of the High Court of Calcutta passed on appeal from the decree of a Subordinate Court in the Province of Bihar; the application for execution must be made to the High Court of Calcutta.[1]

NOTE.

(1) *Lalji* v. *Baijnath*, (1918) 43 Ind Cas 457 (457): 2 Pat L Jour 684.

L. P. Pat.

Calls for Records, etc., by the Government.

Cl. 40. **40.** *See* Calcutta Cl. 43.

Powers of Indian Legislatures.

Cl. 41. **41.** *See* Calcutta Cl. 44.

In witness whereof We have caused these our letters to be made patent. Witness Ourself at Westminster the Ninth day of February, in the year of Our Lord One thousand nine hundred and sixteen and in the sixth year of Our reign.

By warrant under the King's Sign Manual.

(Sd.) SCHUSTER.

LETTERS PATENT (LAHORE).

(*9th February*, 1919.)

CONTENTS.

CLAUSES.

1. Establishment of High Court at Lahore.
2. Constitution and first Judges of the High Court.
3. Declaration to be made by Judges.
4. Seal.
5. Writs, etc., to issue in the name of the Crown and under seal.
6. Appointment of officers.

Admission of Advocates, Vakils and Attorneys.

7. Powers of High Court in admitting Advocates, Vakils and Attorneys.
8. Powers of High Court in making rules for the qualifications, etc., of Advocates, Vakils and Attorneys.

Civil Jurisdiction of the High Court.

9. Extraordinary original civil jurisdiction.
10. Appeal to the High Court from Judges of the Court.
11. Appeal from other Civil Courts in the Provinces of the Punjab and Delhi.
12. Jurisdiction as to infants and lunatics.

Law to be administered by the High Court.

13. By the High Court in the exercise of extraordinary original civil jurisdiction.
14. By the High Court in the exercise of appellate jurisdiction.

Criminal Jurisdiction.

15. Ordinary original criminal jurisdiction of the High Court.
16. Jurisdiction as to persons.
17. Extraordinary original criminal jurisdiction.
18. No appeal from High Court exercising original jurisdiction.
19. High Court to review cases on points of law reserved by one or more Judges of High Court.

CLAUSES.

20. Appeals from other Criminal Courts in the Provinces of Punjab and Delhi.
21. Hearing of referred cases and revision of criminal trials.
22. High Court may direct the transfer of a case from one Court to another.

Criminal Law.

23. Offenders to be punished under Indian Penal Code.

Testamentary and Intestate Jurisdiction.

24. Testamentary and Intestate jurisdiction.

Matrimonial Jurisdiction.

25. Matrimonial jurisdiction.

Powers of Single Judges and Division Courts.

26. Single Judges and Division Courts.

Civil Procedure.

27. Regulation of Proceedings.

Criminal Procedure.

28. Regulation of Proceedings.

Appeals to Privy Council.

29. Power to appeal in civil cases.
30. Appeal from interlocutory judgments.
31. Appeal in criminal cases.
32. Rule as to transmission of copies of evidence and other documents.

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.

33. Special commission and circuits.
34. Proceeding of Judges on special commission or circuit.

Delegation of Duties to Officers.

35. Power to delegate duties.

Calls for records, etc., by the Government.

36. High Court to comply with requisitions from Government for records, etc.

Powers of Indian Legislatures

37. Powers of Indian Legislatures preserved.

LETTERS PATENT (LAHORE).

Letters Patent constituting the High Court of Judicature at Lahore, for the Provinces of Punjab and Delhi, dated 21st March, 1919.

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas,

L. P. Lah. King, Defender of the Faith, Emperor of India. To all to whom these Presents shall come, greeting: Whereas by an Act of Parliament passed in the Fifth and Sixth years of Our Reign and called the Government of India Act, 1915, it was amongst other things enacted that it should be lawful for Us by Letters Patent to establish a High Court of Judicature in any territory in British India whether or not included within the limits of the local jurisdiction of another High Court and to confer on any High Court so established any such jurisdiction, powers and authority as were vested in or might be conferred on any High Court existing at the commencement of that Act; and

WHEREAS the Provinces of the Punjab and Delhi are now subject to the jurisdiction of the Chief Court of the Punjab which was established by an Act of the Governor-General of India in Council, being Act No. XXIII of 1865, and was continued by later enactments and no part of the said Provinces is included within the limits of the local jurisdiction of any High Court.

Cl. 1.

Establishment of High Court at Lahore.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly, for Us, Our heirs and successors, erect and establish, for the Provinces of the Punjab and Delhi aforesaid, with effect from the date of the publication of these presents in the *Gazette of India*, a High Court of Judicature, which shall be called the High Court of Judicature at Lahore, and We do hereby constitute the said Court to be a Court of Record.

Cl. 2.

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the High Court of Judicature at Lahore shall, until further or other provision be made by Us, or Our heirs and successors, in that behalf in accordance with section one hundred and one of the said recited Government of India Act, 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Henry Adolphus Rattigan, Knight, and the six other Judges being William Chevis, Esquire; Henry Scott Smith, Esquire; Shadi Lal, Esquire; Rai Bahadur Walter Aubin Le Rossignol, Esquire; Leycester Hudson Leslie Jones, Esquire; and Alan Brice Broadway, Esquire, being respectively qualified as in the said Act is declared.

3. *See* Calcutta Cl. 5.

4. *See* Calcutta Cl. 6.

5. *See* Calcutta Cl. 7.

6. *See* Calcutta Cl. 8.

Admission of Advocates, Vakils and Attorneys.

7. *See* Calcutta Cl. 9.

8. *See* Calcutta Cl. 10.

Civil jurisdiction of the High Court.

9. *See* Calcutta Cl. 13.

10. *See* Calcutta Cl. 15.

L. P. Lah. Cl. 11.

Appeal from other Civil Courts in the Provinces of the Punjab and Delhi.

11. And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Civil Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India.

Cl. 12.

Jurisdiction as to infants and lunatics.

12. And We do further ordain that the High Court of Judicature at Lahore shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Provinces of the Punjab and Delhi as that which was vested in the Chief Court of the Punjab immediately before the publication of these presents.

Law to be administered by the High Court.

13. *See* Calcutta Cl. 20.

14. *See* Calcutta Cl. 21.

Criminal Jurisdiction.

Cl. 15, Note 1.

Ordinary original criminal jurisdiction of the High Court.

15. And We do further ordain that the High Court of Judicature at Lahore shall have ordinary original criminal jurisdiction in respect of all such persons within the Provinces of the Punjab and Delhi as the Chief Court of the Punjab had such criminal jurisdiction over immediately before the publication of these presents.

1. **Original criminal jurisdiction.**—The original criminal jurisdiction of the High Court of Lahore is co-extensive with that of the late Chief Court of the Punjab. The High Court of Lahore has no jurisdiction to try on its original criminal side a British Indian subject for an offence, since the Chief Court had no such original criminal jurisdiction except in the case of European British subjects.[1]

16. *See* Calcutta Cl. 23.

17. *See* Calcutta Cl. 24.

18. *See* Calcutta Cl. 25.

Cl. 19.

High Court to review cases on points of law reserved by one or more Judges of the High Court.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Lahore shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court

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(1) *Faqir Singh* v. *Ali Mohammad,* 1929 Lah 217 (220): 115 Ind Cas 428: 30 Cr L J 460: 12 A I Cr R 413.

L.P. Lah. Cl. 19. of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right.

Cl. 20. 20. And We do further ordain that the High Court of Judicature at Lahore shall be a Court of appeal from the Criminal Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India.

Appeals from other Criminal Courts in the Provinces of the Punjab and Delhi.

21. *See* Calcutta Cl. 28.

22. *See* Calcutta Cl. 29.

Criminal Law.

23. *See* Calcutta Cl. 30.

Testamentary and Intestate Jurisdiction.

24. *See* Calcutta Cl. 34.

Matrimonial Jurisdiction.

25. *See* Calcutta Cl. 35.

Powers of single Judges and Division Courts.

26. *See* Calcutta Cl. 36.

Civil Procedure.

Cl. 27. 27. And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting, as far as possible, the provisions of the Code of Civil Procedure, being an Act, No. V of 1908, passed by the Governor-General in Council and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively.

Regulation of proceedings.

Criminal Procedure.

Cl. 28. 28. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Lahore shall be regulated by the Code of Criminal Procedure, being an Act, No. V of 1898, passed by the Governor-General in Council or by such further or other laws in relation to criminal procedure as may have been or may be made by competent legislative authority for India.

Regulation of proceedings.

Appeals to Privy Council.

29. *See* Calcutta Cl. 39.

L.P. Lah., Cl. 30.

Appeal from interlocutory judgments.

30. And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant premission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

31. *See* Calcutta Cl. 41.

32. *See* Calcutta Cl. 42.

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.

Cl. 33.

Special commissions and circuits.

33. And We do further ordain that whenever it appears to the Lieutenant-Governor of the Punjab, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the High Court of Judicature at Lahore, should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly.

Cl. 34.

Proceedings of Judges on special commissions or circuit.

34. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Lahore visit any place under the 33rd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Delegation of Duties to Officers.

Cl. 35.

Power to delegate duties.

35. The High Court of Judicature at Lahore may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties.

Calls for records, etc., by the Government.

36. *See* Calcutta Cl. 43.

Powers of Indian Legislatures.

37. *See* Calcutta Cl. 44.

IN WITNESS whereof We have caused these Our Letters to be made Patent.

Witness Ourself at Westminster the 21st day of March in the year of Our Lord One thousand nine hundred and nineteen and in the ninth year of Our Reign.

BY WARRANT under the King's Sign Manual.

(Sd.) SCHUSTER.

L. P. Rang.

LETTERS PATENT FOR THE HIGH COURT OF RANGOON.

CONTENTS.

CLAUSES.

1. Establishment of High Court at Rangoon.
2. Constitution and first Judges of the High Court.
3. Declaration to be made by Judges.
4. Seal.
5. Writs, etc., to issue in name of the Crown and under Seal.
6. Appointment of Officers.

Admission of Advocates and Pleaders.

7. Powers of High Court in admitting Advocates, Pleaders and Attorneys.
8. Powers of High Court in making rules for the qualifications, etc., of Advocates, Pleaders and Attorneys.

Civil Jurisdiction of the High Court.

9. Local limits of the ordinary original civil jurisdiction.
10. Original jurisdiction as to suits.
11. Extraordinary original civil jurisdiction.
12. Joinder of several causes of action.
13. Appeal to the High Court from Judges of the Court.
14. Appeal from other Civil Courts.
15. Jurisdiction as to Infants and Lunatics.
16. Provision with respect to the Insolvent Court.
17. Law to be administered by the High Court in the exercise of ordinary original civil jurisdiction.
18. Equity to be administered by the High Court in the exercise of ordinary original civil jurisdiction.
19. Law and equity to be administered by the High Court in the exercise of extraordinary original civil jurisdiction.
20. Law and equity to be administered by the High Court in the exercise of appellate jurisdiction.

Criminal Jurisdiction.

21. Ordinary original criminal jurisdiction of the High Court.
22. Jurisdiction as to persons.
23. Extraordinary original criminal jurisdiction.
24. No appeal from High Court exercising original criminal jurisdiction.

CLAUSES.

Court may reserve points of law.

25. High Court to review on certificate of the Government Advocate.
26. Appeals from Criminal Courts.
27. Hearing of referred cases, and revision of criminal trials.
28. High Court may direct the transfer of a case from one Court to another.

Criminal Law.

29. Offenders to be punished under Indian Penal Code.

Admiralty Jurisdiction.

30. Civil.
31. Criminal.

Testamentary and Intestate Jurisdiction.

32. Testamentary and intestate jurisdiction.

Matrimonial Jurisdiction.

33. Matrimonial jurisdiction.

Powers of Single Judges and Division Courts.

34. Single Judges and Division Courts.

Civil Procedure.

35. Regulation of proceedings.

Criminal Procedure.

36. Regulation of proceedings.

Appeals to Privy Council.

37. Power to appeal in civil cases.
38. Appeal from interlocutory judgment.
39. Appeal in criminal cases.
40. Rules as to transmission of copies of evidence and other documents.

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.

41. Exercise of jurisdiction elsewhere than at the usual place of sitting of the High Court.
42. Special commissions and circuits.
43. Proceedings of Judges on special commission or circuit.

Provisions regarding pending proceedings.

44. Provisions regarding pending proceedings.

Delegation of duties to officers.

45. Power to delegate duties.

Calls for records, etc., by the Government.

46. High Court to comply with requisition from Government for records, etc.

Powers of Indian Legislature.

47. Powers of Indian Legislature preserved.

LETTERS PATENT FOR THE HIGH COURT OF RANGOON.

[11*th November*, 1922.

George the Fifth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India:

To all to whom these presents shall come, greeting:

Whereas in the Government of India Act, it was amongst other things enacted that it should be lawful for Us by Letters Patent to establish a High Court of Judicature in any territory in British India whether or not included within the limits of the local jurisdiction of another High Court and to confer on any High Court so established any such jurisdiction, powers and authority as were vested in or might be conferred on any High Court existing at the commencement of that Act:

And whereas that portion of the Province of Burma known as Lower Burma is now within the limits of the jurisdiction of the Chief Court of Lower Burma which was established by an Act of the Governor-General of India in Legislative Council, being Act No. VI of 1900, and whereas that portion of the said Province known as Upper Burma is with certain exceptions now within the limits of the jurisdiction of the Judicial Commissioner of Upper Burma appointed in pursuance of a Regulation of the Governor-General of India in Council, being Regulation No. V of 1892, and of the Court of the Judicial Commissioner of Upper Burma which was established by a Regulation of the Governor-General of India in Council, being Regulation No. VIII of 1886, and was continued by a Regulation of the Governor-General of India in Council, being Regulation No. I of 1896:

And whereas no part of the said Province is included within the limits of the local jurisdiction of any High Court.

Cl. 1.

Establishment of High Court at Rangoon.

1 Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our heirs and successors, erect and establish, for those portions of the province of Burma, at present within the limits of the jurisdiction of the said Chief Court of Lower Burma and of the said Judicial Commissioner and of the said Court of the Judicial Commissioner of Upper Burma, as aforesaid, with effect from the date of the publication of these presents in the *Gazette of India*, a High Court of Judicature, which shall be called the High Court of Judicature at Rangoon, and We do hereby constitute the said Court to be a Court of Record.

Cl. 2.

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the High Court of Judicature at Rangoon shall, until further or other provision be made by Us, or Our heirs and successors, in that behalf in accordance with section one hundred and one of the Government of India Act, ordinarily consist of a Chief Justice and not less than seven other Judges, the first Chief Justice being Sir Sydney Maddock Robinson, *Kt.*, and the other Judges being Leslie Harry Saunders, Esq., C.S.I, Maung. Kin, Esq., Charles Phillip Radford Young, Esq., Henry Sheldon Pratt, Esq., Benjamin Herbert Heald, Esq., John

L. P. Rang., Cl. 2.

Guy Rutledge, Esq., one of Our Counsel learned in the Law and High Ernest MacColl, Esq., being respectively qualified as in the said Act is declared.

3. *See* Calcutta Cl. 5.
4. *See* Calcutta Cl. 6.
5. *See* Calcutta Cl. 7.
6. *See* Calcutta Cl. 8.

Admission of Advocates and Pleaders.

7. *See* Calcutta Cl. 9.
8. *See* Calcutta Cl. 10.

Civil Jurisdiction of the High Court.

9. *See* Calcutta Cl. 11.

Cl. 10.

Original jurisdiction as to suits.

10. And We do further ordain that the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try and determine suits of every description if, in the case of suits for land or other immovable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original civil jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Rangoon Small Cause Court.

11. *See* Calcutta Cl 13.
12. *See* Calcutta Cl. 14.
13. *See* Calcutta Cl. 15.

Cl. 14.

Appeal from other Civil Courts.

14. And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Civil Courts of the Province of Burma for which, immediately before the publication of these presents, the Chief Court of Lower Burma or the Court of the Judicial Commissioner of Upper Burma was a Court of Appeal, and from all other Civil Courts, whether within or without the Province of Burma, for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of Lower Burma or to the Court of the Judicial Commissioner of Upper Burma by virtue of any law then in force, or as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature or by competent legislative authority for India.

15. *See* Calcutta Cl. 17.

Cl. 16.

Provision with respect to the Insolvent Court.

16. And We do further ordain that the Court for relief of insolvent debtors at Rangoon shall be held before one of the Judges of the High Court of Judicature at Rangoon and the said High Court, and any such Judge thereof,

L. P. Rang., Cl. 16.

shall have and exercise within the Province of Burma, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in the Province of Burma.

Cl. 17, Note 1.

Law to be administered by the High Court in the exercise of ordinary original civil jurisdiction.

17. And We do further ordain that, with respect to the law to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such law shall be the law which would have been applied by the Chief Court of Lower Burma to such case if these Letters Patent had not issued.

1. **Law, meaning of.**—The word "law" as used in this Clause merely means the legal enactments of the Indian and Burmese legislatures and the English common law and equity which was applied by the late Chief Court of Burma. It does not include the published decisions of that Court and, therefore, the High Court in the exercise of its ordinary original jurisdiction is not bound by the authorised reports of decisions of the Chief Court of Lower Burma.[1]

See also the undermentioned case.[2]

Cl. 18.

Equity to be administered by the High Court in the exercise of ordinary original civil jurisdiction.

18. And We do further ordain that, with respect to the equity to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such equity shall be the equity as nearly as may be which the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction is authorised to apply to such case.

19. *See* Calcutta Cl. 20.

20. *See* Calcutta Cl. 21.

Criminal Jurisdiction.

21. *See* Calcutta Cl. 22.

22. *See* Calcutta Cl. 23.

23. *See* Calcutta Cl. 24.

24. *See* Calcutta Cl. 25.

Cl. 25.

High Court to review on certificate of the Government Advocate.

25. And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the Government Advocate that in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court, should be further considered, the High Court of Judicature at Rangoon shall have full power and authority to review the case, or such part of it, as may be necessary, and

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Cl. 17—Note 1.

[1] In re *Ma Mya* v. *Ma Thein*, 1927 Rang 4 (6, 8, 10, 14): 4 Rang 313: 98 Ind Cas 526.

[2] *Mirza Hashim* v. *Aga Abdul Hoosain*, 1927 Rang 242 (243): 103 Ind Cas 189: 5 Rang 252.

L. P. Rang., Cl. 25.

finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

Cl. 26.

Appeals from Criminal Courts.

26. And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Criminal Courts for which immediately before the publication of these presents the Chief Court of Lower Burma or the Judicial Commissioner of Upper Burma was a Court of Appeal and from all other Criminal Courts, whether within or without the Province of Burma, for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of Lower Burma or to the Judicial Commissioner of Upper Burma by virtue of any law then in force, or as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature or by competent legislative authority for India.

27. *See* Calcutta Cl. 28.

Cl. 28, Note 1.

High Court may direct the transfer of a case from one Court to another.

28 And We do further ordain that the High Court of Judicature at Rangoon shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court,

1. **Power of transfer.**—This Clause does not confer any power of transfer over and above that conferred by S. 526 of the Code of Criminal Procedure.[1] The reason is that this Clause is qualified by Cl. 36, *infra.*

Criminal Law.

29. *See* Calcutta Cl. 30.

Admiralty Jurisdiction.

Cl. 30.

Civil.

30. And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such civil and maritime jurisdiction as might be exercised by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty immediately before the date of the publication of these presents and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as might be exercised by the said High Court at the said date.

Cl. 28—Note 1.

(1) *Ashu* v. *Maung Po Khan*, 1924 Rang 100 (100): 77 Ind Cas 885: 2 Bur L Jour 236: 1 Rang 682: 25 Cr L J 485.

L P. Rang., Cl. 31.

Criminal.

31. And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such criminal jurisdiction as might immediately before the publication of these presents be exercised by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty or otherwise in connection with maritime matters or matters of prize.

Testamentary and intestate jurisdiction.

32. *See* Calcutta Cl. 34.

Matrimonial jurisdiction.

33. *See* Calcutta Cl. 35.

Powers of single Judges and Division Courts.

34. *See* Calcutta Cl. 36.

Civil Procedure.

Cl. 35, Note 1.

Regulation of proceedings.

35. And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, testamentary, intestate and matrimonial jurisdiction, respectively: Provided always that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure being an Act passed by the Governor-General of India in Legislative Council, and being Act No. V of 1908, and the provisions of any law which has been or may be made, amending or altering the same by the local legislature or by competent legislative authority for India.

1. **Power to make rules.**—This Clause enables the High Court to make rules and orders for the purpose of regulating proceedings in civil cases. It does not enable the High Court to frame rules repugnant to the terms of the Letters Patent. Thus, R. 28 of the Appellate Side Rules of the High Court of Rangoon is *ultra vires* in so far as it contemplates that a Judge other than the Judge, who passed a judgment, may declare that a case is a fit one for appeal under Cl. 13, *ante*.[1]

Criminal Procedure.

Cl. 36.

Regulation of proceedings.

36. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Rangoon shall be regulated by the Code of Criminal Procedure being an Act No. V of 1898 passed by the Governor-General of India in Legislative Council or by such further or other laws in relation to criminal procedure as have been or may be made by the local legislature or by competent legislative authority for India.

See notes to Cl. 28, *ante*.

Cl. 35—Note 1.

(1) *Than v. Mg Ba Gyan*, 1926 Rang 1 (2): 4 Bur L Jour 165: 93 Ind Cas 124: 8 Rang 546 F B.

L. P. Rang.

Appeals to Privy Council.

37. *See* Calcutta Cl. 39.

Cl. 38.

Appeal from interlocutory judgments.

38 And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

39. *See* Calcutta Cl. 41.

40. *See* Calcutta Cl. 42.

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.

Cl. 41.

41. And We do further ordain that, unless the Governor of Burma in Council otherwise directs, one or more Judges of the High Court of Judicature at Rangoon, as the Chief Justice may from time to time direct, shall sit at Mandalay, in order to exercise in respect of cases arising in such areas in Upper Burma as the Governor of Burma in Council may direct the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, vested in the said High Court: Provided that the Chief Justice may, in his discretion, order that any particular case arising in the said areas in Upper Burma shall be heard at Rangoon.

Cl. 42.

Special commissions and circuits.

42. And We do further ordain that whenever it appears convenient to the Governor of Burma in Council, that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act vested in the High Court of Judicature at Rangoon should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court or at several such places by way of circuit, one or more Judges of the said High Court shall visit such place or places accordingly.

Cl. 43.

Proceedings of Judges on special commission or circuit.

43. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Rangoon shall visit or sit at any place under the 41st or the 42nd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by the local legislature or by a competent legislative authority for India.

Provisions regarding Pending Proceedings.

L. P. Rang. Cl. 44.

Provisions regarding pending proceedings.

44. And We do further ordain that all suits, appeals, revisions, applications reviews, executions and other proceedings whatsoever pending immediately before the publication of these presents in the Chief Court of Lower Burma, or before the Judicial Commissioner of Upper Burma, or in the Court of the Judicial Commissioner of Upper Burma, or in the exercise of any jurisdiction vested in them by any law shall be continued and concluded in the High Court of Judicature at Rangoon as if the same had been instituted in the said High Court; and the said High Court shall in relation to all such proceedings exercise the jurisdiction given to it by these presents.

Delegation of Duties to Officers.

Cl. 45.

Power to delegate duties.

45. The High Court of Judicature at Rangoon may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties.

Calls for Records, etc., by the Government.

46. *See* Calcutta Cl. 43.

Powers of Indian Legislatures.

47. *See* Calcutta Cl. 44.

In witness whereof We have caused these our letters to be made patent.

Witness Ourself at Westminster the eleventh day of November in the year of Our Lord One thousand nine hundred and twenty-two and in the Thirteenth Year of Our Reign.

By Warrant under the King's Sign Manual.

(Sd.) SCHUSTER.

APPENDIX IV.

RULES OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, 1925.

Interpretation.

P. C. R. 1. 1.—(1) In these Rules, unless the context otherwise requires:—

Interpretation.

"Appeal" means an appeal to His Majesty in Council;

"Judgment" includes decree, order, sentence, or decision of any Court, Judge, or Judicial Officer;

"Record" means the aggregate of papers relating to an appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the appeal;

"Registrar" means the Registrar or other proper officer having the custody of the records in the Court appealed from;

"Abroad" means the country or place where the Court appealed from is situate;

"Agent" means a person qualified by virtue of Her Late Majesty's Order in Council of the 6th March, 1896, to conduct proceedings before His Majesty in Council on behalf of another;

"Party" and all words descriptive of parties to proceedings before His Majesty in Council (such as "petitioner", "appellant", "respondent") mean, in respect of all acts proper to be done by an Agent, the Agent of the party in question where such party is represented by an Agent;

"Respondent" includes Intervener;

"Month" means calendar month;

Words in the singular shall include the plural, and words in the plural shall include the singular.

(2) Where by these rules any step is required to be taken in England in connexion with proceedings before His Majesty in Council, whether in the way of lodging a petition or other document, entering an appearance, lodging security, or otherwise, such step shall be taken in the Registry of the Privy Council, Downing Street, London.

LEAVE TO APPEAL.

R. 2. 2. All appeals shall be brought either in pursuance of leave obtained from the Court appealed from, or, in the absence of such leave, in pursuance of special leave to appeal granted by His Majesty in Council, upon a petition in that behalf presented by the intending appellant.

Leave to appeal generally.

SPECIAL LEAVE TO APPEAL.

R. 3. 3. A petition for special leave to appeal to His Majesty in Council shall state succinctly and clearly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise His Majesty whether such leave ought to be granted, and shall be signed by the Counsel who attends at the hearing or by the party himself if he appears in person. The petition shall deal with the merits of the case only so far as is necessary for the purpose of explaining and supporting the particular grounds upon which special leave to appeal is sought.

Form of petition for special leave to appeal.

P. C.
R. 4.

Five copies of petition to be lodged together with affidavits in support.

4. The petitioner shall lodge at least five copies of his petition for special leave to appeal together with the affidavit in support thereof prescribed by R. 50 hereinafter contained, and, unless as Caveat as prescribed by R. 48 has been lodged by the other parties who appeared in the Court below, an affidavit of service of notice of the intended application upon such parties or their Solicitors or Agents, either abroad or in England.

R. 5.

Time for lodging petition.

5. A Petition for special leave to appeal may be lodged at any time after the date of the judgment sought to be appealed from, but the Petitioner shall, in every case, lodge his Petition with the least possible delay.

R. 6.

Security for costs and transmission of record.

6. Where the Judicial Committee agree to advise His Majesty to grant special leave to appeal, they shall, in their Report, specify the amount of the security for costs (if any) to be lodged by the Petitioner, and shall, unless the circumstances of a particular case render such a course unnecessary, provide for the transmission of the Record by the Registrar to the Registrar of the Privy Council and for such further matters as the justice of the case may require. Unless otherwise ordered the security shall be lodged at any time before the Appellant enters an Appearance.

R. 7.

General provisions.

7. Save as by the four last preceding Rules otherwise provided, the provisions of Rr. 47 to 50 and 52 to 59 (all inclusive) hereinafter contained shall apply *mutatis mutandis* to Petitions for special leave to appeal.

R. 8.

Petitions for special leave to appeal in *forma pauperis.*

8. Rules 3 to 7 (both inclusive) shall apply *mutatis mutandis* to Petitions for leave to appeal in *forma pauperis*, but in addition to the Affidavits referred to in R. 4 every such Petition shall be accompanied by an Affidavit from the Petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject-matter of the intended Appeal and that he is unable to provide sureties, and also by a Certificate of Counsel that the Petitioner has reasonable ground of appeal.

R. 9.

Exemption of pauper Appellant from lodging security and paying Office fees.

9. Where a Petitioner obtains leave to appeal in *forma pauperis* he shall not be required to lodge security for the costs of the Respondent or to pay any Council Office fees.

R. 10.

Exemption of unsuccessful Petitioner for leave to appeal in *forma pauperis* from payment of Office fees.

10. A petitioner whose petition for leave to appeal in *forma pauperis* is dismissed may, notwithstanding such dismissal, be excused from paying the Council Office fees usually chargeable to a petitioner in respect of a petition for leave to appeal, if His Majesty in Council, on the advice of the Judicial Committee, shall think fit so to order.

RECORD AND APPEARANCE BY APPELLANT.

R. 11.

Record to be transmitted without delay.

11. As soon as the Appeal has been admitted, whether by an Order of the Court appealed from or by an order of His Majesty in Council granting special leave to appeal, the Applicant shall without delay take all necessary steps to have the Record transmitted to the Registrar of the Privy Council, and the Registrar shall, with all convenient speed, certify to the Registrar of the Privy Council, that the Respondent has received notice or is otherwise aware, of the Order of the Court appealed from admitting the Appeal, or of the Order of His Majesty in Council giving the Appellant special leave to appeal, and has also received notice, or is otherwise aware of the despatch of the Record to England. Where an Appellant who has obtained special leave to appeal by an Order of His Majesty in Council fails to have the Record transmitted to the Registrar of

P. C. R. 11. the Privy Council with due diligence, the Registrar of the Privy Council shall call upon the Appellant to explain his default, and if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar insufficient, the said Registrar may issue a Summons to the Appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said Summons why the special leave to appeal granted should not be rescinded. The Respondent shall be entitled to be heard before the Judicial Committee in the matter of the said Summons and to ask for his costs and such other relief as he may be advised. The Judicial Committee may, after considering the matter of the said Summons, recommend to His Majesty to rescind the grant of special leave to appeal or give such other directions therein as the justice of the case may require.

R. 12. Printing of record.

12. The Record shall be printed in accordance with the Rules contained in Schedule A hereto. It may be printed either abroad or in England. When printed abroad the parties in England shall, upon perusal, consider whether the order of the documents is in accordance with these Rules and if it is not, they shall agree upon the proper order. The Appellant shall then rearrange copies of the Record for the use of the Judicial Committee and the other parties. In the event of the parties being unable to agree the matter shall be referred to the Registrar of the Privy Council who, if he thinks fit, may require the parties to attend before the Judicial Committee for directions.

R. 13. Number of copies to be transmitted, where record printed abroad.

13. Where the Record is printed abroad, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council 40 copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof and by affixing thereto the seal, if any, of the Court appealed from.

R. 14. One certified copy to be transmitted where record to be printed in England.

14. Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

R. 15. Record printed partly abroad, partly in England.

15. Where part of the Record is printed abroad, and part is to be printed in England, Rr. 13 and 14 shall, as far as practicable, apply to such parts as are printed abroad and such as are to be printed in England, respectively.

R. 16. Reasons for judgments to be included.

16 The reasons given by the Judge, or any of the Judges for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises, shall by such Judge or Judges be communicated in writing to the Registrar and shall be included in the Record.

R. 17. Exclusion of unnecessary documents from Record.

17. The Registrar, as well as the parties and their Agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and, generally to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be printed or copied shall be enumerated in a typewritten list to be transmitted with the Record.

R. 18. Documents objected to be indicated.

18. Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the record as finally printed (whether abroad or in England), shall, with a view to the subsequent adjust-

ment of the costs of and incidental to such document, indicate in the index of papers, or otherwise, the fact that, and the party, by whom the inclusion of the document was objected to. P. C. R. 18.

Registration and numbering of Records.

19. As soon as the Record is received in the Registry of the Privy Council, it shall be registered in the said Registry, with the date of arrival, the names of the parties, and the description whether "printed" or "written". A Record, or any part of a Record, not printed in accordance with the Rules contained in Schedule A hereto shall be treated as written. Appeals shall be numbered consecutively in each year in the order in which the Records are received in the said Registry. R. 19.

Inspection of Records by parties.

20. The parties shall be entitled to inspect the Record and to extract all necessary particulars therefrom for the purpose of entering an Appearance. R. 20.

Appearance by Appellant.

21. The Appellant shall enter an Appearance before taking any step in the prosecution of the Appeal and after entering such Appearance, shall forthwith give notice thereof to the Respondent if the latter has entered an Appearance. R. 21.

Times within which a copy of a written Record shall be bespoken.

22. Where the Record arrives in England either wholly written, or partly written and partly printed, the Appellant shall, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto, and within a period of two months from the same date in the case of Appeals from any other Court, enter an Appearance and bespeak a typewritten copy of the Record, or of such parts thereof as it may be necessary to have copied, and shall engage to pay the cost of preparing such copy at the following rates per folio typed (exclusive of tabular matter) 2*d.* per folio of English matter, 2½*d.* per folio of Indian matter, and 3½*d.* per folio of foreign matter; and shall also engage to pay at such price as shall be fixed by the Registrar of the Privy Council the cost of printing at least 50 copies thereof. R. 22.

Preparation of copy of Record for printer.

23. As soon as the Appellant has obtained the typewritten copy of the Record bespoken by him, he shall proceed with due diligence, to arrange the documents in suitable order, to check the index, to insert marginal notes and check the same with the index, and, generally, to do whatever may be required for the purpose of preparing the copy for the printer, in accordance with the Rules contained in Schedule A hereto, and shall, if the Respondent has entered an Appearance, submit the copy as prepared for the printer, to the Respondent for his approval. In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the Privy Council who, if he thinks fit, may require the parties to attend before the Judicial Committee for directions. R. 23.

Lodging copy of Record for printing.

24. As soon as the typewritten copy of the Record is ready for the printer, the Appellant shall lodge it in the Registry of the Privy Council for printing by a printer selected by the Registrar of the Privy Council, and at the same time shall lodge the amount of the estimated cost of printing the Record. R. 24.

Special case.

25. Whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the parties with the sanction of the Registrar of the Privy Council, may submit such question of law to the Judicial Committee in the form of a Special Case and print such parts only of the Record as may be necessary for the discussion of the same Provided that nothing herein contained shall in any way prevent the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit, and that, in order to promote such arrangements and simplification of the matter in dispute, the said Registrar may call the parties before him, and having heard them, and examined the Record, may report to the Judicial Committee as to the nature of the proceedings. R. 25.

P. C.
R. 26.

Examination of proof of Record and striking off copies.

26. The Registrar of the Privy Council shall, as soon as the proof prints of the Record are ready, give notice to all parties who have entered an Appearance requesting them to attend at the Registry of the Privy Council at a time to be named in such notice in order to examine the said proof prints and compare the same with the certified Record and shall, for that purpose furnish each of the said parties with one proof print. After the examination has been completed the Appellant shall, without delay, lodge his proof print, duly corrected and (so far as necessary) approved by the Respondent, and the Registrar of the Privy Council shall thereupon cause the copies of the Record to be struck off from such proof print.

R. 27.

Number of copies of Record for parties.

27. Each party who has entered an Appearance shall be entitled to receive, for his own use, six copies of the Record.

R. 28.

How costs of printing Record are to be borne.

28. Subject to any special direction from the Judicial Committee to the contrary, the costs of and incidental to the printing of the Record shall form part of the costs of the Appeal, but the costs of and incidental to the printing of any document objected to by one party, in accordance with R. 18, shall, if such document is found on the taxation of costs to be unnecessary or irrelevant, be disallowed to, or borne by, the party insisting on including the same in the record.

PETITION OF APPEAL.

R. 29.

Times within which petition shall be lodged.

29. The Appellant shall lodge his Petition of Appeal—

(*a*) where the Record arrives in England printed, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto, and within a period of two months from the same date in the case of Appeals from any other Courts;

(*b*) where the Record arrives in England written, within a period of one month from, but not before, the date of the completion of the printing thereof:

Provided that nothing in this Rule contained shall preclude the Appellant from lodging his Petition of Appeal prior to the arrival of the Record, or the completion of the printing thereof, if there are special reasons why, in the opinion of the Registrar of the Privy Council, it should be desirable for him to do so.

R. 30.

Form of petition.

30. The Petition of Appeal shall be lodged in the form prescribed by R. 47 hereinafter contained. It shall recite succinctly and, as far as possible, in chronological order, the principal steps in the proceedings leading up to the Appeal from the commencement thereof down to the admission of the Appeal, but shall not contain argumentative matter or travel into the merits of the case.

R. 31.

Service of petition.

31. The Appellant shall, after lodging his Petition of Appeal serve a copy thereof without delay on the respondent, as soon as the latter has entered an Appearance, and shall endorse such copy with the date of the lodgment.

WITHDRAWAL OF APPEAL.

R. 32.

Withdrawal of Appeal before Petition of Appeal has been lodged.

32. Where an Appellant, who has not lodged his Petition of Appeal, desires to withdraw his Appeal he shall give notice in writing to that effect to the Registrar of the Privy Council, and the said Registrar shall, with all convenient speed after the receipt of such notice by letter notify the Registrar of the Court appealed from that the Appeal has been withdrawn, and the said Appeal shall thereupon stand dismissed as from the date of the said letter without further Order.

P. C.

R. 33.

Withdrawal of Appeal after Petition of Appeal has been lodged.

33. Where an Appellant, who has lodged his Petition of Appeal, desires to withdraw his Appeal, he shall present a Petition to that effect to His Majesty in Council. On the hearing of any such Petition a Respondent who has entered an Appearance in the Appeal shall, subject to any agreement between him and the Appellant to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Respondent has not entered an Appearance, or having entered an Appearance, consents in writing to the prayer of the Petition, the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a consent Petition under the provisions of R. 56 hereinafter contained.

NON-PROSECUTION OF APPEAL.

R. 34.

Dismissal of Appeal where Appellant takes no step in prosecution thereof.

34. Where an appellant takes no step in prosecution of his appeal within a period of four months from the date of the arrival of the Record in England in the case of an Appeal from a Court situate in any of the countries or places named in Schedule B hereto, or within a period of two months from the same date in the case of an Appeal from any other Court the Registrar of the Privy Council shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been prosecuted, and the Appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to any respondent who has entered an Appearance in the Appeal.

Dismissal of Appeal for non-prosecution after Appellant's Appearance and before lodgment of Petition of Appeal.

35. Where an Appellant who has entered an Appearance:— R. 35.

(*a*) fails to bespeak a copy of a written Record, or of part of a written Record, in accordance with, and within the periods prescribed by, R. 22; or

(*b*) having bespoken such copy within the periods prescribed by R. 22, fails thereafter to proceed with due diligence to take all such further steps as may be necessary for the purpose of completing the printing of the said record; or

(*c*) fails to lodge his Petition of Appeal within the periods respectively prescribed by R. 29; the Registrar of the Privy Council shall call upon the Appellant to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been effectually prosecuted, and the Appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to all the parties who have entered an Appearance in the Appeal.

R. 36.

Dismissal of Appeal for non-prosecution after lodgment of Petition of Appeal.

36. Where an Appellant, who has lodged his Petition of Appeal, fails thereafter to prosecute his appeal with due diligence, the Registrar of the Privy Council shall call upon him to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall issue a Summons to the Appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said Summons why the appeal should not be dismissed for non-prosecution Provided that no such Summons shall be issued by the said Registrar before the expiration of one year from the date of the arrival of the Record in England. If the Respondent has entered an Appearance in the Appeal, the Registrar of the Privy Council shall send him a copy of the said Summons, and the Respondent shall be entitled to be heard before the Judi-

P. C. R. 36. cial Committee in the matter of the said Summons at the time named and to ask for his costs and such other relief as he may be advised. The Judicial Committee may, after considering the matter of the said Summons, recommend to His Majesty the dismissal of the Appeal for non-prosecution, or give such other directions therein as the justice of the case may require.

R. 37. Restoring an Appeal dismissed for non-prosecution.

37. An Appellant whose Appeal has been dismissed for non-prosecution may present a Petition to His Majesty in Council praying that his Appeal may be restored.

APPEARANCE BY RESPONDENT.

R. 38. Time within which Respondent may appear.

38. The Respondent may enter an Appearance at any time between the arrival of the Record and the hearing of the Appeal, but if he unduly delays entering an Appearance he shall bear, or be disallowed, the costs occasioned by such delay, unless the Judicial Committee otherwise direct.

R. 39. Notice of Appearance by Respondent.

39. The Respondent shall forthwith after entering an Appearance give notice thereof to the Appellant, if the latter has entered an Appearance.

R. 40. Form of Appearance where all the Respondents do not appear.

40. Where there are two or more respondents, and only one, or some of them enter an Appearance, the Appearance form shall set out the names of the appearing Respondents.

R. 41. Separate Appearances.

41. Two or more Respondents may, at their own risk as to costs, enter separate Appearances in the same Appeal.

R. 42. Non-appearing Respondent not entitled to receive notices or lodge case.

42. A Respondent who has not entered an Appearance shall not be entitled to receive any notices relating to the Appeal from the Registrar of the Privy Council, nor be allowed to lodge a case in the Appeal.

R. 43. Procedure on non-appearance of Respondent.

43. Where a Respondent fails to enter an Appearance in an Appeal, the following Rules shall, subject to any special Order of the Judicial Committee to the contrary, apply:—

(a) If the non-appearing Respondent was a Respondent at the time when the Appeal was admitted, whether by the Order of the Court appealed from or by an Order of His Majesty in Council giving the Appellant special leave to Appeal, and it appears from the terms of the said Order, or Order in Council, or otherwise from the Record, or from a certificate of the Registrar of the Court appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of the Order of the Court appealed from admitting the appeal, or of the order of His Majesty in Council giving the Appellant special leave to appeal, and has also received notice, or was otherwise aware, of the despatch of the Record to England, the Appeal may, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date of the lodging of the Petition of Appeal.

(b) If the non-appearing Respondent was made a Respondent by an order of His Majesty in Council subsequently to the admission of the Appeal, and it appears from the Record, or from a Supplementary Record, or from a Certificate of the Registrar of the Court appealed from, that the said non-appearing respondent has received notice, or was otherwise aware, of any intended application to bring him on the Record as a Respondent, the Appeal may, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date on which he shall have been served with a copy of His Majesty's Order in Council bringing him on the Record as a Respondent:

P. C. R. 43.

Provided that where it is shown to the satisfaction of the Registrar of the Privy Council, by Affidavit or otherwise, either that an Appellant has made every reasonable endeavour to serve a non-appearing Respondent with the notices mentioned in Cls. (*a*) and (*b*) respectively and has failed to effect such service, or that it is not the intention of the non-appearing Respondent to enter an Appearance to the Appeal, the Appeal may, without further Order in that behalf and at the risk of the Appellant, be proceeded with *ex parte* as against the said non-appearing Respondent.

R. 44.

Respondent defending appeal in *forma pauperis.*

44. A Respondent who desires to defend an Appeal in *forma pauperis* may present a Petition to that effect to His Majesty in Council, which Petition shall be accompanied by an Affidavit from the petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject-matter of the appeal.

PETITIONS GENERALLY.

R. 45.

Mode of addressing petitions.

45. All petitions for orders or directions as to matters of practice or procedure arising after the lodging of the Petition of Appeal and not involving any change in the parties to an Appeal shall be addressed to the Judicial Committee. All other Petitions shall be addressed to His Majesty in Council, but a Petition which is properly addressed to His Majesty in Council may include, as incidental to the relief thereby sought, a prayer for orders or directions as to matters of practice or procedure.

R. 46.

Orders on petitions which need not be drawn up.

46. Where an Order made by the Judicial Committee does not embody any special terms or include any special directions, it shall not be necessary to draw up such order, unless the Committee otherwise direct, but a Note thereof shall be made by the Registrar of the Privy Council.

R. 47.

Form of Petition and number of copies to be lodged.

47. All Petitions shall consist of paragraphs numbered consecutively and shall be written, typewritten, or lithographed on brief paper with quarter margin and endorsed with the name of the Court appealed from, the full title and Privy Council number of the Appeal to which the Petition relates or the full title of the Petition (as the case may be), and the name and address of the London Agent (if any) of the petitioner, but need not be signed, except as provided by R. 3. Unless the Petition is a Consent Petition within the meaning of R. 56 at least five copies thereof shall be lodged.

R. 48.

Caveat.

48. Where a Petition is expected to be lodged, or has been lodged, which does not relate to any pending Appeal of which the Record has been registered in the Registry of the Privy Council, any person claiming a right to appear before the Judicial Committee on the hearing of such Petition may lodge a Caveat in the matter thereof, and shall thereupon be entitled to receive from the Registrar of the Privy Council notice of the lodging of the Petition, if at the time of the lodging of the Caveat such Petition has not yet been lodged, and, if and when the Petition has been lodged, to require the Petitioner to serve him with a copy of the Petition and to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition. The Caveator shall forthwith after lodging his Caveat give notice thereof to the Petitioner, if the Petition has been lodged.

R. 49.

Service of Petition.

49. Where a Petition is lodged in the matter of any pending Appeal of which the Record has been registered in the Registry of the Privy Council, the petitioner shall serve any party who has entered an Appearance in the Appeal with a copy of such Petition, and the party so served shall thereupon be entitled to require the Petitioner to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition.

P. C.
R. 50.

Verifying Petition by Affidavit.

50. A Petition not relating to any appeal of which the Record has been registered in the Registry of the Privy Council, and any other Petition containing allegations of fact which cannot be verified by reference to the registered Record or any certificate or duly authenticated statement of the Court appealed from, shall be supported by Affidavit. Where the Petitioner prosecutes his Petition in person, the said Affidavit shall be sworn by the Petitioner himself and shall state that, to the best of the deponent's knowledge, information, and belief, the allegations contained in the Petition are true. Where the Petitioner is represented by an Agent, the said Affidavit shall be sworn by such Agent and shall, besides stating that, to the best of the deponent's knowledge, information, and belief, the allegations contained in the Petition are true, show how the deponent obtained his instructions, and the information enabling him to present the Petition.

R. 51.

Petition for Order of Revivor or substitution.

51. A Petition for an Order of Revivor or substitution shall be accompanied by a certificate or duly authenticated statement from the Court appealed from showing who, in the opinion of the said Court, is the proper person to be substituted, or entered, on the Record in place of, or in addition to, a party who has died or undergone a change of status.

R. 52

Petition disclosing no reasonable cause of appeal or containing scandalous matter to be refused.

52. The Registrar of the Privy Council may refuse to receive a Petition on the grounds that it discloses no reasonable cause of appeal, or is frivolous, or contains scandalous matter, but the Petitioner may appeal, by way of motion, from such refusal to the Judicial Committee.

R. 53.

Setting down petition.

53. As soon as a Petition and all necessary documents are lodged the Petition shall thereupon be deemed to be set down.

R. 54.

Times within which set-down petitions shall be heard.

54. On each day appointed by the Judicial Committee for the hearing of Petitions the Registrar of the Privy Council shall, unless the Committee otherwise direct, put in the paper for hearing all such Petitions as have been set down provided that, in the absence of special circumstances of urgency to be shown to the satisfaction of the said Registrar, no Petition, if opposed, shall be put in the paper for hearing before the expiration of ten clear days from the lodging thereof, unless the opponent consents to the Petition being put in the paper on an earlier day.

R. 55.

Notice to parties of day fixed for hearing Petition.

55. Subject to the provisions of the next following rule, the Registrar of the Privy Council shall, as soon as the Judicial Committee have appointed a day for the hearing of a Petition, notify all parties concerned by Summons of the day so appointed.

R. 56.

Procedure where Petition is consented to or is formal.

56. Where the prayer of a Petition is consented to in writing by the opposite party, or where a Petition is of a formal and non-contentious character, the Judicial Committee may, if they think fit, make their Report to His Majesty on such Petition, or make their Order thereon, as the case may be, without requiring the attendance of the parties in the council chamber, and the Registrar of the Privy Council shall not in any such case issue the summons provided for by the last preceding rule, but shall with all convenient speed after the committee have made their report or order notify the parties that the report or order has been made and of the date and nature of such report or order.

R. 57.

Withdrawal of Petition.

57. A petitioner who desires to withdraw his petition shall give notice in writing to that effect to the Registrar of the Privy Council. Where the Petition is opposed, the opponent shall, subject to any agreement between the parties to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Petition is unopposed, or where, in the case of an opposed Petition, the parties have come to an agreement as to the costs of the Petition, the Petition may, if the Judicial Com-

mittee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of the last preceding rule. P. C. R. 57.

Procedure where hearing of Petition unduly delayed.

58. Where a Petitioner unduly delays bringing a Petition to a hearing, the Registrar of the Privy Council shall call upon him to explain the delay, and if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar may, after notifying all parties interested by Summons of his intention to do so, put the Petition in the paper for hearing on the next following day appointed by the Judicial Committee for the hearing of Petitions for such directions as the Committee may think fit to give thereon. R. 58.

Only one counsel heard on a side in Petitions.

59. At the hearing of a Petition not more than one counsel shall be admitted to be heard on a side. R. 59.

CASE.

Lodging of case.

60. No party to an appeal shall be entitled to be heard by the Judicial Committee unless he has previously lodged his case in the appeal provided that where a respondent who has entered an appearance does not desire to lodge a case in the appeal, he may give the Registrar of the Privy Council notice in writing of his intention not to lodge any case, while reserving his right to address the Judicial Committee on the question of costs. R. 60.

Printing of case.

61. The case may be printed either abroad or in England, and shall in either event, be printed in accordance with the Rules I to III contained in Schedule A hereto, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the counsel who attends at the hearing of the appeal or by the party himself if he conducts his appeal in person. R 61.

Number of prints to be lodged.

62. Each party shall lodge 30 prints of his case. R. 62.

Form of case.

63. The case shall consist of paragraphs numbered consecutively and shall state, as concisely as possible, the circumstances out of which the appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the record as printed shall, as far as practicable, be printed in the margin, and care shall be taken to avoid, as far as possible, the reprinting in the case of long extracts from the record. The Taxing Officer, in taxing the costs of the appeal, shall, either of his own motion, or at the instance of the opposite party, inquire into any unnecessary prolixity in the case, and shall disallow the costs occasioned thereby. R. 63.

Separate cases by two or more respondents.

64. Two or more respondents may, at their own risk as to costs, lodge separate cases in the same appeal. R 64.

Notice of lodgment of case.

65. Each party shall after lodging his case, forthwith give notice thereof to the other party. R. 65.

Case notice.

66. Subject as hereinafter provided, the party who lodges his case first may, at any time after the expiration of three clear days from the day on which he has given the other party the notice prescribed by the last preceding Rule, serve such other party, if the latter, has not, in the meantime lodged his case, with a "case notice", requiring him to lodge his case within one month from the date of the service of the said case notice and informing him that, in default of his so doing, the appeal will be set down for hearing *ex parte* as against him, and if the other party fails to comply with the said case notice, the party who has lodged his case may, at any time after the expiration of the time limited by the said case notice for the lodging of the case, lodge an affidavit of service (which) shall set out the terms of the said case (notice), and the appeal shall thereupon, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the party in default provided that no case notice shall be served until after the completion of the printing, or R. 66.

P. C. R. 66. re-arrangement under R. 12, of the Record, and also that nothing in this Rule contained shall preclude the party in default from lodging his case, at his own risk as regards costs and otherwise, at any time up to the date of hearing.

R. 67. Setting down Appeal and exchanging cases.

67. Subject to the provisions of R. 43 and of the last preceding rule, an appeal shall be set down *ipso facto* as soon as the cases on both sides are lodged, and the parties shall thereupon exchange cases by handing one another, either at the offices of one of the Agents or in the Registry of the Privy Council, ten copies of their respective cases.

BINDING RECORDS, ETC.

R. 68. Mode of binding records, etc., for use of Judicial Committee.

68. As soon as an appeal is set down, the appellant shall attend at the Registry of the Privy Council and obtain ten copies of the record and cases to be bound for the use of the Judicial Committee at the hearing. The copies shall be bound in cloth or in half leather with paper sides, and six leaves of blank paper shall be inserted before the appellant's case. The front cover shall bear a printed label stating the title and Privy Council number of the appeal, the contents of the volume, and the names and addresses of the London Agents. The several documents, indicated by incuts, shall be arranged in the following order: (1) Appellant's case; (2) Respondent's case; (3) Record (if in more than one part, showing the separate parts by incuts, all parts being paged at the top of the page); (4) Supplemental record (if any); and the short title and Privy Council number of the appeal shall also be shown on the back.

R. 69. Time within which bound copies shall be lodged.

69. The Appellant shall lodge the bound copies not less than four clear days before the commencement of the Sittings during which the appeal is to be heard.

HEARING.

R. 70. Notice of day on or before which appeals must be set down for ensuing sittings.

70. The Registrar of the Privy Council shall name a day on or before which Appeals must be set down if they are to be entered in the list of business for the ensuing sittings. All appeals set down on or before the day named shall, subject to any directions from the committee or to any agreement between the parties to the contrary, be entered in such list of business and shall, subject to any directions from the committee to the contrary, be heard in the order in which they are set down.

R. 71. Notice to parties of day fixed for hearing appeal.

71. The Registrar of the Privy Council shall, subject to the provisions of R. 42, notify the parties to each appeal by Summons, at the earliest possible date, of the day appointed by the Judicial Committee for the hearing of the appeal, and the parties shall be in readiness to be heard on the day so appointed.

R. 72. Only two counsel heard on a side in appeals.

72. At the hearing of an appeal not more than two counsel shall be admitted to be heard on a side.

R. 73. Nautical assessors.

73. In Admiralty appeals the Judicial Committee may, if they think fit, require the attendance of Nautical assessors.

JUDGMENT.

R. 74. Notice to parties of day fixed for delivery of judgment.

74. Where the Judicial Committee, after hearing an appeal, decide to reserve their judgment thereon, the Registrar of the Privy Council shall in due course notify the parties by Summons of the day appointed by the Committee for the delivery of the judgment.

COSTS.

R. 75. Taxation of costs.

75. All Bills of costs under the orders of the Judicial Committee on appeals, Petitions, and other matters, shall be referred to the Registrar of the Privy Council, or such other person as the Judicial Committee may appoint, for taxation, and all such taxation shall be regulated by the Schedule of Fees set forth in Schedule C hereto.

P. C.

What costs taxed in England.

76. The Taxation of costs in England shall be limited to costs incurred in England. R. 76.

Order to tax.

77. The Registrar of the Privy Council shall, with all convenient speed after the Judicial Committee have given their decision as to the costs of an appeal, Petition, or other matter, issue to the party to whom costs have been awarded an order to tax and a notice specifying the day and hour appointed by him for taxation. The party receiving such order to tax and notice shall, not less than 48 hours before the time appointed for taxation, lodge his bill of costs (together with all necessary vouchers for disbursements), and serve the opposite party with a copy of his bill of costs and of the order to tax and notice. R. 77.

Power of Taxing Officer where taxation delayed through the fault of the party whose costs are to be taxed.

78. The Taxing Officer may, if he think fit, disallow to any party who fails to lodge his bill of costs (together with all necessary vouchers for disbursements) within the time prescribed by the last preceding rule, or who in any way delays or impedes a taxation, the charges to which such party would otherwise be entitled for drawing his bill of costs and attending the taxation. R. 78.

Appeal from decision of Taxing Officer.

79. Any party aggrieved by a taxation may appeal from the decision of the Taxing Officer to the Judicial Committee. The appeal shall be heard by way of motion, and the party appealing shall give three clear days' notice of motion to the opposite party, and shall also leave a copy of such notice in the Registry of the Privy Council. R. 79.

Amount of taxed costs to be inserted in His Majesty's Order in Council.

80. The amount allowed by the Taxing Officer on the taxation shall, subject to any appeal from his taxation to the Judicial Committee and subject to any direction from the Committee to the contrary, be inserted in His Majesty's Order in Council determining the Appeal or Petition. R. 80.

Taxation on the pauper scale.

81. Where the Judicial Committee directs costs to be taxed on the pauper scale, the Taxing Officer shall not allow any fees of counsel, and shall only award to the agents out of pocket expenses and a reasonable allowance to cover office expenses, such allowance to be taken at about three-eighths of the usual professional charges in ordinary appeals. Such pauper scale shall apply to and include the application upon which leave to appeal in *forma pauperis* was granted. R. 81.

Security to be dealt with as His Majesty's order in council determining appeal directs.

82. Where the Appellant has lodged security for the Respondent's costs of an appeal in the Registry of the Privy Council, the Registrar of the Privy Council shall deal with such security in accordance with the directions contained in His Majesty's order in council determining the appeal. R. 82.

MISCELLANEOUS.

Power of Judicial Committee to excuse from compliance with rules.

83. The Judicial Committee may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these rules, and may give such directions in matters of practice and procedure as they shall consider just and expedient. Applications to be excused from compliance with the requirements of any of these rules shall be addressed in the first instance to the Registrar of the Privy Council, who shall take the instructions of the committee thereon and communicate the same to the parties. If, in the opinion of the said Registrar, it is desirable that the application should be dealt with by the Committee in open Court, he may direct the party applying to lodge in the Registry of the Privy Council, and to serve the opposite party with, a notice of motion returnable before the committee. R. 83.

Amendment of documents.

84. Any document lodged in connection with an appeal, petition, or other matter pending before His Majesty in Council or the Judicial Committee, may be amended by leave of the Registrar of the Privy Council, but if the said Registrar is of opinion that an Application for leave to amend should be dealt with by the R. 84.

P. C. R. 84. committee in open Court, he may direct the party applying to lodge in the Registry of the Privy Council, and to serve the opposite party with, a notice of motion returnable before the committee.

R. 85. Affidavits may be sworn before the Registrar of the Privy Council.

85. Affidavits relating to any Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee may be sworn before the Registrar of the Privy Council.

R. 86. Change of Agent.

86. Where a party to an Appeal, Petition, or other matter pending before His Majesty in Council changes his Agent, such party, or the new agent, shall forthwith give the Registrar of the Privy Council and the outgoing agent notice in writing of the change, and shall amend the appearance accordingly. Until such notices are given the former agent shall be considered the agent of the party until the final conclusion of the appeal, petition, or other matter.

R. 87. Scope of application of rules.

87. Subject to the provisions of any Statute or of any statutory Rule or Order to the contrary, these Rules shall apply to all matters falling within the Appellate Jurisdiction of His Majesty in Council.

R. 88. Mode of citation and date of operation.

88. These Rules may be cited as the Judicial Committee Rules, 1925, and they shall come into operation on the 1st day of January, 1926.

SCHEDULE A.

Rules as to printing.

Sch. A. *I. All Records and other proceedings in Appeals or other matters pending before His Majesty in Council or the Judicial Committee which are required by the above Rules to be printed shall be printed in the form known as *demy quarto*.

II. The size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches in height and 8½ inches in width.

III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

IV. Records shall be arranged in two parts in the same volume, where practicable, *viz.*:—

Part I: The pleadings and proceedings, the transcript of the evidence of the witnesses, the judgments, decrees, etc., of the Courts below, down to the Order admitting the Appeal.

Part II: The exhibits and documents.

V. The Index to Part I shall be in chronological order, and shall be placed at the beginning of the volume.

The Index to Part II shall follow the order of the exhibit mark, and shall be placed immediately after the index to Part I.

VI. Part I shall be arranged strictly in chronological order, *i.e.*, in the same order as the index.

Part II shall be arranged in the most convenient way for the use of the Judicial Committee, as the circumstances of the case require. The documents shall be printed as far as suitable in chronological order, mixing plaintiff's and defendant's documents together when necessary. Each document shall show its exhibit mark, and whether it is a plaintiff's or defendant's document (unless this is clear from the exhibit mark) and in all cases documents relating to the same matter, such as

P. C. Sch. A.

(*a*) a series of correspondence, or

(*b*) proceedings in a suit other than the one under appeal, shall be kept together. The order in the record of the documents in Part II will probably be different from the order of the Index, and the proper page number of each document shall be inserted in the printed index.

The parties will be responsible for arranging the Record in proper order for the Judicial Committee, and in difficult cases Counsel may be asked to settle it.

VII. The documents in Part I shall be numbered consecutively.

The documents in Part II shall not be numbered, apart from the exhibit mark.

VIII. Each document shall have a heading which shall consist of the number or exhibit mark and the description of the document in the Index, without the date.

IX. Each document shall have a marginal note which shall be repeated on each page over which the document extends, *viz.*:—

PART I.

Sch A, Part I.

(*a*) Where the case has been before more than one Court, the short name of the Court shall first appear. Where the case has been before only one Court, the name of the Court need not appear.

(*b*) The marginal note of the document shall then appear consisting of the number and description of the document in the Index, with the date, except in the case of oral evidence.

(*c*) In the case of oral evidence, "plaintiff's evidence" or "defendant's evidence" shall appear beneath the name of the Court, and then the marginal note consisting of the number in the Index and the witness's name with "examination," "cross-examination" or "re-examination" as the case may be.

PART II.

Sch. A, Part II.

The word "Exhibits" shall first appear.

The marginal note of the exhibit shall then appear consisting of the exhibit mark and the description of the document in the Index, with the date.

X. The parties shall agree to the omission of formal and irrelevant documents, but the description of the document may appear (both in the index and in the record) if desired, with the words "not printed" against it.

A long series of documents, such as accounts, rent rolls, inventories, etc., shall not be printed in full, unless Counsel so advise, but the parties shall agree to short extracts being printed as specimens.

XI. In cases where maps sent from abroad are of an inconvenient size or unsuitable in character, the appellant shall, in agreement with the respondent, prepare in England, from the materials sent from abroad, maps drawn properly to scale and of reasonable size, showing, as far as possible the claims of the respective parties, in different colours.

SCHEDULE B.

Sch. B.

Countries and places referred to in Rules 22, 29 *and* 34.

Australia.
British Honduras.
British North Borneo.
Brunei.
Ceylon.
China.
Eastern African Dependencies.
Falkland Islands.
Federated Malay States.
Fiji.
Hong Kong.
India.
Mauritius.
New Zealand.
Persia.
Seychelles.
Somaliland Protectorate.
Straits Settlements.

P. C.
Sch. C,
Part I.

SCHEDULE C.

I

Fees allowed to agents conducting appeals or other matters before the Judicial Committee of the Privy Council.

(33 1|3 per cent. is added to these fees.)

	£.	s.	d.
Retainer fee ..	0	13	4
Drawing appearance or Caveat ..	0	5	0
Perusing printed record, for every printed sheet of 8 pages ..	1	1	0
Perusing written record, for every 25 folios ..	0	6	8
Drawing index per folio ..	0	2	0
Drawing marginal notes and headings per folio ..	0	0	6
Attending at the Registry to examine proof print of record with certified record per day ..	3	3	0
Attending at the Registry to examine proof print of record with certified record per half day ..	1	11	6
Correcting revised print of record per sheet of 8 pages:			
Foreign or Indian cases ..	1	1	0
Other cases ..	0	10	6
Instruction for petition or motion, or to oppose ..	0	10	0
Instructions for petition of appeal ..	0	10	0
Instructions for case ..	1	0	0
Drawing petition, motion, case or affidavit per folio ..	0	2	0
Copying petition, motion, case or affidavit per folio ..	0	0	6
Correcting proof of case per sheet of 8 pages Foreign or Indian cases ..	1	1	0
Other cases ..	0	10	6
Drawing and fair copy case notice ..	0	10	0
Perusing petition, motion, or affidavit per folio ..	0	2	0
Perusing petition of appeal ..	1	1	0
Perusing case, per printed sheet of 8 pages ..	1	1	0
Instructions for and preparing retainer to counsel ..	0	10	0
Instructions to counsel to argue an appeal ..	1	0	0
Instructions to counsel to argue a petition or motion ..	0	10	0
Instructions to printer ..	0	10	0
Attending consultation ..	1	0	0
Attending at the council chamber for the hearing of a petition or motion..	1	6	8
Attending at the council chamber all day on an appeal not called on ..	2	6	8
Attending the hearing of an appeal per day ..	3	6	8
Attending a judgment ..	1	8	8
Approving draft order ..	0	10	0
Attendances generally ..	0	10	0
Attendances on counsel where fee is 30 guineas or over ..	1	0	0
Drawing bill of costs per folio ..	0	1	0
Copying bill of costs per folio ..	0	0	6
Attending Taxation of costs of an appeal ..	2	2	0
Attending Taxation of costs of a petition or motion ..	1	1	0
Sessions Fee for each year or part of a year from the date of appearance (in appeals only) ..	3	3	0
Letters, etc. (in petitions) ..	1	1	0
Letters, etc. (in appeals) for 1st year ..	2	2	0
For each following year ..	1	1	0

II

Council Office fees.

Entering appearance ..	1	0	0
Amending appearance ..	0	10	0

P. C.
Sch. C,
Part II.

	£.	s.	d.
Examining proof print of record with the certified record at the Registry (chargeable to appellant only) per day	2	0	0
Examining proof print of record with the certified record at the Registry (chargeable to appellant only) per half day	1	0	0
Lodging petition of appeal	3	0	0
Lodging petition for special leave to appeal	2	0	0
Lodging any other petition or motion	1	0	0
Lodging case or notice under Rule 60	2	0	0
Setting down appeal (chargeable to appellant only)	5	0	0
Setting down petition for special leave to appeal (chargeable to petitioner only)	2	0	0
Setting down any other petition (chargeable to petitioner only)	1	0	0
Summons	1	0	0
Committee report on petition	2	0	0
Committee report on appeal	3	0	0
Original order of His Majesty in Council determining an appeal	5	0	0
Any other original order of His Majesty in Council	3	0	0
Plain copy of an order of His Majesty in Council	0	5	0
Original order of the Judicial Committee	2	0	0
Plain copy of committee order	0	5	0
Lodging affidavit	0	10	0
Certificate delivered to parties	0	10	0
Lodging Caveat	1	0	0
Subpoena to witnesses	0	10	0

Taxing fee 6*d.* for each pound allowed, or a fraction thereof up to £300 and one per cent. beyond that sum, calculated at the rate of 5*s.* for each £25 or, a portion thereof.

APPENDIX V

STATEMENT OF OBJECTS AND REASONS.

The Bill is sufficiently explained in the Report of the Special Committee printed below.

H. ERLE RICHARDS.

Simla, 3rd September, 1907.

Report of the Special Committee appointed to consider the amendment of the Civil Procedure Code.

We have the honour to present this report on the proposals to amend the Code of C. P. which have been submitted for our consideration by the Government of India and, annexed to it, a draft Bill amended by us. A detailed account of the alterations introduced in the Bill will be found in the Notes on clauses which form the second part of this Report, but we desire by way of preface to make some observations of a general character on the defects in the existing law which appear to us to call for reform and on the more important of those alterations.

1. The Code of C. P. of 1882 has been in force for 25 years and the experience of those years has shown that the general lines on which it proceeds are sound. The matters in which it has proved defective are for the most part matters of detail, and they arise, as it seems to us, mainly from the fact that it is impossible to frame a fixed and right Code in such a manner as to sufficiently meet the varying needs of an area so diversified as that to which the Code applies. In our opinion it is essential that there should be some machinery to enable variations to be introduced in procedure to meet the different requirements of different localities as well as to enable defects to be remedied as they are discovered without resort to the tardy process of legislation. We propose to make provision for these purposes by a re-arrangement of the Code. We recommend that matters of mere machinery should be relegated to rules capable of alteration by each High Court, subject to certain checks, and that those provisions only should be retained in the body of the Code in which some degree of permanence and uniformity is desirable. This re-arrangement is in accordance with precedent and possesses advantages so obvious that it is needless to enlarge upon them.

2. The objection—and as it appears to us the only objection of substance—that can be urged against this proposal is that until the scheme of distribution had become familiar to those who have to administer the Act the change may cause some confusion and the familiar numerical references to the present sections will no longer apply. We are sensible that some inconvenience must arise from this cause in the first instance, but this is but a small disadvantage in comparison with the advantages to be obtained by the change, and we cannot think that any one will seriously contend that such a slight and temporary drawback should stand in the way of a reform which appears to us in other respects to be wholly beneficial.

3. The adoption of this principle has necessarily involved a departure from the arrangement of the present Code, but in other respects we have advisedly adhered as closely as possible to the existing language, the meaning of which is now well understood by Courts and by practitioners. Speaking generally, it may be said that we have only departed from the phraseology of the Code where experience has suggested improvements or competent authority has called for some change. We have refrained from altering the wording merely because it might be capable of improvement; for in any change, even of a verbal character, there is a risk of opening a door to fresh litigation. In the amendments that we have introduced we have endeavoured to state general rules of procedure rather than to provide in detail for every possible contingency; for we hold it to be a sound view that

excessive elaboration of details of procedure tends to cramp the actions of the Court and in consequence to encourage technicalities. For this reason we have made no attempt to embody in the Code a digest of the very numerous decisions on the existing sections: we have made amendments to meet case-law only on points on which there is a conflict of authority. And in this connection we desire to point out that at the present time there is even less justification for the enactment of elaborate provisions in regard to procedure than at the time when the Code of 1882 was passed. Since then the standard of legal efficiency in the mofussil has been materially raised, and the principles of procedure are now so well understood that the Courts may be trusted to apply them intelligently in cases for which no provision may be made in terms.

But although we have made the present Code the basis of our draft we have carefully examined the Bill settled by the Select Committee in 1903, and we desire to express our acknowledgments to that Committee for the store of information it contains, and for the materials collected in their Report.

Apart from the re-arrangement to which reference has been made we have not introduced many changes of a radical character in the Code.

4. The general nature of some of the amendments we recommend may be conveniently illustrated by a brief examination of the extent to which the various stages of a suit will be affected by them.

A. To begin with it is hoped that the multiplicity of suits will be further curtailed by the new provisions we have inserted to remove limitations which we regard as needless on the comprehensiveness of a suit, and by the wider powers of amendment vested in the Courts under the Bill. An adequate check is provided by the power of a Court to interfere where embarrassment is likely to result.

B. Increased facilities have been given for the service of process to which further reference is made in the Notes on Clauses. It is hoped that in the gradual introduction of service by post may be found a solution of one of the principal defects in our legal system.

C. In our opinion it is most necessary that litigants in this country should come to trial with all issues clearly defined, and that cases should not be expanded or grounds shifted without reference to the true facts. For this purpose we think that the present system of pleadings in the mofussil, which is notoriously lax, should be improved, and we have incorporated in the rules an Order on pleadings, which it is hoped will lead to sounder and fairer methods of arriving at the real points in dispute. The forms have been revised and we hope that they will be brought into more general use in the mofussil.

We have not been able within the time at our disposal to make these forms, or the other forms in the Appendix to Schedule I, complete: but this is a matter of detail which can be further considered before the Bill is passed into law.

D. It is not possible to secure expedition in the disposal of suits, unless the questions of fact on which there is a real contest are narrowed down as far as possible. As a step towards this, we have incorporated in the rules an Order in which provision is made for the admission not only of documents, but also of facts. It must be left to litigants and their advisers to make adequate use of this order: but it is hoped that the Courts will encourage the use of it, since it certainly affords a means whereby the two principal evils of litigation, delay, and expense, can be materially diminished.

E. We attach much importance to a proper use being made by Courts in the mofussil of the procedure prescribed for the first hearing. The Code as it stands makes provision for the examination of parties by the Court, and we have altered the language so as to compel the production of documents at the first hearing. In our opinion this will act as a substantial check on the fabrication of documentary evidence.

F. The provisions relating to the hearing of suits do not call for material alteration, but we have thought it well to provide expressly for the cases where a party dies between conclusion of the hearing and delivery of judgment. It would obviously be wrong that such an accident should in any way interfere with the disposal of the case, and we have therefore inserted a provision to enable judgment to be pronounced notwithstanding the death.

G. A change of importance has been made in regard to decrees. In the first place, we have inserted an express provision recognizing the distinction between preliminary and final decrees. We hope in this way to afford facilities for checking the delay that now results from the objectionable practice of leaving for determination in execution questions which should be decided by the decree. This change should ensure the more expeditious disposal of a class of suits which at present are conspicuous for the delay to which they give rise. Another amendment of importance which we have introduced is in regard to mortgage-suits. These are very numerous and involve complicated questions of law. Hitherto some confusion has been occasioned by the co-existence of the provisions of the Transfer of Property Act and of the Code in regard to execution in mortgage-suits. We think that the provisions regulating this matter should be dealt with in their entirety in the Code, and we have therefore introduced rules in Order XXXIV to give effect to our view. We propose that the sections of the Transfer of Property Act affected by this change should be repealed. We desire to call the attention of those Provinces to which that Act does not apply to the effect of these changes.

In our opinion it is expedient to give greater assistance to the Courts in the framing of decrees. The importance of this branch of procedure cannot be overrated; it is surrounded by difficulties which are a fruitful source of error and consequently of litigation. We have amplified the provisions of the Code to meet this defect, and have introduced some forms which can be adopted to meet the requirements of individual cases. We think that further forms might be added with advantage before the Bill becomes law.

H. Amongst other matters we have removed limitations which at present exist on the power of appointing Receivers, and have conferred a power to appoint Receivers on Subordinate Courts.

5. **Execution.**—The subject of execution is, perhaps, one of the most difficult with which we have had to deal. The present system, in the mofussil at any rate, tends to excessive delay and affords facilities for defeating the claims of creditors. At the same time the creditor often has only himself to blame, owing to his own laches in prosecuting his rights. In the Presidency Town the same objections cannot be fairly raised; the system works well; whilst, in the mofussil, the difficulties arise not so much from the machinery itself, as from the defective manner in which it is worked. One of the most fruitful sources of litigation is the setting aside of execution sales, on the ground of irregularity in the publication of the sale proclamation. It is notorious that in many of these cases the Court's officer either through negligence or dishonesty has not duly published the proclamation, but it is impossible to deal with such cases by any provision in a Code. After a most careful consideration of the subject, we have not seen our way to any very drastic changes in the present system. We have found ourselves unable to accept the somewhat far-reaching proposal of the Committee of 1902 in relation to the execution of decrees by precept: but we are so far in accord with the view expressed by that Committee as to have been able to insert in the Bill a clause which enables the Court which passed the decree to issue a precept to any other Court to attach property of the judgment-debtor, pending execution in the ordinary course. Beyond this we have felt we could not safely go.

We anticipate that there will be a substantial saving of time, and consequent expense, from the provision requiring that mesne profits shall be ascertained by the Court under the decree itself, and not as now in execution proceedings.

Clause 53 has been introduced to settle a long mooted point upon which there is much diversity of judicial opinion, as to whether or not questions as to the liability of ancestral property in the hands of a son or other descendant to whom it has come otherwise than by descent for the payment of the debt for which the decree was passed, can be determined under Cl. 47 of the present Bill, corresponding with S. 244 of the existing Code. We think they should be.

Other amendments deserving notice relate to (1) the power to break open the outer door of the judgment-debtor's dwelling-house; (2) the date from which the purchaser's title accrues; (3) oral application for immediate execution; (4) the discretion of the Court in the execution of decrees for the restitution of conjugal rights; (5) the execution against partnership property; (6) extended facilities for attaching salaries; and

(7) powers to decree-holders to carry decrees into effect at the expense of the judgment-debtor.

We regard the changes made in relation to execution as calculated to materially assist the judgment-creditor in recovering the fruits of his judgment.

6. **Arbitration.**—Two questions of importance have arisen in connection with this subject: (1) should any of the sections of the Arbitration Act of 1899 be incorporated into the Code; (2) should the right of appeal as now existing, be altered, and if so in what direction? We are of opinion that the best course would undoubtedly be to eliminate from the Code all the clauses as to arbitration, and insert them in a new and comprehensive Arbitration Act. There are, perhaps, difficulties as to this at present. We have determined therefore to leave the Arbitration clauses much as they are in the present Code: but we have placed them in a Schedule in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act.

In regard to appeals, some change has been made. Upon this question, adopting the view of the Judicial Committee as expressed in *Ghulam's* case (I.L.R. 29 Cal. 167) we are strongly in favour of finality in cases of arbitration. If rights of appeal be given, the disappointed party will take advantage of every such right. To meet the difficulty expressed in the case reported in I.L.R. 25 Cal. 141 (which followed many other cases in the Calcutta High Court), we have inserted the words "or being otherwise invalid" in sub-S. (*c*) of S. 521 of the present Code. If, therefore, either party considers the award is invalid on any ground he can apply to have it set aside. We have thought it right to give one appeal from the opinion expressed by the Court on a special case under S. 517, and to allow one appeal as from order under Ss. 521, 523 and 526. And having regard to the rather wide language of the Judicial Committee in *Ghulam's* case, we have further thought it advisable to make it clear that an order granting an application either under S. 523 or 526 is not to be deemed a decree within the meaning of the Code; otherwise there would be a wider right of appeal from orders under these sections than from a decree under S. 522. The other alterations deal with the text, rather than with any question of policy or principle.

7. **Suits relating to public matters.**—We have inserted a clause to enable actions for public nuisances to be brought, with the consent of the Advocate-General, irrespective of special damage. It has been represented to us that such a power is needed and we concur in that view.

8. **Public charities.**—The suggestion has been made on high authority that some express reference should be made in the Code to the power of the Court to apply Cy-pres doctrine in the settling of schemes. But this power would appear to exist already within its proper limits (*Mayor of Lyons'* case, L.R. 3 I.A. 32) and we do not think it necessary to make express reference to it.

It has been represented to us by more than one gentleman whose opinion is entitled to weight, that the power to enquire into the affairs of public charities should be made more extensive. The clause, as it stands, gives sufficient powers to the Courts to direct accounts and to frame schemes when once a suit has been instituted, but it is said that members of the public interested in any public charity ought to have the means of calling for and inspecting accounts without undertaking the burden of a suit, at least in the first instance. We are told that revenues derived from charitable trusts are in some cases very large in amount: that no accounts of their expenditure are ordinarily rendered, and that there is good ground for believing that a considerable portion is misspent or squandered on useless objects.

The Hon'ble Dr. Rashbehary Ghose supports these views and has submitted a clause to give effect to them. It is in the following terms:—

"93-A (1) The Court may also, upon an application by any two or more persons having the like interest and having obtained the like consent, direct any trustee of such charity to cause to be prepared and filed in the Court, within such time as may be specified in the order, a detailed account of the receipts and disbursements in connection with the trust property for a period not exceeding three years next preceding the date of the application.

(2) Such accounts, when filed in Court, shall be open to inspection by the public.

(3) A trustee who fails to comply with any such direction shall be removed if a suit for that purpose be instituted, unless he can show good cause for such failure."

We have given to the subject our best consideration and desire to record our sympathy with the motives of the proposers. But we have not inserted the clause in the Bill because we think that the question is one of policy on which the public opinion of the communities interested should first be obtained. It affects primarily, as we understand, the Hindu and, to a less extent, the Muhammadan community. And we should not feel justified in recommending an amendment of the law on such a subject as this, unless the leaders of those communities were to express their support of the proposal in unequivocal terms. If it is eventually decided to adopt the amendment, then we think that the clause proposed by Dr. Ghose may be accepted.

9. **Suits by or against firms.**—Attention is directed to the new provision in regard to suits by or against firms (O. XXX), which will, we hope, prove acceptable to the commercial community.

10. **New procedure.**—We have given power to provide by Rules for Counterclaims, Third Party Procedure, Summary Procedure in suits for debt or liquidated demands, as, for instance, rent, or any other definite sum payable under a contract and Originating summons. We are of opinion that these forms of proceeding may usefully be adopted in some areas, but that this is a matter which should be left for each High Court to decide.

11. **Appeals.**—As regards appeals from original decrees we have departed but slightly from the existing Code. We have thought it advisable to give legislative sanction to the view that no appeal shall lie from a consent decree, or as to costs, except by leave of the Court: but the most important change is that incorporated in Clause 97, which renders it obligatory upon a party, who considers himself aggrieved by a preliminary decree, to appeal from that decree, at the risk of being precluded from disputing its correctness on an appeal from the final decree. We feel strongly that this is a most useful provision, as tending to that which is so desirable, *viz.*, finality in litigation.

As regards appeals from appellate decrees the only substantial departure from the existing Code is the insertion of Clause 103. Experience has shown the desirability of this clause, the effect of which will be to avoid remands, with their consequent delay and expense.

As regards appeals from orders a comparison of Clause 104 of the Bill with S. 588 of the existing Code would support a *prima facie* inference that the right of appeal from orders had been materially curtailed. But this inference is dispelled on looking at subclause (*h*) of Clause 104 which allows an appeal from any order made under rules from which an appeal is expressly allowed by rules. We have gone carefully into the question of the cases in which an appeal should be allowed from these orders and our conclusion is expressed in the rules themselves.

12. **Rules.**—The distribution of the provisions of the Code between the body of the Bill and the rules is a matter on which opinions may well differ. The general principle on which we have proceeded has been to keep in the body of the Bill those provisions which appear to us to be fundamental and those provisions which confer powers operating outside the Province in which the Court is situated. In some cases we have adopted the plan of inserting leading provisions in the Bill, stating in general terms the powers of the Court, and of leaving, the details to rules; in matters of less importance the provisions have been relegated altogether to rules. The result of this re-arrangement is to reduce the Act, as distinct from Schedules, to 155 clauses. The existing order of sequence has, speaking generally, been maintained, but the reduced bulk of the Bill has rendered it no longer necessary to reproduce the division into Chapters.

It is proposed to vest the power of making Rules in High Courts, subject to the control of Local Governments (or, in the case of the Calcutta High Court, of the Government of India), but we think it most desirable that in exercising this power the Courts should have the advice of representatives of the various branches of the legal profession, and we have accordingly provided that, in the case of Chartered High Courts and of

Chief Courts, Rules shall only be made after those Courts have taken the opinion of a Rule Committee on which there will be representatives of the Bar, of Vakeels or Pleaders and, in Presidency-towns, of Attorneys. In the case of other High Courts power has been given to establish such Rule Committees as the Governor-General in Council may determine. It is believed that Standing Committees of this kind will be of great value. We have thought it better to require the same sanction as is required by the Indian High Courts Act of 1861, in order that the rule-making power should correspond with the power conferred under that Act; but we are of opinion that, in the interest of uniformity, it is expedient that all amendments of Rules should be communicated to the Government of India and to other High Courts before sanction is given to them. This, we understand, can be effected by executive order.

If our proposal is adopted, it will probably be useful to publish annually in every Province some manual corresponding to the English "Annual Practice" containing:—

(1) the Act;

(2) all rules of procedure made under it or under other Acts in the Province;

(3) notes of decisions on the Act and Rules.

13. We are sensible that there may be defects and flaws in the Bill which we append to this Report. The subject is complicated and technical and the time at our disposal has been limited. We do not doubt therefore that much improvement may be made in the Bill before it is finally passed into law. But in our opinion it is framed on the right lines. We believe for the reasons we have stated that in any reform of Civil Procedure it is essential to introduce some elasticity; to give wider powers of control to the High Courts, and to invest them with a larger discretion in regard to the conduct of cases which come before them. Mr. Dikshit, Subordinate Judge from Bombay, has been present throughout our deliberations, and we take this opportunity of acknowledging the help we have derived from his experience of the working of the Code in the mofussil. We desire also to record our acknowledgments of the services of Mr. Law, of the Legislative Department, who has attended to the clerical and press work to our entire satisfaction.

(Signed) H. ERLE RICHARDS.
(„) FRANCIS MACLEAN.
(„) LAWRENCE JENKINS.
(„) S. ISMAY.
(„) RASHBEHARY GHOSE.

Simla, August 31st, 1907.

NOTES ON CLAUSES.

A.—CLAUSES OF BILL.

Preliminary.

Clause 2.—The definitions have been re-arranged in alphabetical order.

Decree.—The importance of the definition of the word "decree" rests on the fact that by reference to it the right of appeal is determined. The Committee have in the main adhered to the existing definition; but they have modified it in two respects, and this has involved a slight recasting of the language. The principal modification aims at permitting an appeal from an adjudication which purports to settle the rights of the parties, though it does not completely dispose of the suit. Such an adjudication the Committee describe as a preliminary decree.

The *explanation* is intended to make it clear that a decree may be partly final and partly preliminary. Thus a decree for the recovery of possession of immovable property and for mesne profits would be of this mixed character.

The word "within" has been substituted for "mentioned or referred to in" with a view to bringing within the definition of decree orders against sureties (*see* Cl. 142) and orders as to Court-fees in pauper suits (*see* O. XXXIII, R. 13) and thus providing for appeals therefrom.

The only other modification is for the purpose of excluding a right of appeal from an order of dismissal for default.

Legal representative.—We have inserted a definition of "legal representative"—an expression which has been variously interpreted by the High Courts as would appear from the reported cases which are not easily reconcilable with one another. *See* 8 C. W. N. 843, in which almost all the earlier cases are reviewed.

The Committee trust that the definition which has been added by them will set at rest what owing to the absence of any such definition from the present Code is a somewhat debatable point.

Mesne profits.—The Committee have altered the definition of "mesne profits" so as to exclude from the calculation any increased rents and profits due to improvements made by the person in wrongful possession for which he cannot at present claim compensation from the rightful owner either by way of mitigation of damages or otherwise.

Clause 4.—The clause as drafted will, it is believed, effect all the savings covered by S. 4 of the Code. The concluding paragraph of that section is believed to be obsolete and has accordingly not been reproduced. On this point the opinions of Local Governments are invited.

Clause 6.—In view of the extended scope of Cl. 4 the reproduction of Ss. 6 and 7 (except as to the final paragraph of S. 6) does not appear to be necessary.

The words "or proceedings in suits" have been introduced in this clause to negative the view that a Court to which a decree is sent for execution has jurisdiction to execute the decree though the amount exceeds the limits of the pecuniary jurisdiction of the Court, a point on which there is a conflict of opinion. (I. L. R. 17 Mad. 309; I. L. R. 16 Cal. 465, 457.)

Clause 7.—The provisions as to Provincial Small Cause Courts have been rearranged in what is hoped is a more convenient form.

PART I.—SUITS IN GENERAL.

The provisions contained in S. 10 of the Code were first enacted by Act XI of 1836 and were reproduced in the Code of 1859 and in subsequent Codes. In the opinion of the Committee their retention is no longer necessary and they have been omitted.

Clause 11.—*Res judicata.*—It is not possible to make a complete exposition of a subject so complex as that of *res judicata* within the limits of a section of an Act and the Committee think it better to re-enact S. 13 as it stands in the Code with such modifications only as experience has shown to be necessary.

The Committee recognize that a proceeding does not come within the language of that section; but they think it better not to deal with this point in express terms for the reason that the applicability of the doctrine of *res judicata* to certain proceedings is not open to doubt, and they foresee that any express reference to proceedings in a crystallised definition might only lead to difficulties (L. R. 11 I. A. 37 and I. L. R. 29 Cal. 707).

The word "another" has been substituted for "former" as being more in conformity with Indian decisions.

Explanation I is new and is intended to affirm the view that the competence of the jurisdiction of a Court does not depend on the right of appeal from its decision.

Explanation VI.—The inclusion of *public rights* is to give due effect to suits relating to public nuisance (Cl. 91).

Clause 12.—This clause is new and is necessitated by the transfer of certain of the provisions of the existing Code to Rules.

Clause 13.—The provisions as to foreign judgment have been re-arranged and as it is hoped stated more clearly.

Section 14.—The last paragraph has been omitted. It appears to the Committee that it is not possible to maintain this distinction in the case of all Asiatic Courts. The Courts of Japan for instance are entitled to be treated on the same footing as European Courts. They know of no satisfactory distinction which could be drawn so as to give effect to the intention of the existing provisions; and they recommend that the paragraph should be omitted and that Courts should rely on the powers given by Cl. 13.

Place of suing.—The provisions under this heading have been collected and re-arranged.

Clause 16 (*a*).—The insertion of the words "with or without rent or profits" is intended to remove any difficulty there may be where the defendant does not reside within the local limits of the Court within whose jurisdiction the property is situate.

Clause 18.—The Committee have added words to this clause in order still further to restrict the taking of technical objections as to jurisdiction.

Clause 20.—The Committee have omitted Explanation III of S. 17, which has become unnecessary owing to the addition made to sub-Cl. (*c*) of the words "wholly or in part" in reference to the cause of action.

Clause 24.—The words "at any stage" have been added to remove the difficulty created by the view that a suit cannot be transferred after the hearing has once commenced, as to which there is a conflict of decision.

Clauses 26-35.—The provisions in Chapter III to XVIII of the present Code have been in the main relegated to rules, but such general provisions as are believed to be essential have been preserved in Cls. 26 to 35.

Clause 32.—The Committee have omitted the last paragraph of S. 136 of the Code as they think unnecessary to impose penal consequences for a default of the class indicated.

PART II.—EXECUTION.

Clauses 36-74.—The bulk of the provisions as to execution will be found in the Rules, but the main provisions as to the Courts by which decrees may be executed, the questions to be determined by Courts executing decrees the limit of time for execution, transferees and legal representatives, procedure in execution, arrest and attachment, the relegation to Collectors of power to execute certain decrees, the distribution of assets and resistance to execution have been retained in the body of the Bill.

Clause 46—*Precept.*—Though a system of execution based on precepts is in the opinion of the Committee open to grave objection, they think the idea may be utilized for the purpose of enabling a decree-holder to obtain an interim attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. They have for this purpose introduced Cl. 46 into the Bill. They think it expedient to fix a time limit for the continuance of this interim attachment, but at the same time they have empowered the Court to extend the period to meet the exigencies of particular cases.

After careful consideration they have come to the conclusion that notwithstanding attachment under a precept, re-attachment on the ordinary application for execution will still be necessary. Though at first sight it may appear a better course to provide that re-attachment shall not be necessary when the issue of a precept is followed by the ordinary application for execution, after careful consideration they have come to the conclusion that it will be safer to require re-attachment, having regarded to the agency by which execution is carried into effect.

Clause 47.—The Committee have omitted sub-Cls. (*a*) and (*b*) of S. 244 of the existing Code because they are strongly of opinion that questions regarding the amount of any mesne profits or interest should be determined by the decree and not in execution. If this view is accepted it will be possible to exercise an effective control over the action taken by Subordinate Courts in dealing with such matters.

The Committee have redrafted sub-Cl. (3) and made it compulsory on the Court to determine questions arising as to representatives of parties. In their opinion it is inexpedient that separate suits should be instituted for the decision of such questions. The delay and expense involved are often very great and result in the needless protraction of litigation.

The *explanation* is intended to put an end to a conflict of judicial decision.

Section 257-*A*.—The Committee think that S. 257-*A* may be omitted with advantage. It was first enacted by Act XII of 1879 with a view to protect the interests of judgment-debtors against the exercise of undue pressure by decree-holders. The section has given rise to conflicting decisions, and as interpreted by the majority of the High Courts is found in practice to be of little service to judgment-debtors. Moreover, S. 16 of the Indian Contract Act as amended appears to the Committee to afford adequate protection where it is required.

Clause 51.—This clause states generally the powers of the Court in regard to execution leaving the details to be determined by rules. It will be observed that the power to direct immediate execution is no longer restricted to one class of suits but that it is now general in terms. Any limitation that may be found necessary will be imposed by rules.

Clause 53.—Has been added by the Committee in order to set at rest a question on which the High Courts are divided in opinion. It is true that where a son or grandson takes any ancestral property by survivorship he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes; but whether the creditor can follow the property in the hand of the son or grandson in execution is a debatable point under the Code. The question is merely one of procedure, and the Committee have come to the conclusion that any controversy between the parties with regard to the liability of the son or grandson to pay the debts of his ancestor should be determined in execution, it being open to them to raise any objection or defence in such proceedings which they might have raised in a separate suit instituted by the creditor, the clause in question not imposing upon them a greater liability than that imposed by the Hindu law.

Clause 55 (1), *second proviso*.—The object of this proviso is to prevent vexatious forms of resistance to execution which constantly obstruct decree-holders in the execution of their decrees.

Clause 55 (2).—The sub-clause is intended to cover the case of certain persons or classes of persons whose summary arrest might, as in the case of railway servants, be attended with danger or inconvenience to the public.

Clause 61.—The Committee have reproduced this Clause from the former Bill (Cl. 269-B) in accordance with what they understand to be the wishes of the Government. But the conditions should in their opinion be so modified as to relieve the Courts from fixing the portion to be released from attachment.

To impose this duty on the Courts would materially increase their work in a matter in regard to which they are not in a position to form the best opinion and would probably result in an undesirable lack of uniformity.

Clause 62.—The Committee have inserted a new provision to authorize the breaking open of the outer door of a judgment-debtor's house. They do not think that it would be safe to extend the operation of this provision to the house of a stranger.

Section 288.—This section of the present Code first appears in the Code of 1877. It was not suggested by any decided case and the only explanation offered by the Select Committee, by whom it was introduced, is as follows:—

"We think that the proclamation of execution sales should state the incumbrances (if any) to which the interest about to be sold is liable, and we have provided that no Judge, etc., shall be answerable for error in the proclamation, unless it has been committed dishonestly."

The Committee are of opinion that, having regard to the provisions of Act XVIII of 1850, the section may safely be omitted.

Clause 64.—An explanation has been added to make it clear that claims within the protection of this clause include claims for rateable distribution of assets.

Clause 69.—The provisions as to Collectors have been placed in a separate schedule. They deal with a special matter and are not of general application.

Clause 73.—The Committee have slightly altered the wording of this clause in order to bring it into line with the Transfer of Property Act, 1882, S. 96.

PART III.—INCIDENTAL PROCEEDINGS.

The general powers of Courts in regard to commissions have been summarised in Cl. 75 and the detailed provision will be found in the First Schedule.

PART IV.—SUITS IN PARTICULAR CASES.

The bulk of the corresponding part of the present Code will be found in the rules. The provisions as to suits by aliens, etc., have been retained in the Bill and a few only of the provisions relating to suits by or against the Government. There is a general clause defining the nature of interpleader suits.

Clause 81.—The Committee think that the same measure of protection should be afforded to the defendant where Government undertakes the defence as where the Government makes no application for the purpose, and it appears to the Committee that the proper protection should be that the defendant should be exempt from mesne arrest and his property from mesne attachment. They therefore propose to strike out the proviso from Cl. 269 and to alter sub-Cl. (*a*) of Cl. 270 so as to give effect to this.

Clause 86 (2).—The Committee have inserted words in this sub-clause to make it clear that the decision of the Government is final and not open to question by the Court. A doubt had been raised on the point.

PART V.—SPECIAL PROCEEDINGS.

Arbitration and suits relating to pubic matters have been discussed in the former part of this Report.

Clause 92 (*Public Charities*).—As a doubt has been expressed in at least one reported decision whether S. 539 is or is not mandatory, the Committee have thought it desirable, in order to settle this question, to introduce sub-Cl. (2).

PART VI.—SUPPLEMENTAL PROCEEDINGS.

Here again a leading provision has been retained in the Bill, and the details of procedure have been relegated to rules.

PART VII.—APPEALS.

Clause 97.—The Committee have inserted an express provision to compel litigants to appeal from preliminary decrees, and have estopped them, on their failure to do so, from raising objections to such decrees in appeals from final decrees. On this point they accept the unanimous opinion of the Calcutta High Court. They think it unreasonable that parties should allow proceedings to be carried on to their final stage and large costs to be incurred if they intend to rely upon objections which could be taken at an earlier stage.

Clause 99.—The Committee have extended this clause in order to give the Courts a larger discretion in dealing with irregularities in proceedings, and they have inserted express words to meet the point decided in I.L.R. 26 Bom 259 and I.L.R. 27 Mad 80 and in a recent decision of the Calcutta High Court.

Clause 100.—The Committee have struck out the word "specified" in the expression "specified law or usage," as being in their opinion redundant.

Clause 105.—Though the remarks of the Privy Council in *Moheshur Singh* v. *The Bengal Government* (7 Moo. I.A. 283) are wide enough to embrace an appeal from an order of remand, the Committee think those orders were probably not in their Lordships' contemplation when they condemned the view that a failure to appeal from an interlocutory order should deprive the person aggrieved of his right to object to such order when subsequently appealing from the decree. And the Committee think there are good reasons on the score of delay and expense for treating an appeal from an order of remand as a special case and precluding an appellant from taking, on an appeal from decree, any objection that might have been urged by way of appeal from an order of remand.

The Committee have deleted the word "such" to remove a difficulty it creates (10 Moo I.A. 340, 413; 12 Moo. I.A. 157.

PART VIII.—REFERENCE, REVIEW AND REVISION.

These provisions are not substantially altered. They are summarised in this Part and the details are in rules.

PART IX.—CHARTERED HIGH COURTS.

Is not materially altered.

PART X.—RULES.

See observations in the former Part of this Report.

PART XI.—MISCELLANEOUS.

The Committee have omitted S. 646 as they see no reason specially to differentiate the case of a Registrar, and it is believed that in practice no use is made of the section.

Clause 137.—The Committee have inserted the words "or other person" after the word "officer" in sub-Cl. (*b*) in order to give the High Court power to relieve the officers of the Courts of the work of administering affidavits in cases in which it may be necessary to do so It has been represented to them by the Calcutta High Court that this relief is much required.

Clause 140.—The terms of S. 583 of the Code do not justify the practice founded on it, and the Committee have therefore recast the section so as to bring it into closer conformity with that practice.

Clauses 145 and 148 to 150 are new. They are intended to enlarge the discretion of Courts.

B.—RULES.

The Committee think that the division of the rules into orders will be found convenient for the purposes of citation and reference.

Under Cl. 35 the Court has full power to apportion costs. The Committee understand that in practice the provision of S. 26 is not operative in the mufassil, and that part of the section which related to costs has not therefore been reproduced.

O. I, R. 3 (*S.* 28).—The Committee realize that the words "in respect of the same matter" in R. 3 have given rise to great difficulty, and they think it advisable to follow the wording of the English rule and to omit them.

O. I, Rr. 5 *and* 7.—The Committee thought that it was desirable to add O. XVI, Rr. 5 and 7, of the English rules.

O. III, R. 2 (*S.* 37).—The provisions of existing Codes which are represented by this clause are in somewhat different terms and are limited to persons holding general powers-of-attorney within certain local limits. The Committee think it unnecessary to preserve these limitations and have made the sub-clause general. It follows that the present Cl. 37 (*b*) becomes unnecessary. It is included in sub-Cl. (*a*).

The last paragraph of S. 37 has been omitted as no longer necessary.

O. III, R. 4 (*S.* 39).—The Committee are uncertain whether it is necessary to make a reference to the Court of the Judicial Commissioner of Sindh. The point is one for the Government of Bombay.

They also suggest in the alternative that the privilege now enjoyed by all advocates enrolled in Chartered High Courts shall be extended to those Advocates enrolled in non-Chartered High Courts who are members of the English or Irish bar or of the Faculty of Advocates in Scotland.

O. IV.—Institution of suits.—The greater part of the existing provision on this subject will be found in the order on pleadings.

O. VI.—The Committee have added a few rules relating to pleadings based upon the system of pleading introduced by the Judicature Acts in England which is generally admitted to be the best form of pleading in civil suits. In this country outside the Presidency town the pleadings are seldom artistically drawn. They are neither concise nor precise but contain vague and general statements from which it is difficult to ascertain definitely the real question in controversy between the parties. The sole object of pleadings is thus frequently defeated, the issue is enlarged, the trial is delayed and much unnecessary expense is incurred by the parties who are also liable to be taken by surprise. They have further provided that the forms in the Schedule shall when applicable be used for all pleadings, and when they are not applicable, forms of the like character shall be used. The rules prescribed by us will not prevent the pleader from exercising his discretion; for the amount of detail must necessarily vary with the nature of each suit. It is however made clear that there must be particularity sufficient to appraise the Court and the other party of the exact nature of the questions to be tried.

The Committee have also given a party who considers that his opponent's pleading does not give him the information to which he is entitled, the right to apply for further particulars so as to enable him to know what case he has to meet at the trial.

They have, however, endeavoured to modify the rigour of the rules by providing in accordance with S. 55 of the Indian Evidence Act that the Court may, notwithstanding the absence of any specific denial, require any fact to be proved by the party who relies upon it.

O. IX.—S. 104 originally formed part of S. 60 of Act, VIII of 1809, and in combination with the rest of that section it was appropriate. As a separate section, however, it is misleading, and it certainly is not now required in view of the provisions for service on a defendant residing out of British India and for proceeding with a suit *ex parte* when a defendant does not appear. Its retention would involve a diversity of procedure which the Committee think undesirable (See I.L.R. 23 All. 99).

O. IX, R. 13.—The Committee have inserted words to make it clear that a decree can only be set aside in favour of a defendant against whom the decree has been passed *ex parte.* There is some conflict of judicial authority upon this point, and the Committee think that the matter should be set at rest in this sense.

O. XI—Interrogatories.—The provisions in the Code as to discovery are based on the rules of English procedure in force at the time when it was passed. Since then the English procedure has been amended and is now contained in O. XXXI. This order has in effect been adopted in the rules regulating the procedure on the original side of the High Courts of Calcutta and Bombay and has it is believed, been found to work satisfactorily in practice.

On the other hand, in Mufassil Courts little use has yet been made of the machinery of discovery, and the Committee therefore think the rules of the Calcutta and Bombay High Courts on their original sides may be safely adopted without risk of disturbing a procedure with which the Mufassil Courts have become familiarized.

This will secure uniformity of practice and also the advantage of the commentary on the rules prescribed by the English decisions.

O. XIII.—Admissions.—The Committee think the practice of admissions may with advantage be extended to facts as well as to documents.

The procedure is not compulsory, but its adoption would result in cheapening and expediting litigation, and it is hoped that its use will be encouraged by the Courts.

O. XIV, R. 6 (*S.* 150).—There does not seem to be any real conflict as to whether an appeal lies, though at first sight it might appear otherwise. It has therefore been considered unnecessary to provide expressly for an appeal.

O. XX, R. 11 (*S.* 210).—The Committee have added words to sub-R. (1) of this rule in order to override the ruling of the Bombay High Court in the case of *Raghu Govind Paranjpe* v. *Dipchand* (I.L.R. 4 Bom. 96), as the practice inculcated by that ruling seems to prevail only in the Presidency of Bombay and not in the rest of India.

O. XX, R. 14 (*S.* 214).—These amendments are based on the rulings contained in the decisions of the High Court of Allahabad at I.L.R. 6 All. 370, 455, and I.L.R. 11 All. 164.

Having regard to the opinion expressed in I.L.R. 24 Mad at page 463, we have thought it right to make it clear that title vests without an instrument of transfer. To require a transfer now might throw a cloud over numberless titles which rest on the assumption sanctioned by long practice that no instrument of transfer was necessary.

O. XX, R. 18 (*S.* 216).—The Committee have introduced an amendment to give effect to the view that appeals from decrees relating to set-off should lie to the Courts to which appeals in respect of the original claim would lie.

O. *XXI, R.* 2.—The Committee have omitted certain words from the last paragraph of S. 258 of the Code in order to make it clear that the Court cannot recognize a payment or adjustment which has not been certified for any purpose whatsoever. It follows that an uncertified payment or adjustment cannot operate to prolong the period of limitation for applying for execution under the Limitation Act.

O. XXI, R. 3.—The Committee have inserted this rule to provide for cases, which they are told are not uncommon, of an estate being situated within the jurisdiction of two or more Courts. There are decisions on this point, but they are not harmonious, and the Committee think it well to determine the law definitely.

O. XXI, 11 (*S.* 256).—The Committee have omitted the limitation imposed under existing Code on oral applications for immediate execution. They see no reason why this limitation should be preserved.

O. XXI, R. 11 (*e*).—The Committee have not given effect to the suggestion that this should be limited to payments and adjustments which the creditor executing the decree is bound by law to recognize, as this would remove a valuable incentive to state truly what payments have been made (see I. L. R. 20 Bom. 288).

O. XXI, R. 20.—The Committee have omitted the words "or his or their representatives". This will be covered by the general clause.

O. XXI, R. 23 (4) *explanation and illustration* (*d*), (*S.* 246).—This addendum has been introduced in accordance with the views of the Calcutta and Allahabad High Courts as expressed in the cases of *Hury Doyal Guho* v. *Din Doyal Guho,* (I. L. R. 9 Cal. 479) and *Ram Sukh Dass* v. *Tota Ram* (I. L. R. 14 All. 339).

O. XXI, R. 26 (*S.* 248).—The Committee have omitted the reference to a decree passed on appeal, for that is ordinarily the decree to be executed [*Kristo Kinkur Roy* v. *Rajah Burrodacaunt Roy* (14 Moo. I. A. 465) and *Muhammad Salaiman Khan* v. *Muhammad Yar Khan,* (I. L. R. 11 All. 267)].

O. XXI, R. 32 (*S.* 260).—The Committee have omitted in this rule all reference to a decree for the recovery of a wife, for there can be no such decree under the law, as a wife cannot be treated as a chattel to be delivered over to the husband. Where any third person prevents the wife from returning to her husband, the latter may obtain an injunction against him which may be enforced in case of disobedience either by the imprisonment of the defendant, or by the attachment of his property, or by both.

O. XXI, R. 34.—Section 261 has been recast so as to bring it into conformity with the chronological order of events, and a provision has been added to meet the requirements of the Indian Registration Act.

O. XXI, Rr. 44 *and* 45.—These provisions were inserted in Bill No. II with the approval of the Government of India, and the Committee have therefore reproduced them in the present edition of the Bill.

O. XXI, R. 56.—The purpose of this rule is to put an end to doubts which from time to time have arisen as to the continuance of an attachment by reason of the practice of "striking off proceedings" or "removing proceedings from the file" for which there is no justification in the Code.

O. XXI, R. 57 (*S.* 278).—Though the execution of mortgage decree is expressly incorporated in the Code, the Committee still think that claims and objections arising out of the execution of such decrees should not be the subject of summary procedure under this and the following rules but should be determined in the ordinary course.

This does not imply that the procedure under the latter rules as to resistance to possession or dispossession does not apply.

O. XXI, R. 76.—In Rr. 76 and 83 express reference has been made to a re-sale so as to make it clear that the default mentioned in those rules will attract the consequence indicated in R. 70. In this connection reference may be made to I. L. R. 7 Cal. 337.

O. XXI, R. 85.—The Committee have altered this rule in order to prevent its being obligatory on the Court to forfeit the deposit in every case. The rule as it stands at present has caused hardship in certain circumstances, *vide* the case of *Sambasiva Ayyar* v. *Vydinada Sami* (I. L. R. 25 Mad. 535).

O. XXI, R. 88 (*S.* 310-*A*).—Words have been added so to make it clear that a purchaser acquiring a title before the sale in execution can claim the benefit of the rule. In other respects the Committee consider it advisable to adhere to the wording of the section.

The proposal that the sale should be set aside on payment of the purchase-money instead of the amount specified in the proclamation is, in their opinion, fraught with danger: it would be obviously useless unless subsequent protection were given to the property, and such protection might lead to collusion, which would be most prejudicial to the decree-holder.

O. XXI, R. 89.—The Committee have struck out the provisions as to irregularity *in attaching the property,* as such irregularity obviously cannot affect the price.

They have introduced the words "rateable distribution of assets" to clear up a doubt which has been the subject of discussion in several cases.

They have altered the language of the proviso in order to meet the doubts which have been raised as to the evidence upon which the Court can act [*Tasadduk Rasul Khan* v. *Ahamad Husain* (I. L. R. 21 Cal. 66)].

O. XXI, R. 91.—The Committee think it proper to retain the provisions of the Code, which make it necessary for the Court to confirm the sale in each case.

O XXI, R. 92 (*S.* 315).—The Committee have added words at the commencement of the clause in substitution of the last paragraph of the section which thus becomes unnecessary.

O. XXI, R. 95 (*S.* 316).—The Committee have preserved the limitation of three years from the date of the certificate as suggested by the Select Committee in Bill No. II. This clears up a doubt as to the time from which limitation begins to run, which has been discussed on more than one occasion.

O. XXII, R. 1.—The Select Committee struck out two of the four illustrations to S. 361 and the Committee think the remaining illustrations may also be deleted as they are too obvious to serve any useful purpose.

O. XXII, R. 3.—The Committee have introduced words in order to conform to the language of the Indian Limitation Act, 1877, as amended.

O. XXII, R. 5 (*S.* 366).—Though *or* is the word used in the Code of 1882 and the Code of 1877, in the Bill of 1877 the word *and* is used, and it appears to the Committee clear that *and* is required by the context. If *and* is not used, then the contrast with the preceding section is lost.

The *explanation* can be omitted having regard to the definition of "legal representative" inserted by the Committee.

O. XXIII, R. 3.—The Committee have considered it expedient to alter the language of S. 375 so as to recognize the power of a Court to enquire into and to record a disputed compromise.

O. XXV, R. 1 (3) (*S.* 380).—The Committee have deleted the last words of this sub-rule, because the nature of the suit excludes the possibility of the property in suit being immovable.

O. XXIX, R. 2.—The Committee have enlarged the language of the Code so as to allow of service by post on corporations having a registered office, and by these means the rule is brought into line with the provisions of the Indian Companies Act. Companies authorized to sue and be sued in the name of an officer or of a trustee must be very few, if, indeed, any exist, and they do not appear to the Committee to call for special treatment.

O. XXX, R. 1.—The Committee have adopted with the necessary alterations the English procedure in relation to suits against firms. This new procedure has been in force for some time in the Presidency-towns of Calcutta and Bombay and has worked satisfactorily.

It is hoped that its general application will be found useful by the mercantile community, for the rules remove technical obstacles which under the present procedure may seriously impede this class of litigation, as where a partner has died.

O. XXXII, R. 3 (4).—This is based on S. 443. The Committee think it necessary to ensure that notice should reach one interested in the minor's welfare, and this rule aims at securing this result. The form of application and of notice in conformity with this sub-rule will be inserted in the schedule of forms.

O. XXXII, R. 9.—The Committee think it expedient that where a guardian insists on his right to be appointed next friend in the place of another there should be power to require him to become liable or give security for costs in the suit previously incurred.

O. XXXII, R. 15.—The Committee have extended this rule so as to cover the case of a person incapacitated from protecting his interests by reason of his mental weakness or of his being a deaf mute.

O. XXXIII, R. 1 (*S.* 401).—The Committee have not preserved S. 402. In the light of the case-law it is misleading, so far as it suggests that a suit will lie for loss of caste or abusive language, and they can see no sufficient reason for withholding from a pauper a right to sue as such in respect of defamation or assault.

O. XXXIV, R. 1.—The proviso to S. 85 of the Transfer of Property Act, 1882, has given rise to certain doubts which the Committee have sought to remove by substituting for it the words now added with a view to making it clear that a person not a party is not bound by a decree [*Ram Nath Rai* v. *Lachman Ram* (L.R. 2 I.A. 193)].

The explanation has been inserted in order to remove doubts which have arisen from the conflict of authorities on the point.

O. XXXIV, R. 2 (*b*).—The Committee have inserted the words "if necessary" before "retransfer" as according to mufassil practice a retransfer is not ordinarily required and they think this practice should not be altered.

O. XXXIV, R. 3.—The Committee have omitted the provision as to the defendant paying money to the plaintiff. They think it better that in every case he should pay it into Court.

O. XXXIV, R. 9.—This rule is new. It is a recognition of existing practice and remedies an obvious omission in the Transfer of Property Act, 1882.

O. XXXIV, R. 11.—The Committee have inserted this rule in compliance with the suggestion of the Privy Council in *Gopi Narain Khanna* v. *Bansidhar* (L.R. 32 I.A. 123). This clause was in the Transfer of Property Bill, but was omitted by the Select Committee on that Bill on the ground that it ought to find a place in the Civil Procedure Code.

O. XXXV, R. 3.—The Committee think that the institution of the interpleader suit affords a sufficient reason for the stay of other litigation in reference to the same subject-matter and they have modified S. 476 so as to give effect to this view.

O. XXXVII, R. 1.—As Chapter XXXIX of the Code is transferred into rules, the Committee have not reproduced paragraph (*c*) of S. 538 as its appropriate place will be in rules under the Presidency Small Cause Courts Act, 1882.

O. XXXVII, R. 2.—The explanation to S. 532 was inserted to negative the effect of the decision in I.L.R. 1 Cal. 130, but its meaning, as it stands, is obscure. The Committee have therefore deleted the explanation, and added words in the body of the rule which will remove the doubts at which the explanation was aimed.

O. XXXVIII, R. 6 (*S.* 483).—The Committee have omitted the words "property within the jurisdiction of the Court," as they have caused a conflict of decision: and they think, as a matter of policy, there should not be the restriction these words suggest.

O. XXXVIII, R. 13.—This rule represents the views of the Government of India as expressed in the former Bill.

O. XXXIX, R. 6.—Words have been added to section 498 so as to empower the Court to order a sale of securities where that state of the market requires such a course.

O. XL.—Having regard to their standard of efficiency, the Committee see no reason to withhold from Subordinate Judges the power to appoint Receivers. They therefore propose that S. 505 of the Code should no longer be retained, for its effect in practice is often to defeat the purpose for which an application is made.

O. XLI.—S. 554 of the Code has been omitted as unnecessary.

O. XLI, R. 5 (*S.* 545).—The Committee have added words to S. 545 in order to make it clear that proceedings under a decree as well as execution can be stayed by an Appellate Court; the recognition of preliminary decrees makes it the more necessary to have an express power to this effect instead of resting on an inherent power [*Balkishen Sahu* v. *Khugnu*, (I.L.R. 31 Cal. 722)]. The Committee have introduced express words authorizing an *ex parte* stay, as the need for such an order constantly arises in practice.

O. XLI, R. 6 (*S.* 546).—The Committee have modified this rule in order to make it clear that security may be required though the property has previously been taken in execution [See *Hukam Chand Boid* v. *Kamalanand Singh*, (I.L.R. 33 Cal. 927)].

O. XLI, R. 7.—The Committee have added this clause to meet particularly the case where the litigant does not quarrel with the decree but appeals from an order passed in execution of that decree (I.L.R. 28 Cal. 734).

O. XLI, R. 23.—After due consideration the Committee have thought it safer not to give legislation sanction to the views enunciated in *Habib Bakhsh* v. *Baldeo Prasad*, (I.L.R. 23 All. 167). The power of reversal and remand is liable to be abused, while the procedure under S. 566 is free from this liability and at the same time furnishes an effectual remedy.

The words at the end of the rule have been added to clear up a doubt which is stated by the Select Committee to exist as to whether evidence recorded at the original trial can be used on the trial after remand.

O. XLI, R. 34.—The Committee consider it most important that an Appellate Court should have the fullest power to do complete justice between the parties.

The illustration indicates a type of case for which provision is intended to be made.

O. XLII, R. 1 (*l*).—The extension of time for the payment of mortgage-money is obviously of much greater moment to the mortgagor than to the mortgagee. Therefore the Committee have provided for an appeal from an order refusing, but not from an order granting an extension of time.

O. XLIII, R. 1 (*S.* 592).—Words have been added to avoid the conclusion at which the Madras High Court has recently arrived (I.L.R. 26 Mad. 369).

O. XLV, R. 1.—The words "or the construction of a document, which construction may affect the merits," have been omitted, as they appear to be sufficiently covered by the power to refer any question of law.

NOTES ON SCHEDULES

SCHEDULE IV.

The Committee have amended S. 22 of the Limitation Act to supply an omission which has been noticed by the High Courts namely; the absence of any provision with regard to a devolution of interest *pendente lite* where it takes place otherwise than by reason of death. The section as amended will include not only cases in which a devolution of interest takes place *pendente lite* owing to death, but also to other cases in which such devolution occurs.

The Code [S. 312] contemplates the confirmation of a sale of immovable property immediately on the expiration of the thirty days allowed by Art. 166 of the Limitation Schedule. But the period allowed for an application to set aside a sale on the ground that the judgment-debtor has no saleable interest therein is sixty days [Art. 172]. The result is that in some Provinces the confirmation of a sale is delayed for sixty days; whilst, in other Provinces, sales which have been already confirmed are liable to be set aside. The Committee think that in the matter of limitation an application under S. 313 should be brought into line with an application under S. 311 and they therefore propose to repeal Article 172 and to amend Article 166 so as to include applications under S. 313.

SPEECH

OF

The Hon'ble Mr. ERLE RICHARDS.

The Hon'ble Mr. ERLE RICHARDS:—"My Lord, I have the honour to present the Report of the Select Committee on the Bill to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature and annexed to it a copy of the Bill in which the amendments suggested by the Committee are shown in italicised type.

"It will be seen from these papers that the Committee recommend no alterations of a radical kind in the Bill as settled by the Committee which sat at Simla during the past summer. There are a number of amendments of detail suggested which taken together effect a substantial improvement; but the main lines of the Bill have been accepted.

"The principal feature of novelty in the Bill as introduced is the re-arrangement of the clauses and the relegation of minor provisions to a schedule which can be amended or added to by High Courts subject to the advice of Rule Committees. The proposal has met with general acceptance. Local Governments and High Courts are at one in thinking that it will effect a valuable improvement in the machinery of our civil procedure, and the Committee agree with them.

"Two amendments have been introduced in that part of the Bill which deals with the rule-making power. The first is the insertion of a proviso that rules before being made are to be published, with the result that under S. 23 of the General Clauses Act there will be an opportunity for the public to criticise any proposals before they become law. This suggestion was put forward by the British Indian Association and the Committee think that it is one of value. The second change is in the composition of the Rule Committees. It has been pointed out that the Rule Committees ought to have among their members some gentlemen in touch with mofussil practice. The Bill as introduced provided that one of the Judges on the Committee should have had mufassal Experience but the Committee think that this in itself is hardly sufficient. They suggest therefore that there should be a Subordinate Judge on each Rule Committee and that there should be power also to appoint a Vakil or pleader practising in the mufassal. They further recommend that the Bill should not come into operation at once on passing but that there should be an interval allowed in order that the public and profession may make themselves acquainted with the new arrangement.

The amendments of the other provisions of the Bill do not call for any special mention on the present occasion. Many of them are in the nature of corrections or improvements of drafting. Since the Bill was introduced in this Council it has been once more examined and revised by some of our Colleagues and the criticisms on it have been carefully considered and digested in the Legislative Department. In that way the work of the Committee has been much lessened. This is the fourth Committee which has now deliberated on civil procedure, and it is safe to say that there is no conceivable point which has not been fully discussed during those deliberations. I would point out, my Lord, that the present Committee, like the Simla Committee are unanimous in their approval of this Bill.''

REPORT OF THE SELECT COMMITTEE.

We, the undersigned Members of the Select Committee to which the Bill to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature was referred, have considered the Bill and the papers noted in the appendix, and have now the honour to submit this our Report, with the Bill as amended by us annexed thereto.

2. The chief feature of novelty in the Bill is the re-arrangement of the clauses and the relegation of minor provisions to a schedule which may be altered by High Courts. We find from the papers before us that this scheme has met with the approval of every Local Government and of all the High Courts in India. In our opinion it will give a much needed elasticity to our Judicial procedure and will enable minor defects to be remedied as they arise without resort to the Legislature, and we recommend it to the Council. We have introduced two changes into Part X of the Bill relating to the rule-making powers. In the first place we have provided that rules must be published before they are made; the result will be that S. 23 of the General Clauses Act will apply and that there will be an opportunity for the public to offer criticisms on any proposals for alterations of procedure, before those proposals are finally passed into law. We have also made a change in the composition of the Rule Committees. It has been suggested by more than one authority that the interests of the Mofussil were not sufficiently represented on those Committees as constituted under the Bill. We recognise the force of this criticism and have accordingly provided that there shall be a Subordinate Judge on each Rule Committee and that the Vakil or Pleader on the Committee shall be enrolled, but need not be practising in the High Court, so that a Vakil or Pleader practising in the Mofussil will be eligible. We further recommend that the Bill shall not come into operation until the 1st January 1909, in order that the public and the profession may have an opportunity of making themselves familiar with the re-arrangement.

3. We have carefully considered the criticisms on the Bill as introduced and the changes which we recommend are summarised below. It will be observed that we do not advise any departures of importance from the conclusions of the Special Committee which met at Simla during the past summer. That Committee had before it a mass of opinions from judicial and other authorities all over India dealing with every point of civil procedure, and they arrived at their conclusions only after a careful consideration of those opinions. We should not therefore in any case have dissented from them without strong reason, but in our judgment those conclusions are right and we accept them. Since the Bill was introduced it has been again examined and revised by some of our Colleagues and the criticisms on it have been digested in the Legislative Department. By these means our deliberations have been much expedited.

CLAUSES.

Clause 2 (2).—The definition of "decree" has been generally accepted.

Clause 11.—We have restored the word "former" and have inserted explanation I on the suggestion of Sir Bhashyam Iyengar to remove a conflict of authority as to the meaning of the expression "former suit."

Explanation V has been omitted. We think it is liable to misconstruction and that the law is well established apart from the explanation.

Clause 22.—We have omitted Cl. 22 of the Bill as introduced, as in our opinion it is unnecessary. We think that sufficient provision is made for transfers under the succeeding clause.

Clause 23.—We have omitted the proviso, which compelled applications to the High Courts under this clause to be made through the District Court. This in our opinion merely duplicates applications and is undesirable.

Clause 25.—Cl. 25 of the Bill as introduced has been rendered unnecessary by the omission of Cl. 22. We have accordingly taken it out and have put in its place a new clause taking power for the Governor-General in Council to transfer cases from one High Court to another under certain circumstances. We think that the exercise of such a power may sometimes be necessary and it has been brought to our notice that the absence of any provision on the point in the existing Code has given rise to difficulty. The new clause proceeds on the analogy of S. 527 of the Code of Criminal Procedure, 1898.

Clause 34.—The words "not being a decree for the enforcement of a mortgage or charge" have been omitted in this clause and elsewhere in order to make it clear that a decree for the payment of money does not include a decree for sale in enforcement of a mortgage or charge.

Clause 46.—We think that a decree-holder who has obtained an *interim* attachment should not be required to re-attach the property if before the determination of the attachment he applies for execution against the property, and we have altered this clause accordingly. There will now be only one attachment.

Clause 51.—We have added a power to execute a decree by appointing a receiver, on the suggestion of the Advocate-General of Madras.

Clause 54.—We have restored S. 265 of the existing Code. It has been pointed out that the provision in the Bill as introduced was opposed to the practice in some provinces under which all partitions of land paying revenue to Government are effected by the revenue-authorities.

Clause 55.—We have carefully considered the provision as to breaking open dwelling-houses and have come to the conclusion that it should be limited to dwelling-houses in the occupancy of the judgment-debtor.

Clause 57.—Sub-Cls. (2) to (6) have been relegated to Rules (O. XXI, R. 39).

Clause 59.—The remaining provisions as to the release of judgment-debtors have been brought up from the Rules and incorporated in this clause.

Clause 60 (1) (*g*).—We have omitted the words "military or civil", because they appear to be of no value. The word "pensioners" of itself covers every class of pensioner.

The exemption has been extended so as to cover pensions granted out of any service family pension fund notified in that behalf by the Governor-General in Council.

Clause 60 (1) (*l*).—This has been extended at the request of the Government of Burma.

Clause 61.—The words "be exempted from liability to attachment or sale in execution of a decree" have been substituted for the words "be released from attachment and shall be free from liability to sale in execution of a decree" in order to make it clear that the exemption extends to produce which has been hypothecated.

Clause 62—has been brought into line which Cl. 55 as now amended.

Clause 66 (1).—The wording has been altered on the suggestion of the Hon'ble Mr. Justice Aikman so as to put the meaning beyond doubt.

Clause 79 (2).—This saving was accepted by the Select Committee of 1903 and we think it desirable to have it in the Bill in order to avoid possible doubt.

Clause 92 (1).—It has been suggested to us by several authorities that Local Governments should be empowered to invest Courts subordinate to District Courts with power to try cases under this clause, and we think that this suggestion should be accepted.

The necessary words have been added.

Clause 96 (3) of the Bill as introduced has been omitted. The case-law on the subject is sufficiently clear and considerable objection has been taken to the sub-clause.

Clause 98.—The wording of the proviso has been altered; it now deals only with the decision on the point of law referred.

Clause 104.—Sub-Cl. (1) (*v*) has been added in order to give a right of appeal against the decision of the Court on a special case; this is in accordance with the recommendation of the Special Committee, but appears to have been omitted from the Bill by mistake.

Clause 107.—Sub-Cl. (1) is new. We think it desirable to have in the body of the Code a general provision about the powers of an Appellate Court.

Clause 134—is new. It supplies an omission.

Clauses 142 *and* 143—have been brought up from the Rules. We think they should be in the body of the Code.

Clause 144.—Sub-Cl. (2) has been added on the suggestion of the Calcutta High Court. We agree that restitution which may be obtained by application under this clause should not be made the subject of a separate suit.

SCHEDULE I.

Order I.

Rules 1 *and* 3.—The words "act or" have been added before the word "transaction".

Rule 3.—This rule has been amplified so as to bring it into line with R. 1.

Rule 5.—The words "cause of action" have been struck out.

They have given rise to considerable difficulty in England.

Rule 8.—We have, on the suggestion of the Advocate-General of Madras, added the words "or for the benefit of" after the words "on behalf of".

Order III.

Rule 4 (3).—We have adopted the alternative draft suggested by the Simla Committee in their report.

Order VI.

Rule 18.—We have substituted the words "he shall not be permitted to amend . . . . . as the case may be" for the words "such order to amend . . . . . become void".

Order VII.

Rule 17 (1).—On the suggestion of the British Indian Association the word "account" has been substituted for the word "book".

Order IX.

Rule 4.—We have struck out the provisions about limitation contained in this rule. These provisions will be incorporated in Bill to consolidate and amend the Limitation Act.

Rule 13.—We think it necessary to provide specially for cases in which it may not be possible to set aside the decree as against the applicant only.

Order XX.

Rule 18.—This rule has been altered so as to correspond with the amended Cl. 54.

Order XXI.

Rule 1 (2).—This sub-rule has been inserted on the suggestion of the British India Association.

Rule 7.—The words "or of the jurisdiction of the Court which passed it" have been omitted. In our opinion a Court executing the decree of another Court ought not to go into any question as to the jurisdiction of the Court which passed it.

Rule 20.—This rule is new. It is inserted in order to make it clear that the provisions as to cross-decrees and cross-claims apply to the case of mortgage-decrees. The rule also makes it clear that the expressions "decree for the payment of money" and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge.

Rule 45.—We have decided to recommend the omission of this rule from the Bill. It was taken from the Bill of 1903 but met with considerable criticism and strong objection has been taken to it by the Madras Board of Revenue and the British Indian Association. In our opinion the procedure prescribed in this rule is cumbrous and there would be little or no practical advantage from it.

Rule 90.—The words "or fraud" have been added after the word "irregularity". We think that the existing law as contained in S. 311 of the present Code is defective, the omission in the section to refer to fraud as a ground for setting aside a sale having led some Courts to hold that an order on an application setting up fraud as a ground for relief is, unlike an order made on an application under S. 311, a decree and open to second appeal. This result, which often involves a considerable prolongation of these proceedings, is in our opinion undesirable. We think that applications for the setting aside of sales should so far as the procedure applicable to them is concerned, stand on the same footing whether they are based on the ground of irregularity or on the ground of fraud.

Rules 95 *and* 96.—We have struck out the provisions about limitations contained in these rules. We agree with the Hon'ble Mr. Justice Miller that it would be more appropriate to incorporate them in the Limitation Act, and we have suggested their incorporation in the Bill to amend and consolidate that Act which is now before Council.

Order XXII.

Rules 3 *and* 4.—Rr. 3 and 4 have been amended so as to provide that if no application for substitution is made within the time allowed by law the suit shall abate. We have struck out the provision that the Court may make an order declaring the abatement as in our opinion it is unnecessary and likely to give rise to difficulty.

Rule 6.—The provision as to antedating the judgment has been struck out and in its stead we suggest a provision to the effect that the judgment shall have the same force and effect as if it had been pronounced before the death took place. In our opinion this is all that is required.

Order XXXIV.

Some of the rules in this Order have been redrafted.

The Transfer of Property Act does not contain any provision for the passing of a final decree in cases where payment is made in accordance with the terms of the preliminary decree. This is in our opinion an omission and we have provided in Rr. 3 (1), 5 (1) and 8 (1) for the passing of final decrees in such cases.

We approve of the proposal to repeal the provisions of S. 99 of the Transfer of Property Act. We think that those provisions have worked considerable hardship and are not really needed. The first part of the section enacts that a mortgagee shall not bring the mortgaged property to sale otherwise than by instituting a suit under S. 67 of the Act. In so far as it precludes the mortgagee from selling the mortgaged property under a judgment unconnected with the mortgage-debt it is in our opinion inexpedient; it is beyond doubt competent to a mortgagee to purchase the equity of redemption from the mortgagor by an agreement subsequent to and distinct from the mortgage-transaction, and we can see no reason why it should not be equally competent to him to have it sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage (*Khiarajmal* v. *Daim*, I. L. R. 32 Cal. 296; *Lisel* v. *Reeve*, 1902 A. C. 461). In so far as it precludes the mortgagee from selling the property under a judgment for the mortgage-debt it serves no useful purpose. We understand that the provision was enacted to prevent mortgagees from suing their mortgagors on the debt as such and in execution selling the mortgagor's interest in the property: we, however, think that no such provision was needed seeing that under the law as it stood prior to the Act the Courts never allowed the sale of a bare equity of redemption under a judgment on the covenant (*Syed Eman* v. *Rajcoomar*, 23 W. R. 187; *Khiara Jamal* v. *Daim*, I. L. R. 32 Cal. 296).

Order XL.

Rule 4.—We have redrafted this rule on the lines of S. 18 (4) of the Provincial Insolvency Act, 1907. We think that the power to imprison receivers is too wide and should be omitted.

Order XLI.

Rule 24.—We have struck out this rule as in our opinion it is unduly restrictive.

Order XLIII.

Rule 1.—We suggest that there should be appeals from orders pronouncing judgment against a party under Order VIII, Rule 10, Order X, Rule 4 and Order XVI, R. 20.

These orders are under the present law appealable as decrees, but having regard to the definition of a decree in the Code they would no longer be appealable in that way, and we think it necessary to make them appealable as orders. We have also given an appeal against an order made under Rule 21 of Order XI.

Appendices.—The forms have been amplified and, where necessary, redrafted. We think that, as now settled, they are an improvement on the forms in the present Code.

6. The publication ordered by the Council has been made as follows:—

In English.

Gazette.	*Date.*
Gazette of India	7th September, 1907.
Fort Saint George Gazette	1st October, 1907.
Bombay Government Gazette	3rd October, 1907.
Calcutta Gazette	18th September, 1907.
United Provinces of Agra and Oudh Government Gazette	21st September, 1907.
Punjab Government Gazette	27th September, 1907.
Burma Gazette	28th September, 1907.
Eastern Bengal and Assam Gazette	25th September, 1907.
Central Provinces Gazette	21st September, 1907.
Coorg District Gazette	2nd January, 1908.
Sind Official Gazette	26th September, 1907.

In the Vernaculars.

Province.	*Language.*	*Date.*
Madras	Tamil	28th January, 1908.
	Telugu	7th and 28th January, 1908.
	Kanarese Malayalam	7th January, 1908.
Bombay	Marathi Gujrati Kanarese	29th January, 1908.
Bengal	Bengali	21st January, 1908.
	Hindi	17th December, 1907.
	Uriya	27th December, 1907.
United Provinces	Urdu	18th January, 1908.
Punjab	Urdu	17th January, 1908.
Eastern Bengal and Assam	Bengali	8th February, 1908.
Coorg	Kanarese Marathi	1st February, 1908.

7. We think that the Bill has not been so altered as to require republication and we recommend that it be passed as now amended.

H. ERLE RICHARDS.
MADHO LAL.
H. A. SIM.
RASHBEHARY GHOSE.
S. ISMAY.
MG. BAH TOO.

The 12*th February,* 1908.

GENERAL INDEX.

N. B.—References are to Sections or Orders and Rules etc., and Note numb

Abandonment
- (of) issue O 14 R 1 N 7
- (of) part of claim by plaintiff O 23 R 1; O 2 R 2
- question of, if one of law—*See* APPEAL

Abatement
- SUIT APPEAL OR PROCEEDING—*See also* under APPEAL. O 22 Rr 2, 3, 4
  - appeal O 22 R 11
    - power of court to prevent abatement by adding party under O. 41, R. 20 O 22 R 4 N 20
  - application for guardianship, provisions of O. 22 if applicable to O 22 R 11 N 6
  - application for leave to sue in *forma pauperis*—impleadment of legal representative O 22 R 3 N 6
  - death after preliminary decree and before final decree—effect O 22 R 3 N 19
  - death of appellant—applicability of O 22 R 3 O 22 R 3 N 3
  - death of one of several plaintiffs or defendants O 22 R 2
  - death of parties O 22 R 1
  - death of plaintiff
    - extent of abatement O 22 R 3 N 18
    - legal representative—impleadment of O 22 R 3
  - death of *pro forma* party O 22 R 4 N 14
  - decree against dead person O 22 R 4 N 19
  - effect of
    - abatement on death of party O 22 R 4 Nn 22, 23
    - abatement or dismissal under O. 22 O 22 R 9
    - on the rights of parties O 22 R 3 N 23
  - execution proceedings, no abatement in, O 22 R 12
    - death of party—impleadment of legal representative O 22 R 3 N 4
    - provisions of O 22, if applies to O 22 R 12
  - extent of abatement O 22 Rr 3, 4
  - insolvency of plaintiff, suit not abated by O 22 R 8
  - legal representatives
    - decree against—effect O 22 R 4 N 16
    - determination of question as to O 22 R 5
    - effect of not bringing on record O 22 R 3 (2)
    - failure to implead legal representatives of deceased plaintiff within prescribed time—effect O 22 R 3

Abatement—SUIT ETC.—legal representative
- impleadment O 22
  - after decree O 22
  - by court on its own motion—whether permissible O 22
  - determination of question as to who is legal representative O 22
  - duty of court O 22
  - joint Hindu family O 22 R 3 N 13; O 22
  - legal representative already on record as party O 22
  - legal representative already on record in another capacity O 22
  - two or more legal representatives O 22
  - under inherent powers, after abatement O 22
  - what amounts to O 22
  - what pleas may be taken by legal representative O 22
  - who can apply for O 22
  - without setting aside abatement O 22 R
  - wrong person as legal representative O 22 R 4 N. 1
    R
- meaning of O 22 R
- minor as O 22 R
- non-impleadment of, on defendants' death—extent of abatement O 22 R
- order appointing—finality of O 22
- power of court to re-hear after decree, after impleading O 22 R

limitation
- application for substitution O 22 R

marriage of female party—no abatement by O

no abatement when death is after preliminary decree and before final decree O 22 R

none by death after hearing, before decree O

none by reason of death after decree O 22 R

order of abatement, if necessary O 22

partial abatement O 22 R

power of appellate court when it finds that suit had abated in lower court O 22 R

Abatement—SUIT ETC.
- representative suit O 1 R 8 N 24; O 22 R 1 N 13
- right to sue
  - procedure where, does not survive to the surviving plaintiff alone O 22 R 3
  - procedure where, it does not survive against surviving defendants alone O 22 R 4
  - survival of O 22 R 1 Nn 4, 5, 7
    - appeal O 22 R 1 N 18
    - no abatement O 22 R 1
    - procedure where party dies and right to sue survives to or against the surviving parties alone O 22 R 2
    - suit by or against
      - Hindu reversioner O 22 R 1 N 15
      - Hindu widow O 22 R 1 N 15
    - suit under sections 14 and 18 of Religious Endowments Act O 22 R 1 N 16
- setting aside O 22 R 9 (2)
  - appeal—whether lies O 22 R 9 N 13
  - effect of O 22 R 9 N 10
  - formal order of abatement whether necessary O 22 R 9 N 9
  - legal representative whether need not be substituted before setting aside abatement O 22 R 9 N 11
- suit
  - effect of abatement O 22 R 9
  - fresh suit, bar of O 22 R 9
  - none by reason of marriage O 22 R 7
  - withdrawal of, after abatement against some of the defendants O 23 R 1 N 24
- suit relating to public trust O 22 R 1 N 14
- suit for wakf property O 22 R 11 N 8

Abuse of Process
- inherent powers of court to prevent S 151

Accounts
- ADJUSTMENT OF
  - commission for S 75 (c); O 26 R 11
  - where by interlocutory order party is placed in immediate possession of property pending decision of suit O 39 R 9
- ADMISSION IN EVIDENCE
  - endorsements on admitted entries O 13 R 5
- BOOKS OF
  - attachment cannot be made S 60
  - copies of when to be used in evidence O 13 R 5
  - power of court to order their—delivery into court, in execution proceedings O 21 R 41 N 5
  - production of, by plaintiff at the time of filing plaint O 7 R 17
- commission to examine S 75 (c); O 26 Rr 11, 12 or adjust O 26 R 11
- decree for O 20 Rr 15, 16, 17
- examination of, commissioner for S 75 (c)
- mortgage—accounts. *See* MORTGAGE
- mortgage suit
  - mode of taking accounts O 34 R 7 N 4

Accounts—Mortgage suit
  - separate suit for over payment to mortgagee whether maintainable O 34 R 9 N 3
- partnership O 20 R 15
  - partner's share, attachment, and accounts, O 21 R 49
- partnership suit O 20 R 15 Nn 2, 3
- principal and agent
  - accounts in suits between, O 20 R 16
  - decree in a suit for accounts between O 20 R 16
- production of—legal representative, power of court executing decree to compel, S 50
- rendition collector, liability of, to render Sch. III, Para 9
  - receiver, liability to render account O 40 R 3
  - *See also* RECEIVER
- settled O 20 R 17 N 2
- special directions as to O 20 R 17
- SUIT FOR S 9 N 30
  - against co-sharer, if bars suit for profits against same person as lambardar O 2 R 2 N 21
  - between principal and agent—decree in, form of O 20 R 16
  - costs in—*See* COSTS
  - decree in—directions in as to mode of taking accounts O 20 R 17
  - directions in, as to mode of taking accounts—discretion of court O 20 R 17
  - frame of suit—splitting of claims O 2 R 2 N 10
  - mere accounts whether maintainable by mortgagor O 34 R 7 N 3
  - payment of claim amount into court O 24 R 1 N 5
  - plaint—contents of O 7 R 2
  - pleading—contents of O 6 R 4 N 7
  - principal and agent—cause of action—*See* PLACE OF SUING
  - security for costs if may be required O 25 R 1 N 12
  - whether small cause S 102 N 5
- taking of
  - directions as to O 20 R 17
  - mode of, special directions as to O 20 R 17
- trusts—suits relating to public trusts
  - directing accounts in, S 92
  - trust property S 92
- unsettled—plaint in suits for recovery of amount due on O 7 R 2

Act of State
- foreign judgment, if a S 14 N 3
- question of, if of civil nature S 9 N 57

Acts
- amendments of Sch IV

Addition of Parties
- *See* PARTIES

Adjournment O 17
- adjourned hearing—failure of parties
  - to appear O 17 R 2
  - of parties to produce evidence O 17 R 3
- costs of O 17 R 1 (2)

Adjournment
- court's power for O 17 R 1
- (of) execution sales O 21 Rr 69, 83
- (of) hearing of suit O 17
- (of) hearing of appeal O 41 R 20
- (of) hearing—determination of suit at adjourned hearing O 17 R 3
- hearing—when court may adjourn O 17 R 1
- power of court to grant O 17 R 1
- when not granted O 17 R 1 proviso

Adjustment
- (of) decree. *See* EXECUTION
- (of) suit. *See* (1) COMPROMISE; (2) COMPROMISE DECREE

Administration
- decree for—form of O 20 R 13
- letters of—application for—death of party—right, survival of O 22 R 1 N 12
- suit for
  - decree in O 20 R 13
  - meaning of O 20 R 13 N 2
  - security for costs if may be required O 25 R 1 N 12
  - when to be filed O 20 R 13 Nn 2, 3, 4
  - who may file O 20 R 13 N 5

Administrator
- SUITS BY OR AGAINST O 31
  - claims not to be joined with claims by or against administrator personally O 2 R 5
  - contents of plaint O 7 R 4 N 2
  - frame of O 2 R 5
  - person—who has not joined in probate need not be made party O 31 R 2
  - representation of beneficiary in suit relating to mortgage concerning property vested in administrator O 34 R 1 N 7

Administrator-General
- is public officer S 2 (17)

Administrator-General's Act
- petition to administrator-general under—verification of O 6 R 15 N 15

Admiralty
- assessors in admiralty cases S 140

Admissions O 12
- CO-DEFENDANTS
  - admission between—use of admission against plaintiff O 12 R 2 N 4
- CONSTRUCTION OF O 12 R 1 N 1
- CONSTRUCTIVE
  - summary suit—leave to defend not obtained—effect—allegations in plaint deemed to be admitted O 37 R 2 N 6
- DOCUMENTS O 12 R 2
  - endorsement on admitted documents, O 13 R 4
  - endorsement on copies of admitted entries in books, accounts and records O 13 R 5

Admissions—Documents
- notice to admit O 12 R 3
  - affidavit of signature O 12 R 7
  - form of O 12 R 3; App. C, Form 9
  - unnecessary documents—costs O 12 R 9
- EFFECT
  - admission by party that he holds suit property as trustee for another—order for deposit into court O 39 R 10
  - made at hearing, by parties or pleader O 10 R 1 N 2
  - proof, dispensation with O 18 R 5 N 2
  - right to begin, in case of O 18 R 1 N 3
- EVIDENCE OF O 12 R 7
  - examination of parties for ascertaining whether they admit any allegation of the opposite side O 10 R 1
- FACTS
  - form of notice to admit, and of admission of facts O 12 R 5; App. C, Forms 10 & 11
  - notice to admit O 12 R 4
- INTERPLEADER SUITS
  - admission in O 35 R 4
  - power of court to adjudicate on admission of party O 35 R 4
- judgment on O 12 R 6
- notice of O 12 R 3
- notice to admit facts O 12 R 4
- (of) case—
  - claim of opposite party O 10 R 1
  - notice of O 12 R 1
  - notice of admission by party of other parties case O 12 R 1
- (of) Privy Council appeal O 45 R 8
- pleadings—admissions in O 12 R 6 N 3
- withdrawal of O 12 R 2 N 2

Adverse possession
- effect of, attachment on O 21 R 63 N 24

Advocate
- vakalatnamah—when advocate need not file O 3 R 4

Advocate-General
- appointment of Govt. I Act S 114
- consent of—to suits Ss 91, 92, 93
- consent of—in suits relating to nuisance—*See* NUISANCE
- discovery—order against for O 11 R 13 N 21
- function of—in relation to suits relating to public trusts S 92 N 27
- information—power of, to exhibit, S 79
- impleadment—addition as party to suit under S. 92 S 92 N 23
- POWERS OF
  - institution of suit relating to public nuisance S 91
  - may authorise or institute suits regarding public nuisances and charities Ss 91, 92
  - under Ss. 91 and 92—collector, when can exercise S 93

Advocate-General
- SANCTION
  - appeal, sanction not necessary for S 92 N 26
  - condition precedent to institution of suit S 92 N 25
  - fresh, if necessary on amendment of plaint S 92 N 25
  - form of S 92 N 25
  - suits relating to public charities S 92
  - suits relating to public nuisance S 91
  - suit under S. 92 S 92 N 2 and Nn 23, 25

Affidavit O 19
- administration of oath—
  - officers empowered S 139
  - by whom to be made S 139
- admissibility of statements made on belief in affidavits O 19 R 3
- attendance of person making affidavit O 19 R 2
- contents of O 19 R 1 N 1
  - argumentative matter and costs O 19 R 3 (2)
- costs of O 19 R 3 (2)
- court fee—if necessary O 19 R 1 N 3
- cross-examination of deponent O 19 R 1 N 4
  - power to order attendance of deponent for O 19 R 2
- discovery by O 11 R 12
  - of document O 11 R 13 N 2
- OF DOCUMENTS O 11 R 13
  - inspection of documents referred to in O 11 R 15
  - lunatic—affidavit from O 11 R 23
  - minor, affidavit by O 11 R 23
  - non-compliance with order for discovery O 11 R 21
  - order for O 11 R 12
- examination of deponent—power of court to order deponent to attend O 19 R 2
- (OF) FACTS O 19 R 3
  - power to order any fact to be proved by S 30; O 19 R 1
- INTERROGATORIES
  - answer to, to be, by O 11 R 8
- meaning of O 19 R 1 N 1
- (as to) opinion O 19 R 1 N 6; R 3
- power of court as to S 30 (a)
- PROOF BY O 19 R 1
  - power of court to order any point to be proved by affidavit O 19 R 1
  - proposed guardian of minor O 32 R 3 (3)
- OF SIGNATURE O 12 R 7
  - on admissions O 12 R 7
  - by pleader O 12 R 7
- stamp on, if necessary O 19 R 1 N 2
- summary suit—affidavit of defence O 37 R 3
- weight to be attached to O 19 R 1 N 6
- by whom to be taken S 139

Agent
- appointment of O 3 R 6
- AUTHORITY—
  - reference to arbitration Sch II P 1 N 19
  - to accept service of process O 3 R 6
  - to file interpleader suit O 35 R 5

Agent—AUTHORITY
  - to receive process for Government O 27 R 4
- delivery of possession to, in execution O 21 R 35 N 7
- political agent, service in foreign territory through O 5 R 26
- of Princes and Chiefs S 85
- (of) principal and agent — suit for account between—decree in, form of O 20 R 16
- RECOGNISED AGENTS O 3
  - agent to receive process—suits by or against Government—who is such agent O 27 R 4
  - appearance and application by O 3 Rr 1—3
  - authority of O 3 R 2 Nn 2, 3, 4
  - (of) foreign rulers etc S 85
  - Government pleader, if recognised agent of Government O 27 R 2 N 2
  - (of) Government—authorised to act for O 27 R 2
  - (of) Government—who is O 27 R 2
  - meaning of O 3 R 2
  - powers of L P cls 9 & 10 N 5
  - of Princes or Chiefs S 85
  - rules relating to O 3
  - service of process on O 3 R 3
  - who are O 3 R 2
- SERVICE OF PROCESS
  - on manager O 5 Rr 12, 13
  - special agent to accept O 3 R 6
- service of summons on O 5 Rr 12—14
  - defendant-principal residing out of British India and having no agent to accept service O 5 R 25
  - by whom, defendant carries on business O 5 R 13
- who is, for purposes of service of summons—master of ship, agent of owner O 5 R 13

Agra Tenancy Act
- proceedings under—claim of set off O 8 R 6 N 12

Agreement
- by person under disability—*See* COMPROMISE

Agricultural land
- recovery of rent of—non-applicability of code S 4

Agricultural Produce
- ATTACHMENT OF, exemption from Ss 60 (1) (b), 61
  - how made O 21 R 44
  - mode of O 21 R 44
  - not attachable before judgment O 38 R 12
  - not obtainable before judgment O 38 R 12
  - provisions as to produce under O 21 R 45
- GROWING CROP
  - attachment of, which cannot be stored O 21 R 45 (5)
  - order prohibiting removal of O 21 R 45 (4)
  - place of sale of O 21 R 74 (1)
  - special provisions relating to sale of O 21 R 75
- sale of O 21 R 74 & 75

Agriculturist
  - house of, exemption from attachment S 60 (1) (c)

Agriculturist
- implements and cattle of, exemption from attachment S 60 (1) (b)
- meaning of O 30 R 1 N 8

Airmen
- suit by or against—procedure O 28

Alien enemy
- contracts with—effect of S 83 N 5
- meaning of S 83 expl; S 83 N 2
- RESIDENCE
  - defendant residing in enemy country—summons, service of S 83 N 4
  - enemy residing in British India—suit by—permission of Governor-General in Council necessary S 83
  - not residing in British India—suit against S 83 N 1
  - residing in foreign country—suit by—maintainability of S 83 N 3
- suit by S 83
  - consent of Governor-General in Council to S 83 (1)
- suit by or against foreign and native rulers Ss. 83 to 87

Ambassador
- arrest—exemption from S 86 (3)
- decree against—execution S 86 (3)
- suit against—certificate sanctioning S 86

Amendments
- Acts S 155; Sch IV
- (of) appellate decree—*See* DECREE
- decree. *See also* DECREE S 152
- execution application O 21 R 17
  - *See also* EXECUTION
- Issue O 14 R 5
- power of court to amend O 14 R 5 (1)
- of judgment—*See* DECREE
- JUDGMENT, DECREES AND ORDERS Ss 152 153
  - accidental errors S 152 Nn 2, 3
  - after appeal, which court to amend S 152 N 9
  - amendment and limitation for appeal S 152 N 14
  - amendment by court *suo motu* S 152 N 10
  - amendment of decree, limitation for execution runs from date of amendment S 152 N 14
  - amendment of time-barred decree, no revival of limitation S 152 N 14
  - amendment pending appeal S 152 N 9
  - amendment when takes effect S 152 N 13
  - appeal from amended decree S 152 N 19
  - appeal from order under S. 152, when lies S 152 N 19
  - appellate court when can amend S 152 N 9
  - appellate decree—appellate court alone may amend S 38 N 5
  - award, S 152 applicable to S 152 N 17
  - clerical or arithmetical mistakes S 152 Nn 2, 3
  - consent decree, nature of the errors that may be corrected without consent S 152 N 16
  - court by which, can be made S 152 N 9

Amendments—JUDGMENTS, DECREES AND ORDERS
  - errors due to error in pleadings may be corrected S 152 N 4
  - errors in, arising from accidental slips S 152
  - executing court no power to amend S 152 N 9
  - inherent power to amend S 152 N 6
  - in what case lies S 152 N 2
  - mistakes having origin anterior to suit may be corrected S 152 N 5
  - non-party cannot apply for amendment S 152 N 11
  - opposite party to be given notice of amendment S 152 N 12
  - revision S 152 N 20
  - right discretionary S 152 N 7
  - rules of limitation, how far applicable S 152 N 8
  - successive amendments when *res judicata* S 152 N 15
  - successor in office, may amend S 152 N 9
  - suit for amendment of decree, whether lies S 152 Nn 16, 18
- memorandum of appeal O 41 R 3
- order for—failure to amend, effect O 6 R 18
- PLEADINGS O 6 R 17
  - amendment confined to time of pendency of proceedings S 153 N 3
  - defect or error in, may be amended S 153 N 2
  - plaint—on adding of parties O 1 R 10 (4)
- power of court S 153
  - appellate court S 107 N 9; S 153; O 6 R 17; O 41 R 3
  - court may amend *suo motu* under S 153 S 153 N 6
- (of) proceedings S 153
  - defect in, general power of court to, S 153
  - instances of proceedings which can be amended under S 153 S 153 N 5
- what court can amend—summary dismissal of appeal against decree O 41 R 11 N 9

Ancestral property
- liability of, under decree S 53

Annuity
- suit for—successive claim—frame of suit O 2 R 2 N 9

Apparel
- whether can be taken into consideration in deciding whether a person is pauper for *forma pauperis* proceedings O 38 R 1 N 7

Appeal Ss. 96-108; O 41
- ABATEMENT OF
  - *See also* ABATEMENT
  - death of appellant—impleadment of legal representative O 22 R 3 N 3
  - death of respondent O 22 R 4 N 3
  - decree of lower court in proceedings on grounds common to all plaintiffs or defendants—appeal against such decree—death of one of the appellants—effect O 41 R 4 N 8

Appeal—ABATEMENT OF
- guardianship applications O 22 R 11 N 6
- in personal action O 22 R 11 N 2
- power of appellate court to appoint legal representative O 22 R 4 N 25
- power of appellate court to declare O 22 R 11 N 7
- procedure—where right survives to or against surviving parties alone O 22 R 2 N 4
- rules as to, and impleadment of legal representatives O 22 R 11
- suit for wakf property O 22 R 11 N 8
- survival of right on death of party O 22 R 1 N 18

ADMISSION O 41 R 9
- endorsement of date of presentation on the memorandum of appeal O 41 R 9
- power to dismiss appeal admitted *ex parte* on ground of limitation O 41 R 9 N 2
- procedure on O 41 Rr 9 to 15
- restriction of grounds of appeal on admission O 41 R 11 N 17
- whether extends time for payment of money due under mortgage decree O 34 R 3 N 5

APPELLATE COURT
- bench of judges S 98
  - difference between, as to part of decree S 98 N 5
  - difference between—dissent to be recorded O 41 R 34
  - difference of opinion—procedure S 98 prov
  - difference of opinion in the decision of preliminary objections—procedure S 98 N 4
  - dissent if any, to be recorded, O 41 R 34
  - dissenting judge need not sign decree O 41 R 35 proviso
  - reference to other judges—when to be made S 98
  - reference under S. 98
    - if can be made by one judge S 98 N 7
    - is confined to the point of law referred S 98 N 8
    - difference must be on point of law S 98 N 6
    - effect of Cl. 36 of Letters Patent S 98 N 12
    - who can hear S 98
    - whose decision to prevail S 98 N 10
- duties of S 107 N 30
  - to send for the record O 41 R 11
- Powers of S 96 N 5, S 107, O 41 R 3
  - (to) allow amendment S 107 N 23
  - (to) allow amendment of plaint S 99 N 4
  - (to) allow withdrawal of proceedings O 23 R 1 N 3
  - (to) allow withdrawal of suit S 99 N 4, O 23 R 1 Nn 11, 12, 13
  - (to) amend issues O 14 R 5 N 6
  - (to) decide (without remand) on ground different from that on which lower court proceeded O 41 R 24
  - discretion—of lower court—of interference by appellate court, competency of S 107 N 12
  - discretion of lower court, when can be interfered with S 107 N 12
  - entertaining application to set aside *ex parte* decree S 107 N 19
  - (to) examine ameen S 107 N 28
  - (to) expunge matters from pleadings O 6 R 16 N 6
  - (to) expunge remarks from judgment S 107 N 29
  - (to) frame issues and refer for trial, whether lies in O 41 R 25
  - (to) give finding against each misjoined defendant separately S 99 N 4
  - (to) go behind report of commissioner in lower court O 26 R 12 N 4
  - (to) grant other or general relief O 7 R 7 N 2
  - inherent powers S 107 N 11
  - injunctions, power to grant S 107 N 18
  - (to) interfere with appointment of receiver S 107 N 26
  - judgment pronounced against party refusing to give evidence O 6 R 20 N 3
  - judgment pronounced immediately on failure of parties to produce evidence on day fixed for first hearing O 15 R 4 N 3
  - (to) make order as to compensatory costs O 41 R 33
  - meaning of S 107 N 10
  - (to) order stay of sale under decree appealed from O 41 R 6 N 9
  - (to) order separate trials O 2 R 6 N 3
  - original court—exercise of S 107 N 9
  - original court—when exercisable by S 107 N 9
  - (to) pass any proper decree or order O 41 R 33
  - (to) pass any decree or order that may be required in the interests of justice O 41 R 33
  - (to) pass any decree or order that ought to have been passed by lower court O 41 R 33
  - (to) pass any decree or order that the nature of the case may require O 41 R 33
  - (to) pass decree or order in favour of party not appealing or filing cross-objection O 41 R 33
  - (to) pass interlocutory orders S 107 N 18
  - (to) determine case finally O 41 R 24
  - (to) frame issues and refer for trial — whether appellate court can exercise S 107 N 6
  - power to summon witnesses S 107 N 8
  - reference to arbitration S 107 N 27
  - regarding court-fee S 107 N 17
  - (to) reject memorandum of appeal S 107 N 21
  - (to) reject plaint S 107 N 21
  - (to) return memorandam of appeal S 107 N 22
  - (to) return plaint O 7 R 10 N 3

Appeal—APPELLATE COURT—Powers of

(to) reverse whole decree in favour of party not appealing—where decree of lower court proceeds on grounds common to several plaintiffs or defendants O 41 R 4
(to) reverse whole decree when appeal is as to part only of that decree O 41 R 33
same as the original court S 107 (2)
(to) say whether strict proof for review is shown O 47 R 4 N 6
stay of execution of orders of Privy Council O 41 R 5
stay of sale of immovable property pending appeal O 41 R 6
(to) summon witnesses, O 41 Rr 27, 28
(to) vary decree as regards all respondents O 41 R 33

APPELLATE DECREE
construction of O 41 R 35 N 2
date and contents of O 41 R 35
dissenting judge need not sign decree O 41 R 35 (4) proviso
specification of relief in O 41 R 35 N 2

APPELLATE JUDGMENT O 41 Rr 30, 34
contents of—
date and signature of O 41 R 31
judgment may be for confirming, varying or reversing decree appealed from O 41 R 32
non-compliance with requirements—effect O 41 R 31 Nn 10 to 12
summary dismissal under O 41 R 11 O 41 R 31 N 9
copy of judgment and decree to be sent to lower court O 41 R 37
(and) decree in O 41 Rr 31, 35
directions in O 41 R 32
disposing of several cases—appeal by several appellants—copy of decree in all cases to be filed O 41 R 1 N 6
ex parte restoring of appeal O 41 R 21
form of O 41 R 32
form of—agreement of parties as to O 41 R 32
point, for determination to be stated in O 41 R 31
reasons for decision to be stated in O 41 R 31
when and where pronounced O 41 R 30
writing of, whether necessary when appeal dismissed under O 41 R 11

APPLICABILITY
of O 22 O 22 (general); O 22 R 11
of O 41 to other proceedings O 41 R 1 N 18
of O 41 R 35 (contents of decree in appeal from original decree)—applicability of rule to High Court O 49 R 3
of rule as to withdrawal of suit O 23 R 1 N 3
of S 96 to High Courts S 96 N 2
of S 98 to Income Tax cases S 98 N 3
Land acquisition cases S 98 N 3
Miscellaneous proceedings S 98 N 3
Punjab Courts Act S 10 S 98 N 3

Appeal—BAR OF

BAR OF S 111
order of remand—failure of appeal from, whether bars appeal from final decision on remand S 105 N 8

BURDEN OF PROOF
burden on appellant to show judgment appealed from is wrong O 41 R 16 N 1
commission order issuing or refusing to issue—whether appealable O 26 R 4 N 7
compromise of O 23 R 3 N 29
competency of — objection to — not raised by respondent's pleader in first instance—effect O 41 R 1 N 14
connected appeals—one decree in two appeals—whether one second appeal is enough O 41 R 1 N 15
consolidation of O 41 R 1 N 15

COPIES
of decree and judgment appealed from to accompany appeal O 41 R 1
certified copies of decree and judgment in appeal to be sent to lower court O 41 R 37
cross-appeals—separate decree in—appeals — connected appeals—whether copies of both decrees necessary for second appeal O 41 R 1 N 7
decree to accompany memorandum of appeal—cross decrees O 41 R 1 N 7
(of) exhibits O 41 R 13
exhibits—copies of, when appeal preferred O 41 R 13 (3)
judgment and decree in appeal—copies of to be furnished to parties at their expense O 41 R 36

COSTS
See COSTS
directions as to, in decree in appeal O 41 R 35 (3)
provision as to, in decree O 41 R 35

COURT-FEE
See also COURT-FEE S 96 N 19; S 97 N 7; O 41 R 1 N 17
refund of—where appeal is over stamped O 41 R 1 N 17
rejection of, for deficiency O 7 R 11 N 6
Criminal Procedure Code—S. 476—appeals in proceedings under—judgment, contents of O 41 R 31 N 13
criminal cases from High Court L P Cl 41

CROSS-OBJECTION O 41 R 22
abatement of appeal—effect O 41 R 22 N 18
against co-respondent O 41 R 22 N 14
against findings not included in decree O 41 R 22 N 3
against whom may be filed O 41 R 22 N 13
appeal filed after time may be treated as O 41 R 22 N 20
dismissal of appeal for failure to furnish security for cost—effect O 41 R 22 N 17
dismissal of appeal
after hearing—effect O 41 R 22 N 17
as time barred O 41 R 22 N 17
for default — cross-objection whether may be heard O 41 R 22
for failure to pay court-fee—effect O 41 R 22 N 17

Appeal—CROSS-OBJECTION
- effect of dismissal of appeal on O 41 R 22 (4)
- effect on, of withdrawal of appeal or dismissal for default O 41 R 22
- effect of withdrawal or dismissal of appeal on O 41 R 22
- form of O 41 R 22
- in *forma pauperis* O 41 R 22
- limitation O 41 R 22 N 19
- omission to file—effect O 41 R 22 N 15
- to order of remand against which appeal was not filed O 41 R 22 N 6
- by respondent O 41 R 22
- when respondent may file O 41 R 22
- whether may be filed in *forma pauperis* O 41 R 22
- who may file O 41 R 22 N 11
- withdrawal of appeal—cross-objections whether may be barred O 41 R 22

DECREES S 96
- amended decree—if lies against S 96 N 13
- consent decree S 96 N 15
  - none against S 96 (2), (3)
- decree allowing set off O 20 R 19
- decree on award
  - court acting as arbitrator, decree by, not appealable Sch II P 16 N 13
  - decree based upon invalid award—applicability of Sch II P 16 N 6
  - decree not in accordance with award—appeal lies Sch II P 16 N 5
  - not appealable Sch II P 17 N 15
  - without hearing objections—appealability of Sch II P 16 N 7
  - without hearing objections—revisability of Sch II P 16 N 7
  - without intervention of court if lies S 104 N 15; Sch II P 21 N 15
- decree in pauper suit—whether propriety of order allowing application to sue in *forma pauperis* may be questioned in appeal from decree O 33 R 7 N 10
- decree relating to set off O 20 R 19 (2)
  - appeal from O 20 R 19
- decree in special case O 36 R 5 N 2
- decree without jurisdiction S 96 N 14
- decree without jurisdiction—appeal if lies against S 100 N 15
- *ex parte* decree S 96 (2)
  - when lies against S 96 N 12
- final decree S 97
  - effect of not drawing up preliminary decree S 97 N 3
  - foreclosure O 34 R 3 N 13
  - in mortgage suit—whether appealable O 34 R 5 N 24
  - where no appeal from preliminary decree S 97
- interlocutory orders, objections to S 105 N 2

Appeal—DECREES
- original decrees, appeals against Ss. 96, 99, O 41
- pre-emption decree O 20 R 14 N 16
- preliminary decree S 97
  - effect of passing final decree pending appeal against S 97 N 5
  - failure of appeal against—effect of S 97
  - for foreclosure O 34 R 2 N 23
  - for partition — court-fee in appeal against S 97 N 7
  - in partition suit O 20 R 18 N 9
  - in partnership suit O 20 R 15 N 7
  - stay of proceedings by lower court O 20 R 16 N 6
  - in suit for accounts O 20 R 16 N 5
- preliminary and final decree
  - appeal from one or the other O 34 R 4 N 16
  - combined — if maintainable against S 97 N 5
  - in mortgage suit—appeal from one or the other O 34 R 5 N 24
- single decree—in several appeals—value of Privy Council appeal S 110 N 9
- what are appealable S 96

DISMISSAL OF, FOR DEFAULT O 41 R 17
- compromise after dismissal—legality O 41 R 17 N 5
- effect of — decree of lower court whether superseded O 41 R 17 N 9
- effect on cross-objections O 41 R 22
- failure of appellant to make deposit for printing O 41 R 11 N 2
- failure to deposit cost of preparing paper book—restoration of appeal O 41 R 19 N 6
- failure to translate and print records O 41 R 17 N 6
- non-appearance of appellant O 41 R 17
- order if appealable O 41 R 17 N 14
- re-admission O 41 Rr 18, 19
- restoration of appeal—when may be ordered O 41 R 18
- restoration, remedies for O 41 R 19 N 8
- restoration under O 41 R 11 N 11
- want of materials for progress of appeal, due to appellant's default O 41 R 17 N 6
- want of prosecution O 41 R 17 N 6

DISMISSAL OF
- failure to make good deficit court-fee appealable S 149 N 13
- failure to appear on the day fixed for hearing O 41 R 11
- failure to deposit process fees O 41 R 18
- failure to pay costs of notice O 41 R 18 Nn 2, 6
- failure to provide materials essential for progress of appeal O 41 R 17 N 6
- failure to serve notice due to appellant's omission to deposit costs O 41 R 18
- failure to serve notice on respondent—and failure to supply identifier—dismissal of appeal whether legal O 41 R 18 N 4
- (at) first hearing O 41 R 11

Appeal—DISMISSAL OF.
(on) merits—failure of appellant to appear on day of hearing, legality of dismissal O 41 R 17 N 4
(on) merits—where court ought to have dismissed for default—effect O 41 R 17 N 14
(for) non-compliance with rules relating to appeal O 41 R 16 N 6
order restoring or refusing to restore appeal O 41 R 19 N 10
(on) preliminary ground—liability—right of appellant to be heard on the merits O 41 R 16 N 3
re-admission of appeal—dismissed under O 41 R 11 (2), O 14 R 19
(after) return of notices to respondent as not served O 41 R 14 N 2
summary dismissal of O 41 R 11
summary dismissal of—after notice has been issued to respondent O 41 R 11 N 2
summary dismissal of under O 41, R 11—effect of dismissal—amendment of decree—which court to amend O 41 R 11 N 9
summary dismissal under O 41, R 11 whether decree O 41 R 11 N 8
(as) time barred—without fixing date for hearing — appeal—legality O 41 R 11 N 7
under O 41 R 11—notice to lower court of such dismissal O 41 R 11
without serving notice on respondent O 41 R 11 (1)

EFFECT OF—
on time fixed for payment under pre-emption decree O 20 R 14 N 7

ESTOPPEL—
judgment-debtor at whose instance sale was stayed cannot appeal against stay order O 41 R 6 N 10
estoppel against O 41 R 1 N 14

EVIDENCE—
additional evidence O 41 R 27
  admission of—by consent of parties O 41 R 27 N 11
  appellate court, if can take O 41 R 27
  appellate court, powers of—to take O 41 R 27
  direction to lower court to take O 41 R 28
  direction to lower court to take—points to be defined and recorded O 41 R 29
  grounds—discovery of fresh evidence O 41 R 27 N 9
  improper admission of—effect O 41 R 27 N 18
  mode of taking O 41 R 28
  power of appellate court to direct additional evidence to be taken while remanding issues for trial O 41 R 25 N 6
  production of, in appellate court O 41 R 27

Appeal—EVIDENCE.
appreciation of, by appellate court S 107 N 14
examination of ameen S 107 N 28
examining of expert witness, whether legal O 18 R 4 N 3
powers of appellate court in matters of S 107 N 13
powers to examine witnesses O 18 R 4 N 3
procedure where lower court has refused to admit O 41 R 27 (1) (a)
reasons for allowing evidence in appeal O 41 R 27
weight of, failure to consider—effect S 107 N 15
where on record sufficient, court may determine case O 41 R 24
witness, examination of, by appellate court O 41 R 28
extension of time—time fixed by original decree, when and how extended S 148 N 9
filing of—pending review application—effect—*See* REVIEW.
findings
  if lies against S 97 N 3; S 100 N 5
  interference with, of fact O 41 R 1 N 13
findings of fact—interference in appeal, when can be made S 107 N 14; O 41 R 1 N 13
form of O 41 R 1; Sch I App G
  misdescription in memorandum of appeal O 41 R 1 N 10
  what to accompany memorandum O 41 R 1
forum of S 96 N 4; S 106

GROUNDS O 41 Rr 1-2
  appellate judge may decide on another ground O 41 R 24
  common to all plaintiffs or defendants—reversal O 41 R 4
  defect, error or irregularity in lower court S 99 N 2
  defect in different proceedings S 99 N 2
  defect in prior suits S 99 N 2
  defect in the frame or institution of suit S 99 N 2
  estoppel S 96 N 10
  hearing of O 41 Rr 16-29
  improper reception of evidence S 99 N 6
  mere irregularities, no ground S 99 N 5
  mere irregularity, appellate court cannot interfere in cases of, S 99
  misjoinder of causes of action S 99 N 4
  misjoinder of parties S 99 N 4
  misjoinder of parties and causes of action S 99 N 4
  non-joinder S 99 N 4
  not taken in memorandum of appeal—effect O 41 R 2
  objections to error or irregularity not affecting merits or jurisdiction S 99
    findings on issues referred O 41 R 26
    irregularities S 99
    interlocutory—statements in S 105 N 4
  over-valuation or under-valuation S 99 N 6
  restriction of—on admission of appeal O 41 R 11 N 17
  restriction of—when fixing day for hearing O 41 R 12 N 1

Appeal—GROUNDS.
- should be raised at the earliest possible opportunity S 99 N 7
- waiver of objection S 99 N 7
- what grounds may be taken in O 41 R 1 N 11; O 41 R 2

HEARING
- of, adjournment of O 41 R 20
- of, to enable addition of respondents O 41 R 20
- appellate court, duty of, to hear respondent O 41 R 16 N 3
- before day fixed O 41 R 16 N 5
- date of, O 41 R 12
  - alteration of, O 41 R 12 N 1
  - notice to appellant O 41 R 17 N 10
  - publication and service of notice of such day O 41 R 14
- *ex parte* O 41 R 17 (2); O 41 R 17 N 13
- *ex parte*—duty of appellant O 41 R 16 N 1
- *ex parte* hearing—when appeal is to be heard *ex parte* O 41 R 17
- *ex parte*—re-hearing O 41 R 21
- *ex parte* restoration O 41 R 21
- *ex parte* setting aside of decree O 41 R 21
- fixing day of O 41 R 12
- judgment to be pronounced after O 41 R 30
- one side, if can be heard in the absence of the other O 41 R 16 N 4
- publication of day of O 41 R 14
- respondent—right of—to support decree or any of the grounds decided against him O 41 R 22
- right to begin O 41 R 16
- right of reply—respondent O 41 R 16
- written arguments whether permissible O 41 R 16 N 3

issues—*See* ISSUES

JUDGMENT
- contents of—dissent to be recorded O 41 R 34
- interlocutory judgment of High Court—if lies against L P Cl 40
- none against S 100 N 5

judgment (and) decree in O 41 Rr 30, 35

JURISDICTION
- consent cannot give S 96 N 4
- (TO) king IN council Ss 109-112; O 45
- Law relating to S 109 N 2
- Letters Patent S 109 N 2
- none in some cases S 111
- right of Ss 109, 110
- S. 102 applies S. 111 (b)
- valuation of S 110
- when appeals lie S 109

LEAVE TO APPEAL
- petition for, to accompany memo. of appeal O 41 R 1 N 14

LIMITATION O 41 R 1 Nn 8, 9
- dismissal of appeal as time barred without fixing date for hearing—legality O 41 R 11 N 7

LOWER COURT
- jurisdiction of, after appeal preferred—extent of S 96 N 2

Appeal—LOWER COURT.
- notice to—when to be sent O 41 R 13
- notice—of dismissal of appeal under O 41 R 11 O 41 R 11
- notice—dismissal of appeal without notice to lower court O 41 R 11
- papers—transmission of, to appellate court O 41 R 13

MEANING OF S 96 N 3

MEMORANDUM OF APPEAL O 41 R 1
- accompaniments of O 41 R 1 (2)
- amendment of O 41 R 3
- amendment of scandalous matters in O 41 R 3 N 4
- contents of O 41 R 1 (2)
- failure to draw in prescribed manner—effect O 41 R 3
- grounds, not set forth in O 41 R 2
- misdescription in O 41 R 1 N 10
- point not taken in—remand whether may be ordered on such point O 41 R 25 N 10
- presentation of O 41 R 1
- presentation—date of—endorsement on memorandum of appeal O 41 R 9
- presentation—date of—for purposes of limitation O 41 R 1 N 5
- presentation—to whom to be presented O 41 R 1
- presentation of, by pleader—with defective vakalatnama O 41 R 1 N 3
- registry of, O 41 R 9
- rejection or amendment of O 41 R 3
- rejection of, for deficiency of stamp O 7 R 11 N 6
- rejection of, on failure to furnish costs ordered O 41 R 10
- rejection of, power of appellate court S 107 N 21
- rejection of, procedure on O 7 R 12 N 1
- rejection of, where security for costs not furnished within time O 41 R 10 (2)
- rejection of without sending to lower notice court O 41 R 11
- return of O 41 R 3
- return of, for presentation to proper court S 107 N 22
- signature by appellant or by pleader O 41 R 1
- summary rejection of O 41 R 11

new case—power to make out O 41 R 2

NEW POINT O 41 R 1 N 12
- appellate court if can decide on grounds not raised in memorandum of appeal O 41 R 2
- appellate court—power of—to base decision on another ground O 41 R 24
- ground of exemption from limitation O 7 R 6 N 2
- grounds not taken in memorandum
  - if can be considered by appellate court O 41 R 2
  - leave of court O 41 R 2
- point as to limitation O 41 R 2 N 5

Appeal—NEW POINT.

- objection as to plea of set off being allowed by court—tenability O 8 R 6 N 17
- point of jurisdiction O 41 R 2 N 6
- powers of appellate court to decide *suo motu* O 41 R 2
- right to urge objections not set forth in memorandum of appeal O 41 R 2
- what grounds may be taken for first time in appeal O 41 R 1 N 12

NOTICE

- day of hearing, O 41 R 14
  - failure to serve—application for fresh notice—whether necessary O 41 R 14 N 2
  - service of, on the respondent through the lower court O 41 R 14
  - service on respondent or his pleader O 41 R 14
- dismissal of appeal without serving on respondent O 41 R 11 (1)
- failure to serve, on respondent—dismissal against one of several respondents O 41 R 18 N 3
- failure to serve on respondent owing to failure to pay process fees—dismissal O 41 R 17
- to lower court—dismissal of appeal—without sending O. 41 R 11
- to lower court—duty of appellate court to give O 41 R 13
- to lower court—to send records—right of appellant to deposit process fees and cause service of notices at any time within the period limited for transmission of records O 41 R 13 N 2
- non-service of—owing to appellant's failure to deposit costs—dismissal of appeal O 41 R 18
- powers of appellate court, to itself issue O 41 R 14
- (to) respondent—dismissal of appeal without notice O 41 R 11
- respondent's failure to appear on day specified in—effect O 41 R 16 N 2
- (to) respondent—service O 41 R 14

ORDERS Ss 104-105; O 43

- abatement—order of O 22 R 3 N 26; O 22 R 4 N 29
  - order refusing to set aside O 43 R 1 (*k*)
  - order setting aside O 22 R 9 N 13
- accounts, order directing, in administration suit O 20 R 13 N 13
- adjournment—order refusing O 17 R 1 N 8
- allowing or rejecting application for leave to sue as pauper O 44 R 1 N 10
- appealable orders S 104; O 43 R 1
- appellate order
  - if lies against S 104 N 21
- arrest, order for,
  - before judgment O 38 R 2 N 6; O 33 R 4 N 4
  - order refusing under O 39 R 2, whether lies from S 104 N 18

Appeal—ORDERS

- assignee—giving or refusing leave to join as party O 43 R 8
- attachment
  - order for contempt, whether lies from S 104 N 11
  - order for attachment and sale of property of witness O 16 R 10 N 5; O 16 R 12 N 3; O 43 R 1 (*g*)
  - order for attachment before judgment—not appealable O 38 R 5 N 24
  - order refusing S 104 N 18; O 39 R 2
- award
  - order on award stated in form of special case is appealable S 104; Sch II P 11
  - order correcting, S 104 N 12
  - order filing or refusing to file agreement to refer to arbitration S 104 N 13; Sch II P 17 N 15
  - order filing or refusing to file, without intervention of court, S 104 N 15
  - order modifying, or correcting, appealability of S 104 N 12
  - order overruling objections to award Sch II P 15 N 14
  - order revoking reference to arbitration, on agreement to refer, not appealable Sch II P 17 N 15
  - order refusing to remit, for reconsideration—not appealable Sch II P 14 N 9
  - order setting aside, when appeal lies S 104
  - order, staying or refusing to stay suit owing to agreement to refer, is appealable S 104
  - order superseding arbitration, whether lies from S 104 N 10
    - when award not made in time is appealable Sch II P 8 N 6
- certificate to appeal to Privy Council, refusing grant of O 43 R 1 (*v*)
- commission
  - order as to appointment of, for examination of witness O 26 R 1 N 7
  - order for issue of, for local investigation—whether appealable O 26 R 9 N 9
  - order for, for partition O 26 R 13 N 4
  - order in respect of, for accounts O 26 R 11 N 6
- compliance with order—whether a bar to appeal S 105 N 7
- compensation

See ARREST AND ATTACHMENT

  - order under S 95, whether lies from S 104 N 17
- compromise
  - order recording or refusing to record O 23 R 3 N 31; O 43 R 1 (*m*)

Appeal—ORDERS
- costs
  - order awarding to plaintiff, in interpleader suit O 35 R 6 N 2
  - order under S 35-A, whether lies from S 104 N 16
- default of party
  - order dismissing suit for failure of party to appear in person despite court's order—order of dismissal whether appealable O 10 R 4 N 6
  - order dismissing suit for failure of both parties to appear on day fixed for hearing O 9 R 3 N 6
  - order dismissing suit for failure to pay process fees, whether appealable O 9 R 2 N 5
  - order dismissing suit for failure of plaintiff to appear personally on being required to do so O 9 R 12 N 3
  - order dismissing suit for plaintiff's failure to apply for fresh summons on the return of previous one unserved—whether appeal lies O 9 R 5 N 5
  - order pronouncing judgment against defendant for failure to file written statement called for by court O 8 R 10 N 2
  - order rejecting application to restore suit dismissed for plaintiffs non-appearance O 43 R 1 (*c*)
  - order setting aside or refusing to set aside dismissal of suit for failure of both parties to appear or for failure of plaintiff to pay process fees O 9 R 4 N 8
  - order striking off defence for failure of defendant to appear personally, despite court's order, whether appealable O 10 R 4 N 6
- devolution of interest—order granting or refusing permission to continue suit in case of O 22 R 10 N 20
- disallowance of claim to exemption from arrest S 135 N 10
- discovery—
  - order dismissing suit for non-compliance with order for O 11 R 1 N 3
  - order made on non-compliance with order for O 43 R 1 (*f*)
- execution
  - appeal against order under S 63 S 63 N 11
  - collector, orders passed by, in execution proceedings transferred to him S 70
  - decision as to order in which properties must be sold O 34 R 5 N 24
  - order allowing or rejecting claim or objection to attachment in execution O 21 R 58 N 24
  - order as to security for restitution—in case of execution of decree pending appeal therefrom O 41 R 6 N 10

Appeal—ORDERS—Execution.
  - order as to stay of execution O 41 R 5 N 19
  - order directing or refusing issue of certificate of satisfaction of decree, when decree transferred for execution O 21 R 6 N 6
  - order disallowing objection by judgment-debtor, to draft of document for execution of which decree is passed O 43 R 1
  - order in, by collector Sch III P 6
  - order in, Privy Council decree or order O 45 R 16; O 41 R 8
  - orders in, whether lies from S 104 N 7
  - order of transmitting court refusing to decide objections to executability of decree is appealable S 39 N 16
  - order under O 21 R 2 O 21 R 2 N 33
  - order under O 21 R 34 O 21 R 34 N 8
  - question relating to
    - appeal—forum of, *See* EXECUTION
    - appealability of order, *See* EXECUTION
- *ex parte* decree
  - order rejecting application to set aside O 43 R 1
  - order setting aside or refusing to set aside. O 9 R 13 N 29
- extension of time
  - order granting or refusing to grant extension of time for payment of mortgage money under decree for redemption O 34 R 8 N 9
  - order under S. 148, no appeal S 148 N 11
- final decree—order rejecting application for, in mortgage suit O 34 R 5 N 24
- fine
  - order imposing, if appealable S 104 N 18
  - order imposing on witness for non-attendance O 16 R 12 N 3
- forum—court to which appeal lies from orders S 106
- improperly adding party O 1 R 10 N 33
- injunction
  - discharging or setting aside O 39 R 4 N 2
  - order directing notice before injunction granting temporary injunction O 39 R 3 N 2
  - order punishing disobedience of temporary injunction O 39 R 2 N 8
  - order refusing or granting O 43 R 1 (*r*)
  - orders relating to O 39 R 1 N 20
- inspection
  - order as to inspection of suit property by parties O 39 R 7 N 7
  - order for, of documents, whether appealable O 11 R 18 N 4
- interlocutory orders S 104 N 4
  - when can be questioned in appeal from decree S 105 N 4
- interpleader suits—orders made in O 35 R 4 N 3; O 43 R 1

Appeal—ORDERS
- issues—order remitting, to lower court O 41 R 25 N 12
- legal representative
  - order allowing or refusing person to be impleaded as O 22 R 3 N 26
  - order determining who is O 22 R 5 N 10
  - order refusing application to add, and directing abatement of suit O 22 R 1 N 21
- mesne profits—order relating to ascertainment of mesne profits awarded by decree O 20 R 12 N 15
- order on application for restoration of suit dismissed for default O 9 R 9 N 12
- order of attachment before judgment O 38 R 6 N 3
- order as to execution of orders of Privy Council O 45 R 16
- order directing sale of immovable property under O 21 R 92 O 43 R 1
- order for restitution S 144
- order granting application to appoint receiver O 43 R 1
- order granting review O 43 R 1
- order in execution-stay of execution O 41 R 8
- order refusing to re-admit an appeal O 43 R 1(*t*)
- order refusing to re-hear an appeal O 43 R 1 (*t*)
- order refusing to set aside order of dismissal for failure to furnish security for costs O 43 R 1
- order refusing transfer of decree, is appealable O 39 N 16
- order rejecting application to appoint receiver O 43 R 1(*s*)
- order rejecting application for leave to join two causes of action O 2 R 4 N 9
- order rejecting application to restore suit dismissed for default O 41 R 1(*c*)
- order rejecting review O 47 R 7
- order relating to amendment of pleadings O 6 R 17 N 20
- order of remand S 105
- order remanding case O 43 R 1(*u*)
- order returing plaint to be presented to proper court O 43 R 1 (*a*)
- order striking out pleadings or part thereof as scandalous, irrelevant etc O 6 R 17 N 7
- order under O 1 R 10 O 1 R 10 N 42
- order under Bengal Tenancy Act S 174—setting aside sale on depositing decree amount O 21 R 89 N 29
- pauper
  - order on application by government for payment of court-fee in pauper suit is appealable O 33 R 12 N 2
  - order rejecting application for leave to sue as O 33 R 5 N 7; O 33 R 7 N 9
- payment of decree amount
  - order postponing order if appealable O 20 R 14 N 1

Appeal—ORDERS—Payment of decree amount
  - order refusing to allow, by instalments O 20 R 11 N 14
- personal decree—order refusing application for O 34 R 6 N 21
- preliminary issue—order on, as to set-off, whether appealable O 8 R 6 N 17
- procedure in appeal from, S 108 N 3; O 43 R 2
- receiver
  - order appointing or refusing to appoint—*See* RECEIVER.
  - order passing receiver's account, appeal lies O 40 R 4 N 5
  - orders in receiver proceedings—no appeal lies O 40 R 4 N 5
  - order under O 40 Rr 3 & 4 if lies O 40 Rr 3, 4
- refusal of application
  - for final decree for redemption O 34 R 8 N 9
  - to extend time for payment of mortgage money under mortgage decree O 34 R 4 N 16
- refund of purchase-money—order granting or refusing, on sale being set aside O 21 R 93 N 13
- re-hearing—order for, of appeal heard *ex parte* O 41 R 21 N 11
  - order re-admitting, appeal O 41 R 19
  - order, refusing to re-admit appeal O 43 R 1(*t*)
- rejection of document—order for, as irrelevant or inadmissible O 13 R 3 N 3
- rejection of evidence—order admitting or rejecting document tendered after first hearing O 13 R 2 N 3
- rejection of memorandum of appeal O 41 R 3 N 6
  - order rejecting, for failure to furnish security for costs as ordered O 41 R 10 N 14
- rejection of plaint—order of, is decree S 2 (2); O 7 R 11 N 11
- remand
  - appeal from order of—power of High Court in such appeals O 41 R 23 N 25
  - order of, under inherent power O 41 R 23 N 22
  - order of, under O 41 R 23. O 41 R 23 N 21
  - order of under O 41 R 33. O 41 R 33 N 16
- return of plaint—order for, if appealable O 7 R 10 N 11
- review—order granting whether lies from S 105 N 11
- rules relating to appeals from O 43 R 2
- security for costs
  - dismissing suit—for failure to give O 25 R 2 N 5
  - order for O 25 R 1 N 14
- stay of suit
  - order staying or refusing to stay suit, whether lies from S 104 N 14
  - order staying suit on account of interpleader suit between parties regarding same subject-matter O 35 R 3 N 2
- what are appealable S 104
  - S 104, strict constriction of S 104 N 2

Appeal—ORDERS
- when lies from S 104 O 43
- withdrawal of suit—order as to O 23 R 1 N 39
- PARTIES—*See* PARTIES
  - addition of O 41 R 33 N 10
    - non-joinder effect O 41 R 20 N 10
    - power of appellate court to add appellant O 41 R 20 N 5
    - power of court to add respondent O 41 R 20
      - for purposes of cross objections O 41 R 22 N 22
  - appeal against whole decree by one of several plaintiffs or defendants where lower court's decree proceeds on grounds common to all of them—decree in appeal—execution of decree by non-appealing parties O 41 R 4 N 9
  - appeal by one of several defendants on ground common to all—death of one of the parties O 22 R 11 N 3
  - applicability of O 1 to appeals O 1 R 1 N 10
  - court's power to add persons interested as respondents O 41 R 20
  - death of a party before hearing—effect O 41 R 30 N 1
  - death of one of several appellants in a case where decree appealed from proceeds on ground common to all of them O 41 R 4 N 8
  - decree against several persons—appeal by one—power of appellate court to set aside against all O 41 R 33 N 8
  - decree against several plaintiffs or defendants—right of one to appeal against whole decree O 41 R 4
  - defect as to—whether may be remedied by amendment of appeal memorandum O 41 R 3 N 3
  - inherent power to add O 41 R 20 N 8
  - mortgage—suit on O 34 R 1 N 18
  - non-joinder of necessary party, effect, O 41 R 1 N 2
  - power of appellate court to add S 107 N 16
    - courts to add person interested in result of appeal as O 41 R 20
  - limitation O 41 R 20 N 11
    - (to) reverse decree in favour of non-appealing parties—lower court's decree proceeds on grounds common to several plaintiffs or defendants O 41 R 4
  - power to transpose parties in appeal S 107 N 16
  - proceedings for realisation of court-fee in pauper suit—government whether party within the meaning of S. 47 O 33 R 10 N 7
  - right to copies of judgment and decree O 41 R 36
  - substitution of S 107 N 16

Appeal—PAUPER
- PAUPER O 44 R 1
- PAUPER APPEAL—*See* PAUPER APPEAL
  - application for leave to appeal as O 44 R 1
  - inquiry into, by which court to be made O 44 R 2
  - objections in O 41 R 22
  - rejection of O 44 R 1
  - rules as to O 44 R 1
- personal decree against mortgagor in mortgage suit—matters relating to O 34 R 6 N 21
- presentation of—debtor in civil prison—whether may present appeal without the assistance of pleader O 41 R 1 N 2
- Privy Council—*See* PRIVY COUNCIL—APPEAL
- rateable distribution proceedings—order in—appealability of—*See* RATEABLE DISTRIBUTION
- RECORD
  - loss of—effect O 41 R 13 N 2
  - right of party to apply to appellate court to send O 41 R 13 N 2
  - transmission of, to appellate court O 41 R 13
  - transmission—time fixed by appellate court for—right of appellant to deposit process fees and cause service of notices at any time before expiry of such period O 41 R 13 N 2
- registration of O 41 R 9
  - appeal, withdrawal of, after registration O 41 R 9
  - register of appeal O 41 R 9
- REMAND O 41 R 23
  - additional evidence—remand for taking O 41 R 27 N 15
  - appeal from, order of S 105
  - appellate court's power to decide without remand though it proceeds on ground different from that relied on by lower court O 41 R 24
  - (of) case, and of issues, distinction between O 41 R 23 N 2
  - (of) case, by appellate court O 41 R 23
  - (of) case, by appellate court—disposal by lower court on preliminary point—power of appellate court to frame issues in its order of remand O 41 R 23
  - (of) case to lower court O 41 R 29
  - (by) consent O 41 R 23 N 19
  - dismissal of remanded appeal for default of appellant's appearance O 41 R 17 N 2
  - disposal of suit upon preliminary point by lower court O 41 R 23
  - disposal on preliminary point, meaning of O 41 R 23 Nn 3-6
  - erroneous order by lower court, in respect of abatement of suit O 22 R 9 N 12

Appeal—REMAND
- failure to appeal from order of remand, whether a bar to appeal from decree on remand S 105 N 8
- improper order of O 41 R 23 N 2
- inherent power to remand O 41 R 23 Nn 10, 15
- (of) issues O 41 Rr 25, 26
  - to lower court—findings—effect of not filing objections O 41 R 26 N 2
  - findings of lower court and evidence to be put on record—objections to finding O 41 R 26
  - findings of—objections to—court-fee on O 41 R 26 N 6
  - findings on—return of—duty of appellate court O 41 R 26 Nn 2, 3
  - power to direct additional evidence to be taken O 41 R 25 N 6
  - objections to findings on remand O 41 R 26
  - to return evidence to appellate court with findings O 41 R 25
  - return of findings by lower court — determination of appeal thereafter O 41 R 26
  - return of findings—objection to remittal of issue, whether may be taken thereafter O 41 R 26 N 3
  - powers and duties of court to which issues are remitted O 41 R 25 N 8
  - to trial court O 41 R 25
  - for trial—when appellate court may make O 41 R 25
  - what court may try issues remitted O 41 R 25 N 7
- jurisdiction after remand depends on remand order O 41 R 23 N 30
- new issues raised before appellate court no remand can be ordered O 41 R 25 N 10
- order of S 105 (2)
  - effect O 41 R 23 N 27
  - matters decided by—finality of O 41 R 23 N 29
- power of appellate court to remand case O 41 R 23
- power to O 41 R 23
- preliminary point—disposal of suit upon, by lower court—remand by appellate court O 41 R 23
- procedure after remand O 41 R 23 N 32
- refund of court-fee, on O 41 R 23 N 33
- (to) what court to be made O 41 R 23 N 26
- where suit has been disposed of on preliminary point—order returning or rejecting plaint whether disposal on preliminary point O 41 R 23 N 6

remittal of issues for trial O 41 R 25
review, how differs from S 96 N 3

RIGHT OF
- abandonment of—effect S 96 N 10
- consent cannot give S 96 N 2
- decree proceeding on common ground against separate plaintiffs or defendants—right of one to appeal against the whole decree O 41 R 4
- distinguished from review—*See* REVIEW

Appeal—RIGHT OF
- (as) distinguished from jurisdiction over S 96 N 4
- in execution proceedings S 96 N 11
- must be given by statute S 96 N 2
- not affected by new code S 154
- of party improperly impleaded O 1 R 10 N 42
- one of several plaintiffs, or defendants, can appeal from whole decree O 41 R 4
- saving of present S 154
- under new code, not retrospective S 154 Nn 1, 2
- under other laws—illustrations of S 96 N 22
- when lost S 96 N 10

right to begin O 41 R 16

SECOND APPEAL
- *See also* SECOND APPEAL S 100, O 42 R 1
- against *ex parte* appellate decree S 100 (2)
- appellate court
  - *ex parte* admission by single judge—can be attacked at hearing before bench S 100 N 2
  - jurisdiction of, does not depend upon the character in which it reaches the appellate court S 100 N 5
  - power to pass decree against person not party to first appeal S 100 N 2
- finding of fact—rule against objections as to, is not applicable to cases to which S 100 does not apply S 100 N 2
- grounds of
  - appellate court assuming jurisdiction, if and when a S 100 N 15
  - conditions of S 100 must be strictly fulfilled S 100 N 2
  - "contrary to usage having force of law," meaning of S 100 N 21
  - decision that a question is not in dispute cannot be attacked S 100 N 2
  - defective judgment, if and when a S 100 N 26
  - disbelieving witness on grounds opposed to law S 100 N 20
  - discretionary matters in which High Court will not interfere S 100 N 16
  - error of law
    - decision not based on legal evidence S 100 N 13
    - drawing or refusing to draw proper inference S 100 N 12
    - failure to consider evidence S 100 N 13
    - finding based on no evidence or in disregard of or on inadmissible evidence S 100 N 12
    - misconception of issue S 100 N 12
    - overlooking onus of proof S 100 N 12
    - what are S 100 N 12
  - errors of procedure
    - admission or rejection of evidence S 100 N 27

Appeal—SECOND APPEAL—Grounds of

- extension of S. 100 to local and special enactments S 100 N 2
- omission to frame or try issues S 100 N 25
  - must affect decision on merits S 100 N, 24
  - what are S 100 N 23
- failure to determine issue of law S 100 N 22
- finding of fact binding S 100 Nn 52, 54
  - concurrent, if binding in second appeal S 100 N 54
  - when not binding S 100 Nn 53, 54
- general S 100 N 11
- question of fact
  - acquisition of easement S 100 N 50
  - damages, question as to, S 100 N 51
  - question of market value of property, if S 100 N 51
  - what is a S 100 N 51
- question of law
  - abandonment, question of, if a S 100 N 48
  - applicability of the law, S 100 N 47
  - binding nature of transaction S 100 N 45
  - construction of documents S 100 N 29
  - distinguished from question of fact and mixed questions of law and fact S 100 N 28
  - existence of custom S 100 N 21
  - existence of liability S 100 N 40
  - existence of nuisance S 100 N 46
  - foreign law, what is S 100 N 49
  - inference from facts S 100 N 32
  - interpretation of law, S 100 N 47
  - legal effect of document or transaction S 100 N 30
  - legal necessity, existence of, S 100 N 45
  - limitation S 100 N 44
  - meaning of words, S 100 N 31
  - merger S 100 N 43
  - nature of contract or transaction S 100 N 38
  - nature of property S 100 N 37
  - nature of possession S 100 N 36
  - nature of tenancy S 100 N 35
  - presumptions and onus of proof S 100 N 32
  - relevancy and sufficiency of evidence S 100 N 34
  - representation, question of, S 100 N 51
  - status S 100 N 42
  - state of mind, such as fraud or negligence S 100 N 39
- refusal to exercise discretion S 100 N 16
- wrong exercise of discretion S 100 N 16

how differs from first appeal S 100 N 2

issue of fact—High Court, power to determine in S 103

Appeal—SECOND APPEAL—New case

- new case
  - mixed question of law and fact, if can be raised S 100 N 57
  - plea of
    - estoppel S 100 N 60
    - going to the root of the case S 100 N 58
    - jurisdiction S 100 N 59
    - limitation S 100 N 60
    - pure questions of law S 100 N 56
    - *res judicata* S 100 N 60
    - when can be raised S 100 N 55
- orders in execution cases S 100 N 9
- order of remand, if can be questioned after remand S 100 N 63
- orders under code and other laws—procedure S 108
- plea abandoned or varied if and when can be raised S 100 N 61
- procedure in S 108 N 2
- right of,
  - does not exist where barred by other laws S 100 N 4
  - must be given by statute S 100 N 2
- rules as to first appeal, apply to O 42 R 1
- separate appeals necessary where separate decrees passed by lower court S 100 N 10
- who may appeal S 100 N 62

SECURITY FOR COSTS O 41 R 10

- Appeal in *forma pauperis*
  - if may be ordered O 41 R 10 N 3
  - enforcement of O 41 R 10 N 17
- failure to give—dismissal of appeal O 41 R 10
- grounds for demanding O 41 R 10 N 6
- insolvency appeal—security if may be required O 41 R 10 N 4
- power of appellate court, to order O 41 R 10
- procedure, when security is ordered O 41 R 10 N 16
- time for furnishing—extension of time O 41 R 10 N 10
- where appellant resides out of British India O 41 R 10 (1)

security for restitution—when may be required O 41 R 6

stay of execution

- security for, when cannot be demanded O 41 R 7

STAY OF PROCEEDINGS O 41 R 5

- appeal whether operates as O 41 R 5
- power of appellate court to S 107 N 18
- power of appellate court to stay proceedings under decree appealed from O 41 R 5 N 4
- under decree, appeal does not operate as O 41 R 5

STAY OF SALE

- of immovable property, pending O 41 R 6
- under lower court's decree—when may be ordered O 41 R 6

Appeal
- SUBSEQUENT EVENTS
  - appellate court if can take note of O 7 R 7 N 4; O 41 R 27 N 16; O 41 R 33 N 4
  - *See* APPEAL—APPELLATE COURT—POWERS OF
- TRANSFER OF S 24
  - by Governor-General in council to another High Court S 25
  - re-transfer of, from one court to another S 24
- VALUATION OF S 96 N 18
  - claim of set off—appeal relating to O 8 R 6 N 17
  - rejection of appeal for under-valuation O 7 R 11 N 6
- when treated as revision S 115 N 19
- WHO CAN APPEAL S 96 N 6
  - co-defendants S 96 N 8
  - co-plaintiff S 96 N 7
  - minor S 96 N 9
- WITHDRAWAL OF
  - after registration O 41 R 9 N 4
  - effect on cross-objections O 41 R 22

Appearance
- *See also* NON-APPEARANCE
  - adjourned hearing—absence of parties on O 17 R 2
- agent, by recognised O 3 R 1
- appearance in person, direction as to O 3 R 1 N 8
  - of parties—rules as to applicability of, to proceedings under O 9 O 9 R 1 N 2
  - of some plaintiffs or defendants alone—procedure O 9 Rr 10, 11
- applicability of provisions as to insolvency proceedings O 9 R 4 N 6
- day fixed for—rule as to O 5 R 6
- DEFENDANT
  - adjourned hearing procedure at, when defendant assigns good cause for previous non-appearance O 9 R 7
  - appearance of one of several, for others O 1 R 12
  - failure to attend O 9 R 6
  - hearing, procedure where defendant only appears at O 9 R 8
  - non-attendance of one of several defendants O 9 R 11
- direction by court to parties to appear in person—failure of party to do so—effect of O 9 R 12
- dismissal of suit for default bars fresh suit O 9 R 9
- exemption from Ss 132, 133
- exemption of certain persons from personal appearance Ss 132, 133
- failure of both parties to appear when suit called on for hearing—effect of O 9 R 3
- firm, appearance of partners where suit brought in firm name O 30 R 6
- fixing day for defendant's appearance O 5 R 6
- government, fixing of time for appearance on behalf of O 27 R 5
- meaning of O 3 R 1 Nn 3, 4, 5, 6; O 9 R 9 N 2
- memo. of—pleader O 3 R 4

Appearance
- non-appearance of parties O 9 Rr 2, 12
- one of several plaintiffs—non-appearance of O 9 R 10
- (by) one plaintiff or defendant for another O 1 R 12
- one of several defendants-non-appearance of O 9 R 11
- (of) parties O 9
  - applicability of provisions as to—
    - application to sue in *forma pauperis* O 9 R 4 N 5
  - failure—to appear for examination O 10 R 4 (2)
  - in person O 3 R 1
  - on day fixed in summons for defendant to appear and answer O 9 R 1
  - rules as to, applicability of, to execution proceedings O 9 R 1 N 1
- partners, where sued in firm name, O 30 R 6
- personal
  - appearance
    - exemption from Ss 132, 133
      - not to be ordered, when O 5 R 4
    - of defendant or plaintiff O 5 R 3
    - persons of rank, exempt from S 133 N 2
    - public officer, exempt from S 81 (*b*)
  - attendance, non-compliance of order of O 9 R 12
  - company—power to require personal appearance of officer of company O 29 R 3
  - consequence of non-attendance O 9 R 12
  - defendant—order for personal appearance O 5 R 3
  - direction by court for personal appearance of party — party's failure to appear—dismissal of suit upon O 10 R 4
  - exemption from
    - commission—examination on—when may be ordered O 26 R 1
    - court cannot refuse to recognize S 132 N 2
    - Ss 132 and 133 applicability to C P Land Revenue Act and Bombay Salt Act S 132 N 2
    - of certain persons
      - personal appearance of Ss 132, 133
    - of certain women S 132 N 1
    - of other persons S 133
    - of woman—
      - does not apply to personal attendance S 132 N 2
      - in criminal cases S 132 N 2
    - who are exempted O 26 R 1 N 3
  - for presentation of application for leave to sue in *forma pauperis* O 33 R 3
  - of parties, court's power to order—limits to O 5 R 4
  - of parties, direction of court as to O 5 R 3
  - persons exempted from—applying for leave to sue as pauper—

Appearance—PERSONAL
examintion of person on commission O 33 R 4
residence and appearance of party in person O 5 R 4
plaintiff alone appearing—procedure O 9 R 6
pleader, appearance of party by O 3 R 1
procedure where defendant has good cause of previous non-appearance O 9 R 7
(by) recognised agent or pleader O 3 R 1
restoration of suit when sufficient cause shown for non-appearance O 9 R 7
security for
appearance of defendant-extent of surety's liability O 38 R 2 N 5
appearance of defendant-form of O 38 R 2
defendant's appearance—application by surety to be discharged—procedure on O 38 R 3
defendant when may be required to give security O 38 R 2
when to be called for O 38 Rr 1, 2
where defendant may be called to give security O 38 R 1
under protest by supposed partner O 30 R 8

Appellate Court
See APPEAL

Application
See the respective topics concerned

Arbitration
See also UMPIRE
agent's authority to refer to Sch II P 1 N 19
agreement to abide by decision of court, effect of Sch II P 1 N 22
AGREEMENT TO REFER Sch II P 17
abatement of proceedings on death of party Sch II P 1 N 17
adjustment of suit if operates as S 89 N 4
applicability of rules as to stay of suit Sch II P 19
arbitrator's death or refusal to act—procedure on Sch II P 17 N 11
court cannot appoint umpire, if not provided Sch II P 17 N 13
effect of, in staying of suit Sch II P 18 N 1
future differences to arbitrators Sch II P 1 Nn 2, 10
future differences, not specifically enforceable Sch II P 18 N 1
if need be in writing Sch II P 17 N 7
must relate to matters within court's jurisdiction Sch II P 17 N 5
omission to register is irregularity Sch II P 17 N 16
omission to register, not revisable if acquiesced in Sch II P 17 N 16
revocation of reference, grounds for Sch II P 17 N 12
signing of, effect, when not signed Sch II P 1 N 21
stay of suit,
application for to be made at earliest opportunity Sch II P 18 N 3

Arbitration—AGREEMENT TO REFER—Stay of suit
court's discretion Sch II P 18 N 9
legal only when there is subsisting valid agreement Sch II P 18 N 7
order for can be revoked Sch II P 18 N 8
(by) Presidency Small Causes Court Sch II P 18 N 10
to be strictly construed Sch II P 17 N 10
without reference to litigation—how to be filed Sch II P 17
agreement relating to appointment of mutawalli, whether can be filed Sch II P 17 N 6
appeal—order, refusing to stay suit, owing to agreement to refer, is appealable S 104 (1) cl (e)
applicability of
O 1 R 8 O 1 R 8 N 25
O 9 R 13 to decree on award O 9 R 13 N 2
provisions of Specific Relief Act to Sch II P 18 N 1; P 22
application by parties to suit, for order of reference Sch II P 1
application for remitting award—limitation Sch II P 14 N 8
appointment of
court as arbitrator Sch II P 1 N 22
conditions necessary Sch II P 5 N 5
by court Sch II P 5 N 2
how to be made Sch II P 5 N 2; Sch II P 2 N 1
umpire, whether order revisable Sch II P 5 N 8
of new arbitrator Sch II P 5.
conditions of Sch II P 5 N 6
Arbitration Act and arbitration under Civil Procedure Code difference between Sch II P 1 N 2
Arbitration Act, applicability of, S 89 N 2
reference to arbitration—second schedule governed by S 89
ARBITRATOR
and commissioner, distinction between O 26 R 13 N 2
and valuer, difference between Sch II P 16 N 14
appointment of Sch II P 2
corruption or misconduct of Sch II P 15
death of Sch II P 5
difference of opinion among Sch II P 4
empowering of, to appoint an umpire Sch II P 4
fraudulent concealment Sch II P 15 N 10
incapacity to act procedure on Sch II P 5 N 4
leaving British India Sch II P 5
notice for appointment of new Sch II P 5
or umpire death of Sch II P 5 (1)
powers of Sch II P 6
to award costs Sch II P 13 N 1
to cease after award Sch II P 10 N 1
to get extension Sch II P 8
to set aside gift conditional on payment of compensation Sch II P 12 N 5
to state special case for opinion of court Sch II P 11

Arbitration—Arbitrator—Powers of

- to summon witnesses Sch II P 7 N 1
- when appointed by court Sch II P 6 N 1
- presence necessary at meeting Sch II P 10 N 2; P 4 N 2
- refusing to act Sch II P 5
  - effect of Sch II P 5 N 3
- statement of special case by Sch II P 11
- summoning of witnesses before Sch II P 7

AWARD

- after fixed period, effect of, Sch II P 15 N 12
- after suspending arbitration—effect of Sch II P S N 11
- against firm—execution of award O 21 R 50 N 3
- appeal from order filing or refusing to file private award whether lies from S 104 N 15
- application for setting aside, limitation for, to be counted from receipt of notice Sch II P 16 N 3
- application for setting aside, time for Sch II P 16 N 3
- application to file--whether security to produce document may be required from defendant O 38 R 5 N 2
- court's power to modify or correct Sch II P 12
- decree on,
  - before limitation period but with consent, effect of Sch II P 16 N 4
  - in case of claim on mortgage O 34 R 4 N 14
  - finality of Sch II P 16 N 4
  - mortgage-suit on O 34 R 5 N 5
  - setting aside—on payment of decree amount O 21 R 89 N 4
  - transferee of decree on award can apply for execution O 21 R 16 N 13
  - when revisable Sch II P 16 Nn 3,5,6,7,9
- delivery of, can be through parties Sch II P 10 N 5
- enforcement of, method of Sch II P 16 N 11
- execution, where award indefinite Sch II P 14
- execution of, stay of—pending suit between parties to award O 21 R 29 N 4
- expiration of period fixed by court where award is made after Sch II P 15
- extension of time for making Sch II P 8
- filing of, notice to be given to parties Sch II P 10 N 4
- filing of, without depositions and documents, if valid Sch II P 10 N 3
- fixing of time for making Sch II P 3 (1)
- form of Sch II App. Form N 5
- fraudulent concealment of matter which ought to have been disclosed S II P 15
- judgment and decree on S II P 16
  - making of, meaning of Sch II P 3 N 7
- may operate as *res judicata* Sch II P 16 N 10
- modification or correction,
  - by court, extent of power Sch II P 12 N 1
  - grounds of Sch II P 12 Nn 2, 3
- mortgage suit—provision as to application for final decree, whether apply O 34 R 4 N 14
- not remitted nor set aside—judgment to be on award Sch II P 16 N 2

Arbitration—Award

- notice of filing of Sch 2 P 10
- order correcting award appealability of S 104 N 12
- order on award stated as special case whether appealable S 104 N 11
- order refusing to remit an award referred through court—whether lies S 104 N 15
- part of award upon matter, not referred to arbitration Sch II P 12
- proceedings to file—splitting of reliefs and claims—bar due to, how far applicable O 2 R 2 N 32
- refusal to reconsider, if valid Sch II P 15 N 3
- remit, power to Sch II P 14
- remitted—failure to reconsider, effect of Sch II P 15
- remitting of Sch II P 14
  - application for, limitation Sch II P 14 N 8
  - private award, not permissible Sch II P 14 N 7
- second appeal, when lies Sch II P 16 N 8
- setting aside Sch II P 15
  - grounds for Sch II P 15 Nn 4, 5, 6, 7, 8
  - on ground of invalid reference Sch II P 15 N 13
  - procedure Sch II P 15 N 2
- to be signed and filed Sch II P 10
- signing of, how and when Sch II P 10 N 1
- signing of, not necessary for award out court Sch II P 10 N 1
- stranger, neither bound by nor can enforce Sch II P 16 N 10
- suit to set aside, if and when lies Sch II P 16 N 12
- superseding arbitration, where award is made after order Sch II P 15
- through court, remitting of, for reconsideration Sch II P 14 Nn 1, 3, 4, 5, 6
- valid though oral, if out of court Sch II P 10 N 1
- where award has left undetermined any of the matters referred to arbitration Sch II P 14 (*a*)
- without court's intervention Sch II P 20
  - appeal against decree on S 104 N 15; Sch II P 21 N 15
  - appeal to Privy Council, if lies on Sch II P 21 N 17
  - award lost, remedy of parties Sch II P 21 N 8
  - court-fee on application for filing Sch II P 20 N 17
  - enforcement of Sch II P 21
  - filing, notice necessary, to other parties Sch II P 20 N 13
  - form of Sch II P 21 N 6
  - limitation for filing Sch II P 20 N 18
  - majority award is invalid unless so agreed Sch II P 20 N 15
  - order filing or refusing to file award, appealability of S 104 N 15
  - part of award if, and when can be filed Sch II P 21 N 7
  - parties to reference Sch II P 20 N 16
  - pending suit O 23 R 3 N 9; Sch II P 20

Arbitration—AWARD—Without Court's intervention

person interested only can enforce Sch II P 20 N 9
person, not party, though deriving advantage, cannot enforce Sch II P 20 N 9
procedure on Sch II P 20 N 2
proceeding to file—nature of Sch II P 20 N 12
revocation of submission Sch II P 17 N 12
revision, if and when lies Sch II P 21 N 18
Small Cause Court can file Sch II P 20 N 11
subject-matter of award, nature of Sch II P 21 N 5
suit to enforce
  jurisdiction of court Sch II P 20 N 10
  limitation for Sch II P 20 N 4
validity of reference and award Sch II P 21 N 4
whether operates as *res judicata* S 11 N 27; Sch II P 21 N 11
withdrawal of application Sch II P 1 N 15; P 20 N 12
concealment, fraudulent by arbitrator Sch II P 15 N 10
corruption—meaning of—in reference to arbitration Sch II P 15 N 5
costs of Sch II P 13
court acting as arbitrator—decree by, not appealable Sch II P 16 N 3
COURTS POWER
  to appoint arbitrator Sch II P 5
  to issue commission to examine witness, pending arbitration O 26 R 1 N 6
  to modify or correct award, limitation for Sch II P 12 N 6
  to order costs Sch II P 13 N 2
court shall refer matter in difference, by order Sch II P 3
death of arbitrator or umpire Sch II P 5
death of party, if operates as revocation of reference Sch II P 1 N 17
decision of majority, if prevails Sch II P 4 N 2
decree based upon invalid award—applicability of Sch II P 16 N 6
decree not in accordance with award—appeal lies Sch II P 16 N 5
decree on award on reference under agreement to refer, not appealable Sch II P 17 N 15
decree on award
  without hearing objections
    appealability of Sch II P 16 N 7
    revisability of Sch II P 16 N 7
delegation of duty by arbitrators Sch II P 4 N 5
disobedience to summons to attend before, consequence of Sch II P 7
evidence of arbitrator Sch II P 15 N 9
execution, when award indefinite Sch II P 14
extension of time
  by court, can be implied Sch II P 8 N 3
  estoppel regarding Sch II P 8 N 4
  oral application not permissible Sch II P 8 N 3
  permissible before award actually made Sch II P 8 N 3
filing of agreement to refer Sch II P 17

Arbitration—FILING OF AWARD

filing of award Sch II P 10
fixing time, meaning of, for making of award Sch II P 3 N 5
form of agreement to refer Sch II P 1 N 21
fraudulent concealment by arbitrator Sch II P 15 N 10
guardian's authority to refer to Sch II P 1 N 20
manager's authority to refer to Sch II P 1 N 20
matters outside the suit cannot be referred Sch II P 1 N 11
misconduct,
  meaning of—in reference to arbitration Sch II P 15 Nn 5, 6, 8
notice to be given to parties Sch II P 10 N 4
order filing agreement to refer is appealable Sch II P 17 N 15
order filing or refusing to file an agreement to refer to arbitration—appeal S 104 N 13

ORDER OF REFERENCE
  form of Sch II App Form No 2
  in a suit Sch II P 3
    on an agreement to refer, Sch II Pp 17, 18
    application to file agreement Sch II P 17
    appointment of arbitrator Sch II P 17
    effect of Sch II P 3 (2) N 8
    notice of application to file Sch II P 10
    stay of suit Sch II P 18
    superseding Sch II Pp 5, 15
order revoking reference to arbitration or agreement to refer not appealable Sch II P 17 N 15
parties—misjoinder and non-joinder of, in arbitration proceedings—effect O 1 R 9 N 8
(by) parties to suit Sch II P 1
pleader's authority to refer Sch II P 1 N 18
provisions of S 89; Sch II
PROVISIONS RELATING TO
  applicability to execution proceedings Sch II P 1 N 4
  applicability to insolvency proceedings Sch II P 1 N 3
  applicability to probate proceedings Sch II P 1 N 5
  applicability to restitution of conjugal rights Sch II P 1 N 6
  applicability under various acts Sch II P 1 N 6 A
  construction and effect of Sch II P 1 N 2
REFERENCE TO
  compromise of suit pending arbitration O 23 R 3 N 13
  dismissal of suit for failure to appear on day fixed for hearing, pending the arbitration O 9 R 3 N 5
  how far governed by Schedule II S 89
  matters outside suit cannot be referred to arbitration Sch II P 1 2
  must be by all interested persons Sch II P 1 N 7
  must be before judgment Sch II P 1 N 13
  not permissible, on remand Sch II P 1 N 16
  two or more arbitrators—provision for difference Sch II P 4 N 1
  withdrawal of suit after Sch II P 1 N 15

Arbitration—REFERENCE TO
    without intervention of court—leave of court—where a party is a minor O 32 R 7 N 15
  REMITTING AWARD Sch II P 14
    application for—limitation Sch II P 14 N 8
    award through court for reconsideration-grounds of Sch II P 14 Nn 1, 3, 4, 5, 6
    failure to reconsider,—effect of Sch II P 15
    private award, not permissible Sch II P 14 N 7
  revocation of submission, if permissible Sch II P 1 N 14
  submission to—whether compromise of suit O 23 R 3 N 9
  in suits Sch II
  suit by or against firm—reference to arbitration O 30 R 1 N 11
  suit under S 92—*See* TRUST
  summoning witnesses, by court, to be as, in suit Sch II P 7
  superseding arbitration, when permissible Sch II P 5 N 7
  superseding reference, permissible by court, instead of extension of time Sch II P 8 N 5
  UMPIRE
    appointed by court, powers of Sch II P 6 N 1
    appointment of Sch II P 4
    when to arbitrate Sch II P 9
  UMPIRE'S AUTHORITY
    to extend time Sch II P 4 N 4
    to make award, extent of Sch II P 4 N. 3
  UMPIRE'S POWER Sch II P 6
  on failure of arbitrators Sch II P 9 N 1
  under other acts than C. P. C. Sch II P 1 N 6 A; Sch II P 14 N 11
  withdrawal of suit pending O 23 R 1 N 23

Arbitration Act.
  saving of the provisions of S 89

Arbitrator.
  arbitrator's powers Sch II P 6

Army
  suit by or against member of—procedure O 28

Arrest
  appearance of debtor
    procedure on appearance of, in obedience to notice or after arrest S 55 O 21 R 40
  BEFORE JUDGMENT S 94 O 38 Rr 1, 4
    appeal from orders relating to O 43 R 1 (q).
    avoidance of O 38 R 1
    compensation for wrongful arrest S 95
    defendant, when, may be arrested O 38 R 1
    period of detention in prison O 38 R 4
    procedure on failure to furnish security O 38 R 4
    security,
      order to furnish, for appearance O 38 R 2
      where defendant fails to furnish O 38 R 4
    subsistance money O 21 R 39 N 2
    summary suit—counter claim for compensation—if ground for granting leave to defend S 95 N 12
    surety—procedure on application by, to be discharged O 38 R 3

Arrest—BEFORE JUDGMENT
    when may be ordered O 38 R 1
  DETENTION Ss 55, 59
    appeal from order for S 104
    of judgment-debtor in civil prison S 55
    (for) obstruction to execution S 74
    period of, in civil prison S 58
  directors, in decree against corporation O 21 R 32
  discharge from debt, release under S 58 is not S 58 (2)
  discharge of judgment-debtor from O 21 R 40
  discretion of court
    conjugal rights, decree for restitution of O 21 R 33
    judgment-debtor, when unable to pay—court may disallow application for arrest O 21 R 40
    to permit judgment-debtor to show cause against detention in prison O 21 R37
  disobedience of injunction O 39 R 2
  disobedience of summons—defaulting witness O 16 R 10 (3)
  IN EXECUTION S 55, O 21 Rr 37, 40
    decrees enforceable by detention in prison O 21 Rr 30-32
    insolvency of judgment-debtor, procedure S 55
  EXEMPTION FROM S 135
    ambassador or envoy of foreign state 86
    (under) civil process S 135
    exemption does not apply in case of contempt for court S 135 N 3
    claim to, disallowed, appeal lies S 135 N 10
    foreign Prince, Chief etc. not liable to arrest S 86 (3)
    judge etc.—while going to or attending tribunal and while returning therefrom, meaning of S 135 N 4
    judge, magistrate or judicial officer S 135
      —not exempt from process for contempt of court S 135 N 3
    judgment-debtor returning from jail on release can be arrested S 135 N 5
    judicial officers, parties, pleaders and witnesses S 135
    members of legislative bodies 135 A
    pardanashin women S 132
    public officer, when S 81
    women Ss. 56, 132
  immediate execution by O 21 R 11 (1)
  (of) judgment-debtor on decree for payment of money O 21 R 11 (1)
  JURISDICTION
    persons out side district S 136
    person residing beyond S 136
    where person to be arrested is outside—and arrest is to be made in execution of a decree S 39
    where it is to be made under other provisions of the code S 136
  not in execution Ss 94, 134
  notice before arrest O 21 R 37
  order for—appeal lies from S 104 (1) (h)
    person outside local limits—procedure S 136 Nn 3, 6

Arrest
  procedure for—breaking open of outer door for S 55, 2nd proviso
  provisions relating to, of judgment-debtors (Ss 56, 57, 59) applicable to all arrests under code S 134 N 1
  RE-ARREST S 58 O 21 R 45
    of judgment-debtor S 58 O 21 R 40
    liability of S 59 O 21 R 27
    non-liability S 58
  RELEASE FROM S 39, S 50
    contagious-disease S 59 (3) (*a*)
    effect of S 58 (2)
    grounds—illness S 59
    of judgment-debtor Ss 58, 59
    not a discharge of debt S 58 (2)
    satisfaction of decree S 58 (1)
  SUBSISTANCE ALLOWANCE S 57 O 21 R 39
    how and when paid O 21 R 39
    omission to pay—release of judgment-debtor S 58
    payments to be made in advance O 21 R 39
    scales of S 57
    to be costs in the suit O 21 R 39
    to be paid into court before arrest O 21 R 39
  surety for appearance of judgment-debtor under arrest S 55 (4)
  second arrest—judgment-debtor already under arrest, can be arrested in other decree S 135 N 5
  WARRANT OF O 21 R 38
    cancellation of S 59 (1)
    contents of O 21 R 38
    for disobeying summons S 32
    may be cancelled on the ground of serious illness S 59
  WRONGFUL
    application on sufficient grounds S 95
    compensation for S 95 (*a*)
      amount and basis of S 95 N 7
      application for—limitation S 95 N 14
      before judgment S 95
      grant of S 95
      remedy S 135 N 9
      what court can grant S 95 N 8

Assessors
  in admiralty and vice admiralty cases S 140
  in salvage towage, or collision, causes S 140

Assets
  See RATEABLE DISTRIBUTION
  distribution of—in execution S 73

Assignment
  pendente-lite O 22 R 10

Association
  See COMPANY

Attachment S 94
  appointment of receiver effect of on—*See* RECEIVER
  ATTACHABLE PROPERTY S 60 (*a*) to (*p*)
    agricultural produce S 61 O 21 R 44
    damages, right to sue for S 60 (1)
    debt S 60 (1)
    expectancy of succession S 60 (1)

Attachment—ATTACHABLE PROPERTY
    judgment-debtor—examination of, as to his property O 21 R 41
    maintenance, right to future S 60 (1)
    mesne profits before determination of amount of O 21 R 42
    native army—pay and allowances of soldiers and followers of, exempt from S 60 (1)
    property of public officer in suit against S 81
    property outside jurisdiction—where it is to be attached under other provisions of Ss 39, 136
    property in hands of receiver, *See* RECEIVER
    property liable to attachment and sale in execution S 60
    property not liable to attachment and sale S 60
    provident fund, compulsory deposits in, S 60 (1)
  BEFORE JUDGMENT S 94 O 33 Rr 5-13
    agricultural produce—exemption of O 38 R 12
    appeal O 38 R 5 N 24
    appeal from orders relating to O 43 R 1 (*q*)
    applicability of provisions to miscellaneous proceedings O 38 R 5 N 2
    application for leave to sue as pauper—applicability of provisions as to O 38 R 5 N 5
    claim and objection O 38 R 8
      claim proceedings whether abates by dismissal of suit O 38 R 9 N 1
      if can be raised after decree O 38 R 11 N 4
      investigation of 38 R 8
      procedure O 21 R 63 N 6
      whether raised afterwards O 38 R 11 N 4
    compensation for wrongful attachment, S 95
    conditional attachment O 38 R 5 N 23
      when may be ordered O 38 R 5
    continues after decree O 38 R 11
    deposit into court—liability for rateable distribution O 38 R 5 N 19
    divorce cases O 38 R 5 N 4
    effect of attachment O 38 R 5 N 18
    effect on strangers O 38 R 10
      right of survivorship if affected O 38 R 5 N 21
      transfer of property O 38 R 5 N 7
    insolvency court—power of, to order O 38 R 5 N 10
    insolvency proceeding—effect of vesting order O 38 R 5 N 20
    jurisdiction, property situated outside O 38 R 5 N 17
    mode of making O 38 R 7
    mortgage suit O 38 R 5 N 3
      personal liability of mortgagor—right of mortgagee to attach non-mortgaged properties before date fixed for payment of mortgage money under decree for sale O 34 R 6 N 9
    notice to show cause O 38 R 5

Attachment—Before judgment

- property to be attached, specification of, O 38 R 5 (2)
- re-attachment after decree O 38 R 11
  - whether necessary O 38 R 11
  - whether operates as waiver of attachment O 38 R 11 N 3
- removal of O 38 R 9
  - dismissal for default of application for execution—effect O 21 R 57 N 8
  - on suit being dismissed O 38 R 9
  - when ordered, O 38 Rr 6 (2), 9
  - when security furnished O 38 R 9
- revival of—dismissal of suit, reversal of judgment in appeal—attachment if revives S 64 N 9
- sale of property under O 38 R 10; O 39 R 6
  - right of decree-holder O 38 R 10
- security for production of property—when defendant may be called upon to give O 38 R 5
- Small Causes Court—powers of S 7 N 6; O 38 R 13
- unconditional order of attachment O 38 R 6
- when may be made, O 38 Rr 5, 6
  - where cause not shown or security not furnished O 38 R 6
- wrongful attachment—liability for O 38 R 5 N 22

CLAIMS AND OBJECTIONS TO

- evidence—in support of O 21 R 59
- investigation of O 21 Rr 58-63
  - claim, when to be allowed, O 21 R 60
  - claim, when to be disallowed, O 21 R 61
  - order allowing or disallowing claim, when conclusive, O 21 R 63
  - sale, postponment of, pending enquiry into claim O 21 R 58 (2)
  - suit, declaratory, by defeated party, O 21 R 63
  - third party, where objection to attachment is made by O 21 R 58
  - trust, property held upon, O 21 R 60
- mortgage claim, continuance of attachment subject to, O 21 R 62
- objection when allowed, O 21 R 60
- objection, when disallowed O 21 R 61
- objector—to adduce evidence O 21 R 59

continuance of default in proceeding with execution after O 21 R 57; O 21 R 62

decree—adjustment of attached decree, when ineffectual O 21 R 53 (6)

DISOBEDIENCE OF ORDER

- attachment to compel party to obey commissioner's order O 26 R 11 N 4
- defaulting witness, O 16 Rr 10, 12
- disobeying order granting injunction, O 39 R 2 (3)
- disobeying summons, S 32
  - witness O 16 Rr 10 (3), 13
- to enforce appearance of defendant S 94 (b)
- failure of duty by receiver O 40 R 4

Attachment—Disobedience of order

- temporary injunction O 39 R 2

EFFECT OF

- private, alienation after S 64
- suits to recover property under, Venue S 16 (*f*)
- transfer of attached property, S 64
- effect on strangers—strangers not affected O 38 R 10

IN EXECUTION O 21 Rr 41-63

- decrees of several courts under S 63
- not necessary if property attached before judgment O 38 R 11

JURISDICTION

- property in the hands of receiver—what court can attach—*See* RECEIVER

precepts S 46 N 1

preliminary decree for possession and rents, attachment under O 21 R 42

PROCEDURE AND MODE

- attachement of land registered in office of collector O 21 R 14
- breaking open of outer door for seizure of S 62 (2)
- crops cut and gathered O 21 R 44 (*b*)
- current coin and currency notes O 21 R 56
- debt O 21 R 46 (*a*)
- decrees O 21 R 53
- decree against firm O 21 R 50
- decree for rents or mesne profits; attachment under O 21 R 42
- growing crop, O 21 R 44 (*a*)
  - which cannot be stored, O 21 R 45 (5)
- immovable property, O 21 R 54
  - particulars of, to be given in application for O 21 R 13
- land paying revenue to Government, attachment of, O 21 R 54
- money decree, O 21 R 41
- movable property O 21 R 43
- movables not in judgment-debtor's possession O 21 R 46 (*c*)
- negotiable instruments, attachment of O 21 R 51
- partnership property, when attachable, O 21 R 49 (1)
- preperty attached in execution of decrees of several courts, S 63
- property beyond juridiction S 136
- property in custody of court or public officer O 21 R 52
- property in dwelling-hous S 62
- property not in judgment-debtor's possession O 21 R 12
- property of witness disobeying summons O 16 R 13
- property outside local limits S 136 N 37
- property subject to decay O 21 R 43 proviso
- salary of public officer or railway servant or servant of local authority, S 60 (1); O 21 R 48
- salary or allowance O 21 R 48
- share in corporation O 21 R 46 (1)
- share in joint property, O 21 R 13 (*b*)
- share in movables O 21 R 47

Attachment
- release from O 21 R 57—60
- removal of O 21 R 55
  - after satisfaction of decree O 21 R 55
- seizure of property in dwelling-houses S 62
- suit to set aside—parties to O 1 R 10 N 27
- suits-in respect of O 21 R 63
- warrant of, O 21 R 24
- WRONGFUL
  - application on insufficient grounds S 95
  - compensation for S 95
  - limitation S 95 N 14
  - grant of S 95
  - Small Causes Court, if can grant S 75 N 9

Attorney
- service of process—High Court, original side O 49 R 1
- right to address court L P Cls 9, 10

Award
- *See* ARBITRATION

Bailiff
- delegation of authority by O 21 R 24 N 3

Bankers' Book
- meaning of O 7 R 17 N 1

Bankers' Books Evidence Act, 1891 O 7 R 17; O 11 R 18 N 5; O 13 R 5

Bar Councils Act
- Letters Patent Cls 9 and 10, relation to L P Cls 9, 10 N 1

Bar of suit
- application for leave to sue as pauper refused—suit on same cause of action, if barred O 33 R 15
- compensation for wrongful arrest, attachment or injunction—suit for, when barred S 95
- dismissal of suit for default O 9 R 9
- further suit S 12
- objection as to—bar under S. 66—when can be raised S 66 N 20
- PRIOR SUIT
  - abatement of second suit if barred O 22 R 9
  - decree for money in respect of claim arising under mortgage—fresh suit for sale not barred O 34 R 14
  - dismissal of, for failure to pay process fees—bar if applies O 9 R 4
  - dismissal—fresh suit when not barred O 9 R 4
  - omission of reliefs—further suit when barred O 2 R 2 N 22
  - minor—guardian—minor if barred O 2 R 2 N 11
  - mortgage suit—further suit for overpayment or mesne profits if maintainable O 34 R 9 N 3
  - rejection of—fresh plaint, not barred O 7 R 13
  - rejection of plaint—does not preclude fresh suit O 7 R 13
  - withdrawal of further suit, bar of O 23 R 1
- questions in execution of decree S 47 (1)
- rules precluding institution of further suits S 12 N 2
- second suit Ss 11, 12

Bar of Suit
- SPLITTING OF CLAIMS O 2 R 2 N 36
  - bar due to
    - burden on defendant to prove bar O 2 R 2 N 27
    - illustrations O 2 R 2 N 26
- splitting of reliefs—bar due to—suits on different causes of action O 2 R 2 N 23
- suit to adjust account in cases where, by interlocutory order party is immediately placed in possession of property pending decision of suit O 39 R 9 N 1

Barrister
- High Court—eligibility to be judges of H C S 2
- High Court—one-third of judges to be H C S 2
- meaning of H C S 19

Bengal Tenancy Act
- decree under—execution of—form of application O 21 R 11 N 2-A
- proceedings under
  - application of O 9 O 9 R 9 N 6
  - claim of set off O 8 R 6 N 12

Benami S 66 N 21
- BENAMIDAR
  - discovery—order for or against O 11 R 13 N 15
  - party—whether necessary, in suit relating to mortgage O 34 R 1 N 8
  - purchase by decree-holder benami at execution sale O 21 R 72
  - suit against certified purchaser as S 66
  - suit by or against—parties to O 1 R 10 N 27

Bench of Judges
- appeal heard by—difference of opinion —procedure S. 98

Bill of Exchange
- costs—recovery of noting non-acceptance of dishonoured O 37 R 6
- suit on—joinder of parties liable on same O 1 R 6
- suit on—summary suit O 37 R 2

Bombay Pleaders Act O 3 R 4 N 18

British India
- administrator residing outside—
  - suit against administrators—parties, O 31 R 2
- appellant residing outside—security for costs O 41 R 10
- arbitrator leaving Sch 2 P 5 (1)
- court outside—execution in, of decree passed by S 44
- defendant about to leave—arrest before judgment O 38 R 1 (*b*)
- defendant residing outside—service of summons on O 5 R 25
- firm carrying on business outside—suit by or against—plaint in name of firm O 30 R 1 N 6
- firms, suits by and against, carrying on business in O 30 R 1
- meaning of S 1 N 1
- plaintiff residing outside—security for costs O 25 R 1
- property situated outside—attachment before judgment if can be ordered O 38 R 5 N 17

British India
- residence outside—meaning of, for purposes of security for costs O 25 R 1
- umpire leaving Sch 2 P 5 (1)
- witness residing outside—commission to examine O 26 R 5

Burden of proof
- failure to discharge—effect O 18 R 2 N 1

Burial
- right to—suit for—if of civil nature S 9 N 25

Business
- suit against person carrying on, in name other than his own O 30 R 10

Cantonment Committee
- whether public officer S 2 (17)

Case
- agreement to state—disposal of case stated O 36 R 5
- to be stated O 36 R 1
- statement of case—on production of evidence O 18 R 2
- stating of S 90; O 36 R 1
  - by arbitrators Sch II P 11
  - for court's decision—power to state case S 90
  - for High Court's opinion S 113

Caste
- expulsion from—suit relating to S 9 N 46
- suit on behalf of O 1 R 8 N 3

Caste Property
- accounts, inspection of—suit for S 9 N 45
- suit relating to S 9 N 44

Caste questions
- suit involving S 9 N 43

Cause of action
- *See also* PLACE OF SUING
- decree not to be reversed in appeal for misjoinder of S 99
- different causes of action, separate trials of O 2 R 6
- inclusion of whole claim in one suit—co-contractor, decree against, if precludes suit against another co-contractor O 1 R 6 N 6
- JOINDER OF O 2 R 3; L P cl. 14
  - of defendants O 2 R 3
  - power of court to order separate trials O 2 R 6
  - scope of Order 1 O 1 R 3 N 2
  - several causes of action in the same suit—relief in respect of, statement of, in plaint O 7 R 8
  - suit for recovery of immovable property O 2 R 4
  - under the Letters Patent L P cl. 14
- MEANING OF O 2 R 2 N 7; O 33 R 15 N 4
  - continuous course of dealing O 2 R 2 N 10
  - obligation and collateral security constitute one cause of action O 2 R 2 N 8
  - several transactions—forming one continuous dealing O 2 R 2 N 10
  - successive claims arising under same obligation constitutes one cause of action O 2 R 2 N 9

Cause of Action
- MISJOINDER
  - decree not to be reversed for S 99
  - effect of O 2 R 3 N 14
  - effect of O 1 R 9 on O 1 R 9 N 2
  - if ground for appeal—*See* APPEAL
  - (and) parties—generel O 2 R 3 Nn 6, 7, 8
  - objection as to, when to be taken O 2 R 7
- obligation and collateral security constitute one O 2 R 2 N 8
- pauper, rejection of application to sue as—if no cause of action. O 33 R 5 (d)
- plaint must contain facts constituting, O 7 R 1 (e)
- plaintiff seeking relief in respect of several distinct causes O 7 R 8
- rejection of plaint for not disclosing O 7 R 11 (a)
- separate trials of different causes of action O 2 R 6
- splitting of O 2 R 2
- subsequent events—relief O 7 R 7 N 4
- successive claims arising under same obligation, O 2 R 2 Expln
- suits, rules precluding further, on same cause of action, S 12
- suits to be instituted when arises wholly, or in part, S 20
- what claims to be joined with claims for recovery of immovable property, O 2 R 4
- whole claim, inclusion of O 2 R 1 N 3

Central Provinces Land Revenue Act
- warrant issued under O 21 R 24 N 7

Certificate
- of fitness or value for appeal to Privy Council O 45 R 3
- for appeal to Privy Council—refusal of O 45 R 6
- sale, certificate of, to bear date on which sale becomes absolute, O 21 R 94
- sale, certificate of, to purchaser at court sale O 21 R 94

Certification
- of adjustment of decree O 21 R 2

Charge
- enforcement of O 34 R 15
  - money decree for claim under charge—sale of property in execution not permissible O 34 R 14 N 3
- interpleader suits, when plaintiff entitled to a charge for costs in, O 35 R 6
- meaning of O 34 R 15 Nn 3, 4, 5, 6, 9, 10
  - invalid mortgage, if creates a decree O 34 R 15 N 8
- mortgagee's charge on surplus sale proceeds on sale of mortgaged properties for arrears of revenue or rent O 34 R 15 N 13
- O 34 applies to O 34 R 15
- party to suit—paying revenue due on suit land to prevent sale for arrears, whether entitled to charge O 39 R 9 N 1
- pauper suits, of Government for court-fees in O 33 R 10
- suit to enforce—applicability of provisions relating to simple mortgage O 34 R 15
- suit to realise charge on immovable property O 34 R 15

Charitable and Religious Trusts Act, S. 9 S 92 N 2

Charities

suit in respect of Ss 92, 93
suits relating to public S 92

Chartered High Courts

See also HIGH COURTS
admiralty and vice-admiralty jurisdiction, L P cls. 32, 33
advocate-general, grant of certificate in criminal cases, L P cl. 26
advocates, vakeels and attorneys--powers of, in admitting, L P cl. 9
appeal from courts in the province L P cl. 16
appeal from High Court of original jurisdiction to High Court in its appellate jurisdiction L P cl. 15
appeal from criminal courts in the province L P cl. 27
appeal, none, from High Court exercising original criminal jurisdiction L P cl. 25
appearance of suitors, L P cl. 9
applicability of S. 95 to S 95 N 11
applicability of Sch I O 49 R 2
civil jurisdiction of L P cls. 11--21
Code, extent of application of, to Ss 117; 120; O 49 R 3
constitution of H C S 2
criminal jurisdiction L P Cls 22—30
decree, contingent upon decision of High Court O 46 R 2
establishment of, in several presidencies in India, H C S 1
establishment of, other High Courts in India H C S 16
execution by, of decrees transferred by other courts, O 21 R 9
execution of decree before ascertainment of costs S 118
extraordinary original civil jurisdiction L P Cl 13
infants, jurisdiction as to L P Cl 17
insolvent court, provisions with respect to L P Cl 18
joinder of several causes of action under the Charter L P Cl 14
judges, clerks and ministerial officers of High Court, L P Cls 3, 4
judges of, declaration to be made by, L P Cl 5
judges of, provision as to appointment, etc, H C Ss 2—6; Govt. I Ss 101—105
judges, when equally divided, opinion of senior judge prevails L P Cl 36
jurisdiction
  and powers of, H C S 9; Govt. I S 107
  appellate, as to appeals from original suits L P Cl 15
  appellate, from courts in the province L P Cl 16
  exercise of, not at usual place of sitting L P Cl 31
law to be administered by the Chartered High Courts. L P Cls 19—21
Letters Patent, High Courts to be established by H C S 1
lunatics, jurisdiction as to L P Cl 17
matrimonial jurisdiction L P Cl 35
offenders to be punished under the Indian Penal Code L P Cl 30
officers, appointment of, L P Cl 8
opinion of High Court, power to refer case for S 113

Chartered High Courts

ordinary and extraordinary jurisdiction S 120 N 3
original jurisdiction, local limits of, L P Cl 11
original civil jurisdiction as to suits L P Cl 12
  what is S 120 N 3
original side—right of audience in,—not controlled by code S 119 Nn 1, 3
powers of
  Indian legislature, preserved, L P Cl 44
  single judges and division courts, L P Cl 36
PRIVY COUNCIL
  appeals to, L P Cls 39—42
  in criminal cases L P Cl 41
  from decree or final orders of, S 109
  rules as to transmission of documents to L P Cl 42
  provisions of code applicable to—Ss 116, 117
provisions relating to Ss 116—120 (Part IX); O 49
reference of questions as to jurisdiction in Small Causes O 46 R 6
referred cases, hearing of, L P Cl 28
regulation of criminal proceedings L P Cl 38
requisition for records by Government to be complied with L P Cl 43
reserving points of law for opinion of, in criminal trials before High Court in its original criminal jurisdiction L P Cl 25
review by High Court in criminal cases L P Cl 26
revision, powers of High Court as to S 115
revocation of Letters Patent of L P Cl 1
rules in Sch I of the Code, how far applicable to O 49 R 3
rules of practice for subordinate courts to be framed by High Court, Govt I S 107
rules, power of Chartered High Courts to make, as to their original civil procedure S 129; L P Cl 37
rules, power to make for original side S 129 N 2
saving in respect of O 49 R 2
seal of High Courts L P Cl 6
Ss 16, 17, 20, of Code not applicable to, original side of S 120 N 2
security for costs in L P appeals, O 41 R 10 whether applies S 117 N 1
service of certain processes of O 49 R 3
Small Cause Courts are subordinate to S 3
special provisions in code, relating to Ss. 116—120
supreme courts, provisions applicable to, to apply to Chartered High Courts, H C S 11
testamentary and intestate jurisdiction, L P Cl 34
transfer of criminal case or appeal, L P Cl 29
transfer of suits or appeals by, S 24; H C S 15; L P Cl 13
transfer of suit from court in which it is filed to another court, where such courts are under different High Courts S 23 (3)
unauthorised persons not to address, S 119
writs, etc, to issue in name of the crown, L P Cl 7

Cheque
  attachment, liable to, in execution of decrees S 60 (1)
Chiefs (Ruling) and Princes
  See also PRINCE
  agents recognised, who may act as, for, S 85
  arrest, exemption from, S 86 (3)
  attachment of property of S 86 (3)
  consent of Governor General in Council, for suits against S 86
  execution of decrees in territories of foreign Prince or State S 43
  execution of decrees passed by courts of Native States S 44
  provisions of code as to minors and lunatics do not apply to O 32 R 16
  style of Princes and Chiefs as parties to suits S 87
  suits against, S 86
  suits by, S 84
  suits by or against not governed by O 32 O 32 R 16
Chota Nagpur Tenancy Act
  decree under
    execution of—application for—form and contents of O 21 R 11 N 2-A
    requirements O 21 R 13 N 2
  execution—cross claim under same decree passed under the Act O 21 R 19 N 1
  plaint return of—in proceedings under O 7 R 10 N 1
  proceedings under—amendment of pleadings, in O 6 R 17 N 1
Civil Nature
  co-sharer—suit relating to contribution by—one of civil nature S 9 N 31
  suit of a S 9
  suit of—common law rights—suit for—if of civil nature S 9 N 22
Civil Prison
  for disobeying summons S 32 (d)
Civil Procedure Code
  See also Code
  APPLICATION OF S 1
    to Chartered High Courts, S 120; O 49 R 3
    to High Courts S 117
    to proceedings in any courts of civil jurisdiction S 141
    to Small Cause Courts Ss 7, 8
    to Revenue Courts S 5
  Code not retrospective in certain matters R 157
  commencement of the Code S (2)
  (as) distinguished from rules, S 2 (1)
  does not limit or affect any special or local law S 4
  extent of the Code S 1 (3)
  inherent powers of courts, provisions of Code not to affect S 151
  limiting or affecting remedy of landholder or landlord, if S 4
  limiting or affecting special or local law or special jurisdiction, if S 4
  miscellaneous proceedings, procedure in Code for suits, to apply to, S 141
  non-applicability of S 4
Civil Procedure Code
  Presidency Small Cause Courts Act—provisions made applicable S 8 N 5; O 51
  procedure prescribed by—if affected by special procedure S 4 N 3
  Provincial Small Cause Courts, extent of application of, to, S 7; O 50
  reference to old or other enactments S 151
  retrospective effect of S 155
  Revenue Courts—applicability to S 5 N 1
  rules are included in "Code" S 2 (1)
Civil Rights
  meaning of S 9 N 16
Civil Servant
  is a public officer S 2 (17)
Civil suit
  nature of S 9 N 16
Claim
  abandonment of part of O 23 R 1
    bar of fresh suit—mortgage suit—further suit for over-payments or mesne profits if maintainable O 34 R 9 N 3
  by or against executor, administrator or heir O 2 R 5
  arising under mortgage, decree for O 34 R 14
  (TO) ATTACHED PROPERTY O 21 R 58
    disallowance of O 21 R 61
  COUNTER CLAIM O 8 R 6 N 15
    by defendant, security for costs if may be required from defendant O 25 R 1 N 13
  cross claims—under same decree—in execution O 21 R 19
  enforceable under attachment S 64
  frame of suit
    relinquishment of claim O 2 R 2 N 12
    relinquishment of part of claim in framing suit O 2 R 2
  investigation by collector Sch III P 4
  investigation of claims to attached property O 21 R 58
  investigation of claims to property attached before judgment, O 38 R 8
  omission to sue for portion of arrears of rent—subsequent suit for the same barred O 2 R 2 Ill
  omission to sue in respect of a portion of a claim O 2 R 2 (2)
  relinquishment of part, by plaintiff to bring suit within jurisdiction O 7 R 10 N 1
  relinquishment of part of claim bars further suits O 2 R 2
  sale in execution, postponement of, pending inquiry into claims O 21 R 58 (2)
  suit to include the whole claim O 2 R 2
Client
  death of client or pleader—puts an end to appointment O 3 R 4 (2)
Club
  See COMPANY
Code
  See also CIVIL PROCEDURE CODE
  definition of S 2 (1)
  enactments amended, schedule of, S 155; Sch IV

Code
- (and) rules, distinction between S 2 (1)
- rules in Sch I
  - adding to, altering, or annulling Ss 122, 125-131

Co-defendant—*See* PARTIES

Collector
- accounts, rendering of, to court, Sch III P 9
- alienation, prohibition as to, pending execution by Sch III P 11
- assets, inquiry as to, in execution proceedings Sch III P 4
- collector as manager of minor's estate—is public officer S 2 (17) Notes
- debts, inquiry as to, in execution proceedings Sch III P 4
- decree for money, procedure for liquidation of Sch III P 7
- decrees transferred—powers of collector in executing Sch III P 1
- decrees, transfer of, for execution by S 68
- decree-holders, notice to, in certain cases by Sch III P 3
- deemed to act judicially in executing decrees S 71
- delegation to—of power to execute S 68
- district court, when may issue notices and enquire instead of Sch III P 5
- districts, where property to be sold is in several Sch III P 12
- EXECUTION BY Sch III
  - alienation
    - restricted, pending execution by collector S 72 (1); Sch III P 11
    - application to set aside sale on ground of judgment-debtor's want of title, to whom to be made O 21 R 91 N 6
  - attendance—of parties and witnesses before collector Sch III P 13
  - conduct—of sales by collector Sch III P 10
  - dispossession of person other than judgment-debtor under order of collector—remedy O 21 R 100 N 4
  - investigation of claims by collector Sch III P 4
  - liquidation of decrees, scheme for Sch III P 7
  - property in several districts Sch III P 12
  - rules as to transfer of decrees to collector for execution Ss 68, 70
  - sale—applicability of rules as to proclamation of O 21 R 70
  - sale by collector—confirmation O 21 R 92 N 11
  - sale—setting aside by depositing decree amount O 21 R 89 N 9
  - schedule III of the code applies to decrees transferred to collector S 69
- (to) exercise powers of advocate-general, when S 93
- (if can) institute suit on behalf of Secretary of State O 27 R 2 Nn 1 2
- judicially, deemed to be acting, in executing transferred decrees S 71
- jurisdiction of civil courts, barred as to collector's powers S 70 (2)
- local government, rules for execution of decrees by collector, to be made by S 70
- may be appointed receiver, when O 40 R 5
- nuisance, consent of collector to suit relating to S 93

Collector
- owner, when collector may exercise powers of Sch III P 7 (2)
- partition by, of estate paying revenue to Government S 54
- pauper suit, when a copy of decree in, to be sent to O 33 R 14
- personal assistant to collector—power of O 27 R 2 N 1
- powers in execution Sch III P 1
- power in special cases Sch III P 2
- powers of
  - to compel attendance and production Sch III P 13
  - in execution proceedings not exercisable by civil court S 70 (2)
- public charities, suit relating to, consent of S 93
- receiver, when collector may be appointed O 40 R 5
- recovery of balance by collector Sch III P 8
- sales in execution, how to be conducted by Sch III P 10
- scheme of liquidation of decrees for payment of money Sch III P 7
- statement by collector to district court Sch III P 5
- stay in certain cases of public sale of land S 72
- subsistance of judgment-debtor, providing for Sch III P 9 (3)
- transfer of certain decrees for execution by S 68
- transfer of decree to, for execution—dismissal of, for default O 21 R 57 N 4
- visitatorial powers of S 93

Commission O 26
- ACCOUNTS
  - to examine or adjust O 26 R 11
  - when to issue O 26 R 11
- admissibility of evidence taken on commission O 26 R 8
- (to) another court S 76 (1)
- attendance of witnesses before commissioner O 26 R 17 (1)
- boundary dispute—local investigation O 26 R 9 N 2
- cases in which court may issue O 26 R 1
- on request to examine witness outside British India O 26 R 5
- COMMISSIONER
  - appointment of, objections to O 26 R 12
  - to be given necessary instructions O 26 R 12
  - disobedience of order O 26 R 11 N 4
    - effect of O 26 R 14 N 7
  - examination of, in court O 26 R 10 N 5
  - if to be examined O 26 R 10
  - *ex parte*, when, may proceed, O 26 R 18 (2)
  - fee of payment of O 26 R 11 N 5
    - reduction of commissioner' bill O 26 R 15 N 2
  - for partition—procedure of O 26 R 14
  - parties, appearance of before the O 26 R 18
  - powers of O 26 R 10 N 3; O 26 R 11 N 3; O 26 R 16
    - to apply for issue of process against witness O 26 R 17

Commission—COMMISSIONER
- compulsion of witness to give evidence before O 26 R 17
- to enter upon or into any land or building O 26 R 16
- to examine any person whom commissioner thinks proper O 26 R 16
- to examine documents and other things relevant to the enquiry O 26 R 16
- to examine parties if he thinks proper O 26 R 16
- to proceed in the absence of parties O 26 R 18
- whether to report his own opinion on the matter referred for examination or merely transmit proceedings O 26 R 12
- resistance to O 26 R 14 N 7
- witnesses, attendance and examination of, before O 26 R 17 (1)
- witnesses, issue of process to, on application of, O 26 R 17 (2)

COMMISSIONER'S REPORT
- appellate court, how far binding on O 26 R 12 N 4
- court to confirm, vary or set aside O 26 R 14
- further evidence, power of court to take O 26 R 10 N 8
- how far binding on court O 26 R 10 N 7
- interference with the report by court O 26 R 10 N 10
- objections to O 26 R 10 N 6; O 26 R 14 N 6
  - commission for accounts O 26 R 12 N 3
- rejection on the ground of failure to pay expenses of commission O 26 R 15 N 1
- to be in evidence in suit O 26 R 12
- when set aside, court may issue new commission

COURT
- commission to examine witness, issue of, to court O 26 R 4
- issue of, to—power of such court to appoint another to take the evidence O 26 R 6
- may direct further enquiry, O 26 R 12 (2)
- may issue commission to another court S 76
- other than High Court situate in another province—power of court to issue commission to S 76

EVIDENCE
- commission to take plaintiff's evidence O 26 R 4 N 3
- commission to take defendant's evidence O 26 R 4 N 4
- proceedings and report to be in O 26 R 12 (2)

EVIDENCE TAKEN ON
- admissibility — documentary evidence O 26 R 8 N 4
- admissibility, objection as to—if may be taken before trial court—oral evidence O 26 R 8 N 3
- effect O 26 R 7
- when depositions may be read in evidence O 26 R 8
- whether may be read as evidence in the suit when grounds have ceased O 26 R 8

EVIDENCE, TO TAKE
- commissioner, if may note demeanour of witness O 26 R 7 N 3
- execution of commission O 26 Rr 6, 7
- of exempted persons S 133 (3); O 26 R 1
- grounds for taking evidence on commission ceasing subsequently—effect O 26 R 8
- language in which evidence to be taken O 26 R 7
- procedure of commissioner—in taking evidence — irregularity in—effect of O 26 R 8 N 2
- return of commission to court with the evidence O 26 R 7
- second commission, issue of, on failure of first O 26 R 4 N 6
- witness resident out of British India—examination of O 26 R 5

examination of commissioner by court O 26 R 10 (2)

EXAMINATION OF WITNESS
- commission for—applicability of provisions of Code as to—proceedings under special and local acts O 26 R 1 N 1 A
- on commission—persons for whose examination commission may issue O 26 R 4

(TO) EXAMINE
- accounts O 26 Rr 11, 12
- or adjust accounts S 75 (c); O 26 R 11
- pauper applicant O 33 R 4
- a person S 75 (A)
- person out of British India S 77

TO EXAMINE WITNESS O 26 Rr 1-8
- grounds for, for appointment of O 26 R 1 N 1
- order for O 26 R 2
- when to be issued O 26 R 1
- to whom to be issued O 26 R 3

execution of—enlargement of time for O 26 R 7 N 1

ex parte, when commissioner may proceed. O 26 R 18 (2)

EXPENSE OF O 26 R 15
- to be paid into court O 26 R 15
- failure to pay, effect O 26 R 15 N 1

foreign courts, commissions issued by—execution and return of, provisions as to S 78

further inquiry—after commission O 26 R 10 (3)

immovable property, for partition of, O 26 R 13

instructions, court to give to commissioner O 26 R 12 (1)

ISSUE OF
- in what cases to be issued S 75 N 1

Commission—ISSUE OF
- by consent of parties—objections to commission—estoppel O 26 R 12 N 3
- new commission O 26 R 14 N 8
- power of court to impose terms as conditions precedent O 26 R 15 N 1
- to court and execution by O 26 R 6

LETTER OF REQUEST
- in lieu of commission
  - power of court to issue S 77
  - power to issue letter instead of commission where witness to be examined resides out of British India S 77; O 26 R 5

LOCAL INVESTIGATION
- commission for S 75 N 3; O 26 Rr 9, 10
  - to whom may be issued O 26 R 9 N 5
- court ought not to hold with a view to gather information for judgment S 75 N 3
- order for—whether appealable O 26 R 9 N 9
- power of court to order further enquiry O 26 R 10
- report of commissioner
  - admissibility of, in evidence O 26 R 10 N 4
  - duty of court to consider O 26 R 10 N 4
  - effect of O 29 R 10
  - examination of commissioner in court O 26 R 10
  - power of court to order further enquiry on O 26 R 10
  - procedure of commissioner O 26 R 10

mesne profits, to ascertain O 26 R 9

market-value of property, to ascertain O 26 R 9

ORDER FOR O 26 R 2
- omission to actually issue, effect of O 26 R 3 N 1
- whether revisable O 26 R 5 N 4

order re-issuing or refusing to issue commission to take evidence—whether appealable O 26 R 4 N 7

parties, appearance of, before commissioner O 26 R 18 (1)

(FOR) PARTITION O 26 R 13
- application for—appointment of commission, limitation for O 26 R 13 N2
- court if can pass final decree *suo motu* on commissioner's report O 26 R 14 N 9
- issue of—whether proceeding in execution O 26 R 14 N 9
- procedure of O 26 R 14

pauper applicant, when, may be ordered to be examined on O 33 R 4 (2)

person applying for leave to sue as pauper—issue of commission for examination of—where such person, if exempt from the personal appearance in court O 33 R 4

person out of British India—commission to examine S 77

powers of commissioners, O 26 R 16

powers of court to issue S 75

Commission — (Contd.)

proceedings and report to be evidence, O 26 R 12 (2)

provisions as to, applicable to non-British Indian Courts S 78

RETURN OF O 26 R 7
- court to direct, where to be O 26 R 4 (3)
- issued to another court S 76 (2)
- with deposition of witnesses O 26 R 7

to take evidence—deputy collector—power of—to delegate officer of his court to take evidence on commission O 26 R 3 N 2

when deposition may be read in evidence O 26 R 8

when issued, O 26

(for) whose examination to be issued O 26 R 4

WITNESS
- attendance and examination of, before commissioner O 26 R 17 (1)
- commission to examine, when may be issued O 26 R 1
- examination of
  - commission for—cancellation of commission — successor of judge, power of O 26 R 1 N 1
  - commission for—stage at which commission may be issued O 26 R 1 N 1
  - on commission—commission to whom may be issued O 26 R 3
  - return of commission for, direction as to O 26 R 4
- to examine
  - application for commission O 26 R 2
  - court whether may refuse to issue commission O 26 R 4 Nn 1, 2
  - issue of commission, grounds for—question whether party applying for commission will be benefited or not is no consideration O 26 R 4 N 1
    - procedure O 26 R 3
  - order for, if may be made by court of its own motion O 26 R 2 N 1
  - party, right of, to issue commission O 26 R 4 N 2
  - power of court to issue commission pending arbitration proceeding O 26 R 1 N 6
  - principles governing issue of commission O 26 R 1 Nn 2—4
  - to whom commission may be issued O 26 R 4
  - witness, resident out of British India O 26 R 5
  - witness, resident within jurisdiction—commission to whom to be issued O 26 R 3
- giving evidence before commissioner—expenses of O 26 R 17
- issue of process to, on application of commissioner O 26 R 17 (2)

Commissioner—parties—failure to appear before commissioner—effect O 26 R 18 N 1

Community
- village community—suit on behalf of O 1 R 8 N 3

Company
- *See also* CORPORATION
- association of individuals, whether public officer S 2 (17) Notes
- club—suit on behalf of O 1 R 8 N4
- CORPORATION
  - *See also* CORPORATION
  - execution against-examination of officer of, as to its property O 21 R 41
  - interrogatories, when corporation is party to the suit O 11 R 5
  - meaning, of O 29 R1 N 2
  - officer of, power to require personal attendance of O 29 R 3
  - suit by or against, procedure O 29
  - where deemed to carry on business S 20 Expln II
- liquidation—decree against—transfer of—execution O 21 R 16 N 20
- OFFICIAL LIQUIDATOR
  - discovery—order for O 11 R 13 N 22
  - if can sue on behalf of company O 29 R 1 N 6
- process, service of, on O 29 R 2
- residence of—meaning of, for security for costs O 25 R 1 N 4
- SUIT BY OR AGAINST
  - procedure O 29
  - title of suit O 28 R 1 Nn 2, 3, 4
- unregistered company—suit by or against O 29 R 1 N 3
- whether pauper for purposes of pauper suit O 33 R 1 N 10
- winding up proceedings—set off claimed by debtor of company O 8 R 6 N 10

Compensation
- application for, if bars suit S 95 N 13
- for attachment, arrest or injunction applied for on insufficient grounds S 95
- appeal from, order awarding, if lies S 104 (1) (g)
- award of, for wrongful arrest, attachment or injunction S 95 (1)
- costs, compensatory in respect of vexatious claim or defence S. 35-A
- injunction, interim, in case of S 95
- suit for, award of compensation under S. 95 bars S 95 (2)

Compromise
- *See also* COMPROMISE DECREE
- adjustment of suit by O 23 R 3
- agreement by persons under disability S 147
- (OF) SUIT
  - appeal from order recording or refusing to record. O 43 R 1 (m)
  - decree in terms of, O 23 R 3
  - minor, by guardian or next friend of O 32 R 7
  - parties, by, out of court O 23 R 3

Compromise decree
- adjustment of suit—meaning of O 23 R 3 N 7
- agreement stating case for opinion of court and providing for certain things being done upon the finding of the court with respect to the question O 36 R 1
- agreement to take oath—effect of O 23 R 3 N 10
- appeal against S 96 (3)
- appeal—decree on special case stated by agreement of parties for decision of court O 36 R 5 N 2

Compromise decree
- application to set aside—whether application to set aside *ex parte* decree O 9 R 13 N 6
- compromise—matters to be included in O 23 R 3 N 19
- compromise of appeal—after same was dismissed for default O 41 R 17 N 5
- compromise of suit O 23 R 3
- compromise—validity and legality of O 23 R 3 N 8
- effect of and admissibility in evidence O 23 R 3 N 24
- (for) execution of documents—enforcement of O 21 R 34 N 3
- form of O 20 R 6 N 2
- Hindu widow—compromise by O 23 R 3 N 22
- minor—compromise on behalf of minor—leave of court O 32 R 7
- pauper suit—compromise of—whether ground for dispaupering pauper plaintiff O 33 R 9 N 4
- providing payment by instalments—no final decree necessary O 34 R 5 N 5
- representative suit O 1 R 8 N 23
- setting aside
  - effect of O 23 R 3 N 28
  - mode of O 23 R 3 N 28
- submission to arbitration—whether compromise O 23 R 3 N 9

Concise statement
- meaning of O 7 R 9 (1)

Conjugal rights
- decree for—discretion in executing decree for restitution of O 21 R 33
- decree for, mode of execution O 21 R 32
- suit for—if of civil nature O 9 N 28

Consent
- to proceedings in suits on behalf of persons under disability S 147

Consolidation
- of appeals S 151; O 41 R 1 N 15
- OF SUITS O 2 R 6 N 4
  - (on) appeal to Privy Council O 45 R 4
  - for valuation O 45 R 4

Contempt of Court
- agreement with receiver—*See* RECEIVER
- arrest for, no exemption from, S 135 (2)
- disobedience of decree for injunction, for restitution of conjugal rights or for specific performance—punishment for, O 21 R 32
- interference with receiver's possession O 40 R 1 N 34
- non-compliance with order for discovery O 11 R 21
- process for—no exemption in favour of judge, magistrate etc S 135 N 3

Contract
- breach of suit for—frame of suit—splitting of claims O 2 R 2 N 10
- co-contractor—decree against—if precludes suit against another co-contractor O 1 R 6 N 6
- injunction, temporary, to restrain breach of, O 39 R2

Contract

joinder of, parties liable on same contract O 1 R 6
nature of, if a question of Law—*See* Appeal
rights under—if civil right S 9 N 29
specific performance of—decree for, mode of execution of, O 21 R 32
Suit on
  pleading—contents of O 6 R 4 N 8
  survival of right to sue—on death of parties O 22 R 1 N 8

Contribution

suit for
  co-judgment-debtor depositing—getting sale set aside—suit if lies O 21 R 89 N 31
  parties to O 1 R 3 N 9

Conveyance

execution of—by judge or officer of court O 21 R 34 (4)

Co-owner

bid of, to prevail at execution sale O 21 R 88

Copy

memo. of appeal—copies of judgment and decree to accompany O 41 R 1

Corporation

See also company
attachment of a share in O 21 R 46
attendance, personal, of officer of, power to require O 29 R 3
business, where deemed to carry on, and place of suing S 20 Expln II
decree against O 21 R 32 (2)
discovery—order for, against O 11 R 13 N 16
examination of officer of, as to property of, O 21 R 41
injunction against O 39 R 5
injunction to, binding on officers O 39 R 5
interrogatories to, delivery of, O 11 R 5
manager—sale of shares in execution—procedure on O 21 R 79 (3)
personal attendance of principal officer O 29 R 3
place of business S 20 Expl 2
place of suing, S 20 Expln II
pleadings, subscription and verification of O 29 R 1
secretary of—to receive process O 29 R 2
shares in,
  attachment of, O 21 R 46
  defined S 2 (19)
  delivery of, in execution O 21 R 79 (3)
  sale of, in execution O 21 R 76
  transfer of, sold in execution O 21 R 80
suit by or against
  director of corporation to receive process O 29 R 2
  director of—to sign plaint O 29 R 1
summons—service upon O 29 R 2

Co-sharer

execution sale—co-sharer's bid to be preferred O 21 R 88

Co-sharer

one of several co-sharer judgment-debtors if can apply to set aside execution sale O 21 R 90 N 8
preference to bid, at execution sale O 21 R 88

Costs S 35

account suits, costs in S 35 N 10
of adjournment O 17 R 1
administration suits, costs in S 5 N 17
admiralty and vice-admiralty cases S 35 N 11
affidavit, of O 19 R 3
affidavit containing hearsay or argumentative matters, of O 19 R 3 (2)
of appeal
  remand O 41 R 23 N 34
  security for—power of appellate court to order O 41 R 10
appeal withdrawal of—respondent, right of, to costs O 41 R 9 N 4
appellant, when to give security for O 41 R 10
application, costs of—modes of granting S 35 N 4
of arbitration S 35 N 12; Sch II P 13
arbitration proceedings out of court—costs incurred in—if can be allowed S 35 N 4
Award of
  on abatement of suit owing to non-impleadment of legal representative O 22 R 4 N 26
  discretion of court S 35 N 1
  in judgment without specifying amount—procedure O 20 R 6 N 7
  to opposite party—on abatement of suit due to failure to implead legal representative O 22 R 3 N 24
  subject to such conditions and limitations as may be prescribed, S 35 N 2
  subject to the provision of any law for the time being in force, S 35 N 3
claim suit O 21 R 63 N 25
of commission O 26 R 15
Compensatory costs
  exception to general principle S 35-A N 2
  order of—appealability of S 35-A N 3
  in respect of false or vexatious claims or defences S 35-A
  when can be given S 35-A N 2
Construction of
  decree as to costs S 35 N 39
  the decree of Privy Council as to S 34 N 33
  will, suit for—costs in S 35 N 18
contribution for—costs payable under joint decrees—suit for, when lies S 35 N 34
costs against guardian *ad litem* of minor party O 32 R 11 N 4
costs of amendment of plaint in pauper suit O 33 R 16 N 1
costs shall follow the event, principle of S 35 N 7
court guardian—costs of O 32 R 4
Court's power
  to impose terms as to, when ordering re-hearing of appeal heard and decided *ex parte* O 41 R 21
  to order costs on restoration of suit dismissed for failure of both

Costs

- parties to appear at hearing or for plaintiff's failure to pay process fees O 9 R 4 N 1
- decree awarding costs, where judgment is silent O 20 R 6 N 7
- decree to give directions as to, O 20 R 6 (2)
- decree or order as to—enforcement of S 35 N 37
- discretion of court, costs to be in, S 53
- discretion of court as to—if can be delegated S 35 N 6
  - review, if court can S 35 N 30
- direction for, in decree in appeal O 41 R 35 (3)
- dishonoured bill, costs of noting non-acceptance of O 37 R 6
- divorce cases, costs in S 35 N 13
- documents, of proving, when notice to admit not given or complied with O 12 R 2
- of enquiry as to pauperism O 33 R 16
- executable decree, awarded by—suit if will lie S 35 N 28
- execution of decree before ascertainment of costs S 118
- executing court—power of, to add costs not awarded by decree in execution O 34 R 10 N 7
- *ex parte* decree—setting aside—court's power to impose terms as to O 9 R 13 N 22
- extent of costs S 35 N 26
- facts, of proving, when notice to admit not complied with O 12 R 4
- guardian *ad litem*, costs incurred by officer of court acting as, O 32
- interest on costs S 35 (3); S 35 N 35
- in interpleader suit O 35 Rr 3, 4, 6
  - plaintiff's costs, charge for, on thing claimed O 35 R 6
- interrogatories, of, O 11 R 3
- judicial discretion of court
  - costs are in the S 35 N 5
  - principles in the exercise of S 35 N 5
- jurisdiction,
  - absence of,—no bar to exercise by court of powers as to, S 35 (1)
  - want of, no bar to award S 35 (1)
- lien of pleader for, where set-off claimed by defendant, O 8 R 6 (2)
- MINOR, SUIT BY OR AGAINST S 35 N 19
  - costs of attorney or solicitor of minor's guardian or next friend—recovery of—minor's estate O 32 R 1 N 13
  - instituted without next friend—order for costs against person presenting plaint O 32 R 2
- MORTGAGE SUIT O 34 R 2 N 11
  - *See also* MORTGAGE
  - costs in, O 34 Rr 2 (*a*); 4, 7
  - costs of mortgagee subsequent to decree O 34 R 10
  - personal liability of mortgagor for costs of suit O 34 R 5 N 26; O 34 R 10 N 8
  - for redemption O 34 R 7 N 6
  - for sale O 34 R 4 N 12
- of notice for admission or production of unnecessary documents, O 12 R 9
- object of awarding S 35 N 1
- of officer of court, as guardian *ad litem*, O 32 R 4 (4)
- official assignee, liability of, for S 35 N 20

Costs

- official liquidator—costs incurred by S 35 N 20
- order as to,—appealability of S 35 N 29
- order for delivery of further particulars—power of court to order costs against party in default O 6 R 5 N 5
- order for
  - to be paid out of estate, order when to be made S 35 N 16
  - revision, if lies S 35 N 31
- partition suits, costs in S 35 N 21
- partnership suits, costs in S 35 N 22
- PAUPER
  - of application for leave to sue as, and of inquiry into pauperisms O 33 R 16
  - costs against guardian or next friend of minor O 33 R 11 N 4
  - costs of successful defendant O 33 R 11 N 5
  - rejection of application for leave to sue as pauper—fresh suit maintainable only if costs of government and other opposing party are paid O 33 R 15
- payment into court—of sum claimed in suit—apportionment of costs O 24 R 4
- plaintiff—insolvency of—costs payable by plaintiff before insolvency O 22 R 8 N 11
- pleader and client, as between—suit for recovery of, if will lie S 35 N 28
- pleader, liability of, for costs, in suit on behalf of minor O 32 R 2 (1)
- pleader's liability—when he has obtained order against minor without his being represented by next friend or guardian O 32 R 5
- pleaders' lien for costs O 8 R 6 N 16
- postponement of hearing occasioned by plaintiff's default as to summons O 9 R 6 (2)
- prior court having no jurisdiction to order costs—subsequent suit, if will lie for costs S 35 N 28
- probate proceedings, costs in S 33 N 23
- of process O 48 R 1
- proclamation of sale—costs not covered by, O 21 R 89 (3)
- provision in decree as to, at variance with judgment O 20 R 6 N 7
- reasons to be given for disallowing S 35 (2)
- of reference to High Court, O 46 R 4
- refund of, order for, on variation or reversal of decree, S 144 (1)
- representative suit S 35 N 24; O 1 R 8 N 22
- Secretary of State, costs against S 35 N 15
- SECURITY FOR O 25
  - of appeal—power of appellate court to order security O 41 R 10
  - from appellant O 41 R 10
  - claim and cross claim O 25 R 1 N 13
  - defendant if can be ordered to give security O 25 R 1 N 13
  - if can be required from pauper plaintiff O 33 R 1 N 16
  - inherent power to demand O 25 R 1 N 11
  - insolvency of plaintiff O 22 R 8 N 13
  - order for—failure to furnish security—effect O 25 R 2
  - in Privy Council appeals O 45 R 7
  - suit decreed—effect O 25 R 1 N 14
  - when may be required from plaintiff O 25 R 1

Costs

separate costs, when may be allowed S 35 N 27
separate suit for costs, maintainability of S 35 N 28
SET-OFF O 21 R 19 Nn 1, 4
  and lien of pleader for costs O 8 R 6 (2)
  of, against sums due O 20 R 6 N 8
  costs awarded to mortgagor in mortgage suit—set off against mortgage money O 34 R 9 N 2
  court may direct costs payable to party to be, O 20 R 6 (3)
  pre-emption decree O 20 R 14 N 14
single judge of High Court, order as to appeal if lies to High Court. S 35 N 32
solicitor's lien for O 8 R 6 N 16
  enforcement of S 35 N 38
stranger to suit,
  order against—when can be made S 35 N 9
  against, order if will lie S 35 N 28
  when can be made liable, S 35 N 9
subsistence allowances, sums disbursed for, to be costs in suit, O 21 R 39 (5)
successful party, costs disallowed to—instances of S 35 N 7
summary suit, costs in O 37 R 2 (2)
taxation of costs by taxing master—if court can review S 35 N 30
trust cases, costs in S 35 N 16
unsuccessful party to bear costs S 35 N 9
variation or reversal of decree, or order—for refund of costs on, S 144 (1)
when pauper succeeds O 33 R 10
by whom to be paid S 35 N 9

Court

addressing court—right of S 119
attachment of property in custody of O 21 R 52
business of court, transfer of, from one to another S 150
Chartered High Courts, Ss 116-120; O 49
civil courts, meaning of L P Cl 16 N 2
closing of—on the last day for depositing decree amount for setting aside execution sale—effect O 21 R 85 N 3; O 21 R 89 N 28
collector's court not inferior to district court S 3 N 2
commission—issue of. *See* COMMISSION
commission to examine witness, whether may be issued to O 26 R 4
courts in territories of Foreign Prince or state, established by Governor-General S 43 N 3
"court which passed a decree," definition of, for execution S 37
deposit into, of money or other thing subject of suit—order for O 39 R 10
deposit of money into court, by defendant—interest not allowed to plaintiff after notice O 24 R 3
discretion of—if any, to refuse to examine witnesses O 18 R 4 N 1
evidence—discretion to call further, after closing of case O 18 R 4 N 1
evidence to be taken in open court O 18 R 4 N 2
foreign—defined, S 2 (5)
foreign Prince or State—courts established by Governor-General in territories of, and execution of decrees, Ss 43; 45
inspection of property by O 18 R 18
jurisdiction of—to try all civil suits, unless barred S 9
language of courts subordinate to High Courts S 137
mamlatdars' courts Pre. N 19
meaning of, under S 113 S 113 N 1
name of court in which suit brought, to be stated in plaint, O 7 R 1 (*a*)
Native States, in, execution of decrees passed by S 44
officer of
  if can be appointed to take evidence on commission O 26 R 3 N 2
  purchase by, at execution sale O 21 R 73
opinion of, right to state case for, S 90
papers from its own records or from other courts, may be sent for O 13 R 10
payment into
  interest whether ceases to run O 24 R 3
  notice of O 24 R 2
  of sum claimed in suit O 24 R 1
  of sum claimed in suit—procedure where plaintiff accepts deposit as satisfaction in part or full O 24 R 4
POWER OF
  to adjourn hearing O 17 R 1
  (to) amend S 152; 153
  to amend judgments etc, S 152
  appellate court S 107; O 41 R 33
  (to) appoint arbitrator Sch II P 5
  (to) appoint commissioners to hold interim sale of crops on land attached O 39 R 6 N 2
  (to) compel parties' attendance O 18 R 4 N 1
  (to) compel person to furnish security, for disobeying summons S 32 (*d*)
  (to) compel production of documents O 11 R 14
  to enlarge time S 148
  to examine the party O 18 R 4 N 1
  to fix time limit for cross examination O 18 R 4 N 1
  inherent power, not affected, S 151
  to inspect O 18 R 18
  to interfere in the examination, only in case of incompetency of party O 18 R 4 N 2
  to modify or correct award Sch II P 12
  (to) order proof by affidavit O 19 R 1
  (to) order separate trials O 1 R 2; O 2 R 6
  to pass orders to safeguard ends of justice S 94
  pending appeal to Privy Council O 45 R 13
  Privy Council, on application for execution of orders of, O 45 R 15
  (to) send for record O 13 R 10
  on transfer of business S 150
Presidency Small Cause Courts, applicability of Code to S 8 O 51
property in custody of—attachment of, —mode of O 21 R 52
Provincial Small Cause Courts, applicability of Code to S 7, O 50
Revenue Court—application of Code to S 5

Court

review, court to which application for, to be made, S 114, O 47 R 1
subordination of S 3
  additional and assistant judge's courts subordinate to district court, S 24 (3)
transfer of business of one court to another, S 150
transfer of suits, Ss 22-24
transfer of suits instituted in more than one court S 22
transferred decrees—power of courts, in execution, S 42
unauthorised person not to address court S 119
under S. 113, under Bombay Mamlatdars Court Act, collector, if court S 113 N 1
under S. 113, deputy commissioner of Oudh—if court S 113 N 1
what court can execute decree S 38
witness, to examine, pursuant to commission O 26 R 6

Court-fee

accounts suit between principal and agent O 20 R 16 N 4
additional, to be paid in questions in execution S 47 (2)
administration suit, O 20 R 13 N 12
affidavit, O 19 R 1 N 3
appeal against final decree in mortgage suit—*ad valorem* fee payable O 34 R 3 N 14
appeal against instalment decree, O 20 R 11 N 14
appeal as a pauper, rejected—time for payment of court fee, how determined S 149 N 10
appeal, by one of several parties from decree against all, proceeding on common ground O 41 R 4 N 10
appeal, court-fee on O 41 R 1 N 16
appeal from mortgage decree, in O 34 R 5 N 25
appeal from preliminary decree in mortgage suit, O 34 R 4 N 16
appeal, in—whether may be demanded after disposal of appeal O 41 R 35 N 5
claim suit, O 21 R 63 N 22
cross objection in appeal, O 41 R 22 N 21

DEFICIENCY OF
  (in) appeal, right of appellant to be heard on proportionate part of claim S 149 N 6
  can be made up in regard to any document S 149 N 4
  grounds for granting time to make up S 149 N 5
  made up after limitation, effect S 149 Nn 3, 7
  may be made up at the admission subject to objection later S 149 N 12
  ordered to be made up by lower court, interference in appeal, extent of S 149 N 8
  power of court to make up S 149 N 2
  when discretionary to allow deficit to be made up S 149 N 5
Government, right of, to apply for payment of, in particular pauper suits, O 33 R 12
mortgage suit for redemption—court-fee whether payable on surplus profits decreed in favour of mortgagor O 34 R 7 N 18
on objections to findings returned on remand of issues to lower court O 41 R 26 N 6
partnership suit O 20 R 15 N 6
pauper appeal—filed after limitation, subsequent payment of court-fee invalid S 149 N 10

PAUPER SUITS
  exemption from payment of, O 33 R 8
  realisation of, when plaintiff has succeeded in suit O 33 R 10
  recovery of court-fees in O 33 Rr 10, 11, 12
  refusal of leave, subsequent payment of court-fee, whether relates back S 149 N 10
plaint must show value of subject-matter of suit for purpose of O 7 R 1 (1)
(on) plaint returned for presentation, whether enures in court to which plaint is returned O 7 R 10 N 8

POWER
(of) appellate court S 107 N 17
to make up deficient court-fee S 149
proceedings under S 95—conversion of into suit by paying court-fee S 149 N 11
process—court-fee on—time for payment of O 48 R 1

REFUND OF
  remand in appeal O 41 R 23 N 33
  where appeal is over stamped O 41 R 1 N 17
revision, conversion of, into appeal—court-fee after limitation S 149 N 11
right to make up deficiency—distinction between appeal and suit S 149 N 9
set off—court-fee on O 8 R 6 N 14
suit for mesne profits O 20 R 12 N 8
suit to set aside execution sale O 21 R 92 N 9
suit to set aside order of executing court in proceedings for delivery of possession O 21 R 103 N 6
total non-payment of—time may be granted for payment S 149 N 6
value of suit for O 7 R 1
when court bound to allow deficiency to be made up S 149 N 5
written statement, O 8 R 1 N 1

Court of Wards

compromise by, on behalf of minor O 32 R 7 N 9
manager of estate—not a public officer S 2 (17) Notes
suit against—notice when necessary S 80 N 5

Criminal proceedings

uncertified adjustment of decree, if can be taken into account by criminal court O 21 R 2 N 32

Criminal Procedure Code

S. 145—proceedings under—effect of prior delivery of possession under civil courts order O 21 R 36 N 4
S 195—petition for sanction under—affidavit in support of—cross-examination of deponent, if permissible O 19 R 1 N 4
S 476—appeal under—summary dismissal of O 41 R 11 N 2

Crop

attachment of O 21 R 44 (*a*)
  which does not admit of being stored O 21 R 45 (5)

Crop
- growing crop is movable property S 2 (13)
- interim order prohibiting removal of growing crop, in execution O 21 R 45 (4)
- sale of growing crop, in execution O 21 Rr 74, 75

Cross claims
- execution of O 21 R 91
- mortgage suits, in, O 21 R 20

Cross decrees
- assignment in case of O 21 R 18

Cross-objections
- dismissal of appeal, effect of, on, O 41 R 22 (4)
- form of, O 41 R 22 (2)
- time within which to be filed, O 41 R 22 (1)
- who may file O 41 R 22 (1)
- withdrawal of appeal, effect of, on, O 41 R 22 (4)

Crown
- discovery, right of O 11 R 13 N 17
- right of—to precedence in respect of court-fees in pauper suit O 33 R 10

Custodia legis
- appointment of receiver makes property in—*See* RECEIVER

Cypres doctrine
- public trust—applicability to S 92 N 22

Damages
- ascertainment of—commission for O 26 R 9
  - local investigation O 26 R 9
- breach of contract, suit for S 9 N 20
- interest as S 34 N 10
- interest on—if can be awarded before date of judgment S 34 N 2
- RESTITUTION
  - reversal or variation of decree—and order for payment of damages, S 144 (1)
- RIGHT TO SUE FOR
  - not liable to attachment, S 60 (1) (*e*)
  - special damage—none necessary in suit under S. 91 S 91
- SUIT FOR
  - defendants' duty to traverse in written statement O 8 R 3
  - defendant failing to certify adjustment of decree in his favour O 21 R 2 N 30
  - defendant need not plead to O 8 R 3
  - deposit by defendant in court O 24 R 1
  - plaint, contents of O 7 R 2 N 4
  - pleadings, and matters affecting, O 8 R 3
- WRONGFUL ARREST
  - suit for S 55 N 15
- WRONGFUL ATTACHMENT
  - seizure of movable property in execution—suit for S 62 N 4
  - seizure of movable property in execution—limitation for suit for damages S 62 N 5
  - suit for—if can be claimed in execution proceedings O 21 R 63 N 10

Dead person
- decree against O 22 R 4 N 19
  - effect of S 52 N 8
- suit by or against O 22 R 1 N 19

Debenture
- debenture stock and debenture bonds, difference between S 2 (19) Notes
- meaning of S 2 (19) Notes

Decree—
- *See also* Execution
- ADJUSTMENT OF O 21 R 2
  - certificate of O 21 R 2
  - minor party—leave of court whether necessary O 32 R 7 N 14
  - payment out of court and certification O 21 R 2
- AMENDMENT OF Ss 152 153
  - appeal—copy of amended decree necessary O 41 R 1 N 4
  - arithmetical mistakes S 152
  - clerical mistakes S 152
  - summary dismissal of appeal against decree—which court to amend O 41 R 11 N 9
- APPEAL
  - division court, appeal to Privy Council against decree of S 111
  - *ex parte* decree, from S 96 (2)
  - final order to include for purposes of appeal to Privy Council O 45 R 1
  - irregularity, decree not to be interfered with, in appeal for mere, S 99
  - not to be varied in appeal, for irregularities S 99
  - original decree, from S 96; O 41
  - Privy Council, what cases are appealable to S 109
  - set-off, from decree allowing O 20 R 19 (2)
- AWARD, DECREE BASED ON Sch II Pp 16; 21
  - award without intervention of court—appealability of S 104 N 15; Sch II P 21 N 15
  - decree not in accordance with—appeal lies Sch II P 16 N 5
  - invalid award, appealability of Sch II P 16 N 6
  - reference under agreement to refer, not appealable Sch II P 17 N 15
  - without hearing objections
    - appealability of Sch II P 16 N 7
    - revisability of Sch II P 16 N 7
- classes of S 2 (2) N 9
  - whether exhaustive S 2 (2) N 10
- consent decree—appeal against S 96 (3); O 23 R 3
- CONTENTS OF O 20 R 6
  - administration suit. O 20 R 13
  - appellate decree O 41 R 35
  - compromise—decree in terms of O 23 R 3
  - costs to be mentioned O 20 R 6
  - instalment decree O 20 R 11
  - original decree O 20 R 6
  - partition suit or suit for separate possession of share O 20 R 18
  - partnership suit, for dissolution of O 20 R 15
  - pre-emption suit O 20 R 14
  - representative suit O 1 R 8 N 21
  - suits for
    - accounts O 20 Rr 15, 16, 17
    - immovable property, O 20 R 9
    - mesne profits, and possession O 20 R 12
    - movable property O 20 R 10

Decree—CONTENTS OF—Suit for
- restitution of conjugal rights O 21 R 32 N 5
- when set off is allowed O 20 R 19

COPY
- appellate decree, certified copy to be furnished to party O 41 R 36
- appellate decree, copy to be sent to lower court O 41 R 37
- certified copy production if necessary for execution application O 21 R 11
- certified copy to be furnished to party O 41 R 36; O 20 R 20
- memorandum of appeal to be accompanied by—meaning of O 41 R 1 N 4
- (in) pauper suits, copy to be sent to collector O 33 R 14

DATE OF O 20 R 7
- appellate decree O 41 R 35
- original decree O 20 R 7

DEFINITION OF S 2 (2)
- adjudication necessary S 2 (2) N 4
- appeal to Privy Council, for purposes of O 45 R 1
- appealable orders not included in S 2 (2) N 15
- conclusive determination necessary S 2 (2) N 7
- decision of questions relating to discharge, when decree S 47
- decision of mere right to sue is not S 2 (2) N 6
- detenmination, in execution of decree against firm, of liability as partner O 21 R 50 N 6
- dismissal for default, not included in S 2 (2) N 16
- dismissal of suit as being filed on behalf of a minor without a next friend, whether amounts to a decree O 32 R 2 N 2
- essential, elements of S 2 (2) N 3
- formal expression of adjudication necessary S 2 (2) N 8
- order after preliminary decree determining period and mode of accounting, if decree O 20 R 12 N 14
- order, distinction from 2 (2) N 2
- order rejecting plaint whether decree S 2 (2) N 13
- orders under S 47 is a decree S 2 (2)
- order under S 144 is a decree S 144 N 30
- partly preliminary and partly final S 2 (2) N 12
- rejection of plaint is decree S 2 (2)
- rights in matters of procedure, decision as to, if a decree S 2 (2) N 6
- right to costs, decision as to, if a decree S 2 (2) N 6
- suit, decision must have been given in S 2 (2) N 5
- summary dismissal of appeal under O 41 R 11 O 41 R 11 N 8

DRAWING UP OF
- to agree with judgment, O 20 R 6 (1)
- to conform with order on reference O 46 R 3
- court's duty to S 33 N 5
- decree can be passed—contingent on order in reference O 46 R 2

Decree—DRAWING UP OF
- judgment, to be drawn up after S 33 N 5; O 20 R 6 N 2
- not in accordance with judgment, effect of O 20 R 6 N 7
- pending reference to High Court O 46 R 2
- procedure where judge has vacated office before signing decree, O 20 R 8

EXECUTION OF O 21
- application for O 21 Rr 10-23
- by transferee O 21 R 16
- ascertainment of costs, before S 118
- collector, by Sch III
- competency of court to execute S 38
- corporation, decree against for specific performance or injunction O 21 R 32 (2)
- court to which application for execution to be made O 21 R 10
- "court which passed a decree," meaning of, S 37
- cross-decree, application for O 21 R 18
- decree for movable property, O 21 R 31
- decree passed in Native States, execution of Ss 43, 44
- executable decree S 38 N 5; S 47 N 33
- executing court, if can go behind S 38 Nn 8, 9
- execution of document or endorsement of negotiable instrument, decree for O 21 R 34
- firm, decree against O 21 R 50
- foreign court, by S 45
  - decree of,—limitation for S 44 N 6
  - procedure for execution of decree of S 44 N 6
- High Court, by O 21 R 9
- immovable property, decree for O 21 Rr 35, 36
- injunction, decree for, O 21 R 32
- joint-decree, application for execution O 21 R 15
- land situate in more than one jurisdiction O 21 R 3
- mortgage decree for sale, whether immovable property for execution purposes O 21 R 89 N 8
- mode of transfer of execution O 21 Rr 5, 6
- money decree, how executed O 21 R 30
- Native States, decrees passed by courts of S 44
- notice of execution, when to be given O 21 R 22
- oral application for execution O 21 R 11 (1)
- partition or separate possession of share of estate paying revenue to Government, decree for S 54
- pending Privy Council appeal O 45 R 13
- pre-decree agreement in bar of O 23 R 3 N 15; R 4 N 2
- Princes, Chiefs, Ambassadors and envoys, against S 86 (3)
- property attached in execution of decrees of several courts, S 63
- property in jurisdiction of two courts—which court to execute O 21 R 3
- public officer, against S 82
- public officer, against—procedure O 21 R 48

Decree—EXECUTION OF
- reference to High Court—application for execution pending, not allowed O 46 R 2
- restitution of conjugal rights, decree for O 21 Rr 32, 33
- scheme for liquidation, provisions of Sch III P 7
- specific performance, decree for O 21 R 32
- stay of, pending appeal to Privy Council, O 45 R 13 (2) (*c*)
- (in) suit cognisable by small cause court—execution of, to be transferred to such court O 21 R 4
- transfer of decree
  - appeals from transferee court's order S 42 N 5
  - applicability of O 22 R 10; O 22 R 10 N 7
  - by village court, not permissible S 39 N 14
  - for execution S 39
  - for sale or possession of property outside jurisdiction S 39 R 8
  - jurisdiction of transferring court S 38 Nn 6, 7; S 42 Nn 1, 3
  - jurisdiction of transferee court, how long continues S 42 N 3
  - limitation of the transferred decree to be decided by which court S 40 N 1
  - notice of transmission necessary S 39 N 17
  - power of court in executing transferred decree S 42
  - to another court S 39
  - to collector S 68
  - to court in another province S 40
  - to subordinate court O 21 R 8
- which courts can execute O 21 Rr 3-9

EX PARTE
- *See* Ex parte decree

FINAL DECREE
- court passing, cannot re-open preliminary decree S 97 N 1
- for foreclosure O 34 R 3
- meaning of S 2 (2) N 11
- for redemption O 34 R 8
- for sale O 34 R 5

FORMS OF Sch I App D

immovable property—mortgage decree for sale, whether immovable property for execution purposes O 21 R 89 N 8

instalments—decree may direct payment by O 20 R 11

judgment
- effect of not being in accordance with O 20 R 6 N 7
- to follow S 33

judgment to be in agreement with O 20 R 6 (1); O 20 R 6 N 2

MONEY DECREE
- for claims arising under mortgage—enforcement of O 34 R 14
- interest, rate of S 34
- meaning of O 21 R 16 N 17; O 21 R 30 N 2
  - decree providng for sale of property in default of payment O 21 R 30 N 6
  - for purposes of set off of cross decrees O 21 R 18 N 3

Decree—MONEY DECREE
  - is not movable property O 21 R 78 N 3
- maintenance decree—whether money decree O 21 R 30 N 2
- rent decree O 21 R 30 N 4

mortgagor,
- personal decree against, for balance due after sale O 34 R 6
- where mortgagee is overpaid O 34 R 9

partition decree of estate paying revenue to Government S 54

PAYMENT OF DECRETAL AMOUNT O 21 R 1
- modes of paying O 21 R 1
- payment into court O 21 R 1 N 4
- payment out of court O 21 Rr 1, 2
- postponement of O 20 R 11 (1)

PRELIMINARY DECREE
- appeal from S 97
- classes of S 2 (2) N 10
- court cannot re-open when passing final decree S 97 N 1
- definition of S 2 (2) Expln
- effect of not drawing up *See* APPEAL
- foreclosure, suit for O 34 R 2
- redemption-suit for O 34 R 7
- sale, suit for O 34 R 4

(of) Privy Council—execution of O 45 R 15

(for) rent—property not exempt from attachment and sale S 60 (2)

review—decree passed by two or more judges—review by whom O 47 R 5

second appeal from appellate decision S 100
- will lie only if decision amounts to decree S 100 N 8

setting aside
- compromise decree O 23 R 3 N 28
- *ex parte* decree O 9 R 13
- in suits on negotiable instruments O 37 R 4
- fraud, suit to set aside *ex parte* decree on the ground of O 9 R 13 N 12
- summary suit on negotiable instrument—setting aside decree and rehearing suit O 37 R 4

signing of
- decree to be signed O 20 R 7
- need not be signed by dissenting judge O 41 R 35 (4) proviso
- to be signed by successor of judge O 20 R 8

stay of execution O 21 R 26; O 41 R 5
- appellate court O 41 R 5
- by court passing decree O 41 R 5 (2)

superseding decree—dismissal of appeal for default—decree of lower court whether superseded O 41 R 17 N 9

TRANSFER OF
- application by transferee for substitution of himself on record O 21 R 16 N 19
- assignment of rent decree under Tenancy Acts O 21 R 16 N 9
- by decree-holder, O 21 R 16
- consideration for—if can be questioned by the executing court O 21 R 16 N 11
- decree in favour of minor, whether leave of court is necessary for transfer O 32 R 7 N 14
- equities of judgment-debtor, transfer subject to S 49
- for execution S 39; O 21 R 16 N 3
  - *See also* EXECUTION

Decree—TRANSFER OF
order of court passing decree is binding on transferee court O 21 R 28
instrument of transfer when takes effect O 21 R 16 N 10
meaning of O 21 R 16 N 18
pledge of decree O 21 R 16 N 8
money decree in enforcement of claim under mortgage—transferee to be bound by restrictions against mortgagee O 34 R 14 N 10
mortgage decree—registration if necessary O 34 R 5 N 21
mortgage decree, transfer of, includes the supplemental decree against mortgagor personally O 34 R 6 N 23
(by) operation of law—instances O 21 R 16 N 5
registration, if necessary O 21 R 16 N 4
rights of transferee—right of defendant to set off O 21 R 18 N 10
suit by transferee for declaration of right or for refund of price O 21 R 16 N 23
transferee's application for execution O 21 R 16
transferee's rights S 49

Decree-holder
application for execution by O 21 R 10
assignment of decree—execution, O 21 Rr 15, 16
attaching creditor,—if a S 2 (3) N 2
defined S 2 (3)
dispossession by, O 21 R 100
execution sale
cannot bid at, without leave of court, O 21 R 72
joint decree-holder,
application for execution, by, O 21 Rr 15, 16
payment out of court to one of two joint decree holders O 21 R 15 N 8
whether can certify satisfaction of mortgage decree O 34 R 5 N 30
meaning of S 2 (3)
payment or
adjustment of decree, notice to decree-holder, why it should not be certified O 21 R 2 (2)
payment out of court to O 21 R 2
rateable distribution—among decree-holders, S 73
stay of execution—pending suit by judgment-debtor against, O 21 R 29

Default
dismissal for—*See also* (1) DISMISSAL FOR DEFAULT; (2) APPEARANCE
dismissal of appeal—for appellant's default O 41 R 11 (2); O 41 R 7
dismissal of suit, for O 9 Rr 8; 9
execution—default in proceeding with, after attachment O 21 R 57
order of dismissal for—not a decree S 2 (2) (*b*)
purchase-money—default in payment of, in time, O 21 R 86
re-admission—of appeal dismissed for O 41 R 19
re-sale on, of deposit by purchaser, O 21 R 84

Defendant
See also Party
APPEARANCE
court may order defendant to appear in person O 5 Rr 3, 4

Defendant—APPEARANCE
day for appearance of, how fixed in summons, O 5 R 6
of one, for several, O 1 R 12
personal, when can be ordered, O 5 Rr 3, 4
security for S 94 (*a*); O 38 R 1; O 38 R 2
ARREST OF
before judgment when leaving, or removing property O 38 R 1 (*a*)
failure to find a fresh surety—court may commit him to prison O 38 R 4
defence—of one on behalf of others O 1 R 8
non-appearnce of—court to proceed *ex parte* after proof of service of summons O 9 R 6
ex parte decree to be passed after proof of service of summons O 9 R 6 N 2

Definitions S 2
mark—meaning of S 2 (20) Notes
public officer S 2 (17) Notes
seal—meaning of S 2 (20) Notes

Dekkhan Agriculturists' Relief Act
decree for sale in suit on mortgage under—preliminary and final decree—whether necessary O 34 R 5 N 27
suit against firm—firm whether can be agriculturist under the Act O 30 R 1 N 8
suit under—compromise of O 23 R 3 N 12

Delivery
(of) coin or currency notes attached O 21 R 56
decree for—of immovable propery, execution of O 21 R 35
decree of movable property to state the amount payable in the alternative, O 20 R 10
decree of immovable property O 21 R 35
in occupancy of judgment-debtor, O 21 R 95
in occupancy of tenants, O 21 R 96
of interrogatories S 30 (*a*)
of movable property—to purchaser in execution O 21 R 79
of negotiable instrument or shares O 21 R 80
of property sold O 21 Rr 79-81

Demeanour
remarks on, of witness, O 18 R 12

Demurrage
suit for—frame of suit—splitting of claim O 2 R 2 N 10

Deposit
acceptance of—deposit by defendant in money suits O 24 R 4
by defendant—in suit for money or for damages, O 24 R 1
by purchaser at court sale O 21 R 84
by trustee—of money O 39 R 10
(for) expenses—in Privy Council appeals O 45 R 7
order for further deposit O 45 R 10
refund of balance O 45 R 12
to be made by applicant for leave to appeal O 45 R 7
of money or movables O 39 R 10
of negotiable instrument O 37 R 5
of subject-matter of suit O 39 R 10
to set aside sale O 21 R 89
summary suit—order for deposit of bill, hundi, or note in, O 37 R 5

Detention
- *See also* ARREST
- of subject-matter of suit O 39 R 7

Devolution
- of interest during suit O 22 R 10

Dignity
- suit for upholding S 9 N 47

Director
- company,—right to be director of,—if of civil nature S 9 N 26

Disability
- person under—consent or agreement by S 147

Discovery O 11
- documents S 30; O 11 R 1 N 1; O 11 Rr 12-19
  - affidavit of O 11 R 13
  - application for O 11 R 12
  - objection to O 11 R 13 N 3
  - right to and extent of— O 11 R 13 N 1
  - when premature O 11 R 20
- exemption from giving—sovereign prince or ruling chief, suit by or against S 85 N 5
- (of) facts O 11 R 1 N 1
- forms of Sch I App C
- interrogatories O 11 Rr 1-11
- meaning of O 11 R 1 N 1
- order for—non-compliance O 11 R 21
  - power of court S 30
  - specific documents, power of court to order discovery of O 11 R 19 (3)
- particulars by defendant before plaintiff is to give further particulars in his plaint O 6 R 5 N 3
- premature discovery—objections to O 11 R 20

Discovery and Inspection O 11
- *See also* INTERROGATORIES

Dismissal for default
- APPEAL O 41 R 17 (1)
  - default at preliminary hearing O 41 R 11 (2)
  - default under O 41 R 11—restoration of appeal O 41 R 11 N 11
  - effect of dismissal; decree of lower court whether superseded O 41 R 17 N 9
  - failure of appellant to appear on date of hearing O 41 R 17
  - failure to appear on day fixed for hearing O 41 R 11
  - failure to furnish security for costs ordered O 41 R 10
  - restoration of O 41 R 19
- application for execution O 21 R 10 N 9; O 21 R 57
- application for leave to sue as pauper O 33 R 15 N 3
- application to set aside sale O 21 R 90 N 50
  - refusal to restore—appeal if lies O 21 R 89 N 29
- EFFECT
  - fresh suit if barred O 9 Rr 4, 9
  - remedies O 9 R 8 N 8
    - provisions in O 9 as to—applicability to applications O 9 R 9 N 6
  - when not a bar to fresh suit O 9 Rr 4, 5
- failure to furnish security O 25 R 2

Dismissal for default
- non-appearance of either party O 9 R 3
- non-appearance of plaintiff O 9 R 8
- non-compliance with order for discovery O 11 R 21
- non-payment of charges for summons O 9 R 2
- order of,—is not decree S 2 (2) (*b*)
- RESTORATION O 9 Rr 4-9
  - restoration in favour of one plaintiff whether operates in favour of all O 9 R 9 N 9
  - sufficient cause—meaning of O 9 R 4 N 2
  - sufficient cause for non-appearance—meaning of O 9 R 9 N 8
- setting aside of O 9 R 9
  - application for O 9 R 9
- SUIT
  - non-appearance of plaintiff O 9 R 8
  - pauper suit—court-fees, O 33 R 11
  - plaintiff's default, O 9 R 9
  - where plaintiff does not apply for one year for fresh summons O 9 R 5
  - where plaintiff fails for three months to apply for fresh summons O 9 R 5
- when justified—instances O 9 R 8 N 3

District Court
- issuing of notices and inquiry by, for collector, Sch III P 5
- meaning of S 2 (4) N 2
- POWERS of
  - to receive statement from collector Sch III P 5
  - to revise and refer O 46 R 7
  - to submit for revision, proceedings in small causes O 46 R 7
  - to transfer and withdraw suits, appeals and proceedings, S 24
- SUBORDINATION
  - additional and assistant judges—courts of, when subordinate to S 24 (3)
  - of Small Cause Court S 3
  - to High Court, S 3

District Judge
- meaning of; whether assistant judge is district judge, for purposes of executing transferred decree or transferring same to subordinate court O 21 R 8 N 1

Divorce
- suit for
  - attachment before judgment whether permissible O 38 R 5 N 4
  - compromise of O 23 R 3 N 5

Division Court
- appeal to Privy Council S 111

Documents
- additional evidence—when allowed in appeal, O 41 R 27
- admissibility of—objection to O 13 R 3 N 2
- admission of—after first hearing O 13 R 2
- ADMITTED DOCUMENTS
  - copies of—endorsement on O 13 R 5
  - endorsement on O 13 R 4
  - notice for O 12 R 2
  - record of O 13 R 7
  - return of O 13 R 9
- affidavit of—contents of O 11 R 13 Nn 11, 12
- COPIES
  - right to take of documents of other side O 11 R 15 N 5

Documents—COPIES OF
- business books, giving copies of entries in, in lieu of inspection, O 11 R 19
- endorsement on O 13 R 5
- letter-book, shop-book or account-book, copies of entries in, O 13 R 5 (1)
- public record, receiving copies of entries in, O 13 R 5 (2)
- right to take, of documents of other side O 11 R 15 N 5
- verified copies of documents O 11 R 19

decree for execution of O 21 R 34
DISCOVERY OF O 11 R 1 N 1
- application for O 11 R 12
- effect of non-disclosure O 11 R 13 N 25
- objections to O 11 R 13 N 3
- premature discovery of O 11 R 20
- right to—extent of right to inspection O 11 R 13 N 1

effect of—to be stated in pleadings O 6 R 9
examination of—before framing issues, O 14 R 4

EXECUTION OF
- by court—for transfer of negotiable instrument or share in corporation, in execution O 21 R 80
- by judge or officer of court, on behalf of party against whom decree is passed for execution of document O 21 R 34
- mode of execution of decree for O 21 R 34
- receiver, power of, to execute document, O 40 R 1 (d)

impounding of, S 30 (a); O 13 R 8
INSPECTION S 30 (a) O 11 Rr 15; 18 (2)
- court may order copies of documents to be given to party applying O 11 R 19
- order for O 11 R 18
- privileged document O 11 R 13 N 10
- power of court to order, S 30 (a); O 11 Rr 11, 21
- power of court to inspect, when privilege claimed O 11 R 19 (2)
- right to O 11 R 13 N 1
- documents mentioned in pleadings or affidavits O 11 R 15
- time for O 11 R 17

irrelevant or inadmissible O 13 R 3
list of,
- to be filed with plaint O 7 R14
- to accompany plaint O 13 R 1
- relied on, but not in possession of party O 7 R 15

not accompanying plaint O 7 R 14 (2)
notice to admit O 12 Rr 2, 3
power of court to order party to state by affidavit if any document is or was in his possession O 11 R 19
PRIVILEGED DOCUMENTS O 11 R 13 Nn 3, 4
- order for production of O 11 R 14 N 1
- power of court to inspect O 11 R 19
- waiver of privilege O 11 R 14 N 5

PRODUCTION OF
- application to produce records of court O 13 R 10
- at first hearing O 13 Rr 1 and 2
- before Collector Sch III P 13
- by plaintiff—when filing plaint—omission to produce—effect of O 7 R 18 N 1

Documents—PRODUCTION OF
- costs of unnecessary notice to produce O 12 R 9
- document not in party's possession O 7 R 15
- documents in possession of party must accompany plaint O 7 R 14
- documents relied on in plaint—production of O 7 R 14
- failure to produce under O 7, R 14, consequence of O 7 R 18
- failure to produce at first hearing—effect of subsequent production O 13 R 2
- impounding and return O 13
- in answer to defendant's case not inadmissible O 7 R 18 (2)
- non-compliance with order for discovery O 11 R 21
- notice to produce O 11 R 16; O 12 R 8
  - form of App C form 12
  - for inspection O 11 Rr 15; 16
- on which plaintiff sues, O 7 R 14
- order for production on oath O 11 R 14
- power of court to order O 11 R 14
- requiring persons present in court to produce O 16 R 7
- summons to attend and to produce O 16 R 1
- summons to produce, O 16 R 6
- to cross-examine witnesses—not inadmissible O 7 R 18 (2)
- to refresh memory not inadmissible O 7 R 18 (2)

provisions as to—apply to material objects produced O 13 R 11
public record—admission of—endorsement on copy O 13 R 5
registration of—by judge or officer of court O 21 R 34 (6)
rejected document
- endorsements on O 13 R 6
- return of O 13 R 7 (2)
- rejection of irrelevant or inadmissible O 13 R 3

return of
- account books—original to be returned after a copy is filed O 7 R 17 (2)
  - power of courts to order S 30; O 13

sending for—power of court to send for papers from its own records etc, O 13 R 10

Dower
- claim for—whether amounts to charge O 34 R 15 N 10

Dwelling House
- arrest,—entry by serving officer into dwelling house, for, S 55
- seizure of property—entry by serving officer into dwelling house for seizing, S 62

Ejusdem generis
- doctrine of—applicability to construction of O 47 R 1 O 47 R 1 N 16

Enemy
- suit by alien enemy S 83

Envoy
- execution of decree against S 86 (3)
- when may be sued S 86

Estoppel

appeal—estoppel against O 41 R 1 N 14
compromise—of execution proceedings O 23 R 4 N 2
uncertified payment of decretal amount—decree-holder, whether estopped O21 R 2 N 2, 8
waiver
  irregularity in sale proceedings O 21 R 90 N 41
  objection to execution, failure to raise O 20 R 23 N 1

Evidence

ADDITIONAL EVIDENCE
  (in) appeal O 41 Rr 27, 29
  (in) appeal, mode of taking O 41 R 28
  lower court improperly refusing to admit—additional evidence in appeal O 41 R 27
  review on discovery of new and important evidence O 47 R 1
ADMISSIBILITY
  objection to, when to be taken O 18 R 11
ADMISSIONS
  (of) facts or documents O 12 R 7
AFFIDAVIT O 19 R 1
  agreement to take evidence by affidavit O 19 R 1 N 5
APPELLATE COURT, POWER OF
  appreciation of evidence, as to S 107 N 14
  in regard to matters of S 107 N 13
COMMISSION, EVIDENCE TAKEN ON O 26 R 1
  admissibility O 26 R 8
  admissibility of—evidence of foreign witness taken on commission O 26 Rr 1, 8
  report of local investigation by commissioner in another suit O 26 R 10 N 4
COURT, POWER OF
  (to) allow further evidence after case is closed O 18 R 2 N 1
  (to) examine witness—immediately O 18 R 16
  (to) recall witness already examined O 18 R 1 17
  (to) require persons present in Court to give evidence or produce documents O 16 R 7
  (to) send for papers from its own records or from other courts O 13 R 10
DEMEANOUR OF WITNESS
  remarks on O 18 R 12
  witness description of, by judge in notes of deposition, whether evidence O 18 R 5 N 1
INTERPRETATION TO WITNESS O 18 R 6
LANGUAGE IN WHICH TO BE RECORDED
  English—record of evidence when to be in S 138; O 18 R 9
  interpretation to witness when necessary O 18 R 6
MEMORANDUM OF O 18 R 8
  inability of judge to make memorandum as required, reasons to be recorded O 18 R 14
  (in) unappealable cases O 18 R 13
  when evidence not taken down by judge O 18 R 8

Evidence

MODE OF RECORDING
  (in) appealable cases O 18 R 5
  Chartered High Court—saving of rules for taking of evidence by O 49 R 2
  manner of taking O 18 R 5
  non-appealable cases O 18 R 13
  not taken down by judge O 18 R 8
  objection to question when to be taken down O 18 Rr 10, 11
  particular question and answer may be taken down O 18 R 10
  questions and answers when to be taken O 18 Rr 10, 11
  questions objected to and allowed by court O 18 R 15
  signature of judge to deposition O 18 R 1
  signature of witness to deposition O 18 R 5
PRODUCTION OF
  documentary evidence, O 13 Rr 1,2
  failure to produce evidence at adjourned hearing O 17 R 3
  failure to produce evidence at first hearing O 15 R 4
  hearing, (at,) O 18 R 2
  material objects—production, impounding and return of O 13 R 11
  time to be granted for O 18 R 2 N 1
  where there are several issues O 18 R 3
MISCELLANEOUS
  de bene esse—in what cases allowed O 18 R 16
  evidence taken before another judge, use of O 18 R 15
  expenses of experts O 16 R 2 (2)
  interrogatories, answers to, may be used as evidence O 11 R 22
  pleadings to state facts and not evidence O 6 R 2
  (as to) pauperism O 33 R 6
  refusal of party to suit to give evidence when required by court O 16 R 20
  summons to give evidence O 16 R 1
  (in) transferred suit O 18 R 15 (2)

Evidence Act
  Ss 163 and 164—production of documents order for O 11 R 14 N 4

Examination
COMMISSION
  examination before commissioner O 26 R 17 (1)
  examination by O 26 Rr 1—
  (for) examination of a person S 75 (a)
  (for) examination of witness O 26 Rr 1 to 8
de bene esse—of witness—when allowed O 18 R 16
immediate, of witness O 18 R 16
(OF) PARTY
  (by) court, at first hearing O 10
  oral examination of party or companion of party O 10 R 2
  (to be) recorded O 10 R 3
(of) person out of British India S 77
(of) witness O 18

Execution

ABATEMENT OF
  applicability of O 22 to execution

Execution—ABATEMENT OF
proceedings O 22 (General); O 22 R 4 N 4; O 22 R 12; O 22 R 10 N 15
abatement-dead person—application for execution against O 21 R 11 N 11
death of decree-holder, if causes execution proceedings to abate S 50 N 3
death of petitioner—substitution of legal representative O 22 R 3 N 4
insolvency of party—effect O 22 R 8 N 4

ADJUSTMENT OR PAYMENT OUT OF COURT
adjustment of decree O 21 R 2
attached decree, adjustment of, when ineffectual O 21 R 53
certificate of adjustment O 21 R 2
certificate of satisfaction O 21 R 2
money payable under decree—meaning of—for purposes of R 2 O 21 R 2 N 3
oral adjustment of decree O 21 R 2 N 8
payment out of court to the decree-holder to be certified O 21 R 2
uncertified adjustment—remedies of judgment-debtor O 21 R 2 N 29
uncertified payment out of court—suit by judgment-debtor based on such payment O 21 R 2 Nn 24, 25

APPEAL
appeal, forum of S 47 N 85
arrest—appeal from orders against judgment-debtor or surety S 55 N 18
claim by party to suit—order if appealable S 47 N 84
court-fee in respect of S 47 N 84
interlocutory orders in execution proceedings—appealability of S 47 N 86
non-appealable order, execution of—appealability of decision under S 47 S 36 N2
decree-holder order allowing to withdraw execution proceedings, whether appealable O 21 R 17 N 10
order allowing or refusing execution, after considering objection made on notice to show cause against execution O 21 R 23 N 3
order amending or refusing to amend sale certificate whether appealable O 21 R 94 N 16
order as to claims and objections to attachment O 21 R 63 N 26
order deciding question relating to execution—appealability of S 47 N 84
order declaring co-sharer to be purchaser at execution sale O 21 R 88 N 6
order directing security for stay of execution O 21 R 29 N 6
order disallowing or allowing application for arrest O 21 R 40 N 9
order disallowing objections and claims to attachment O 21 R 61 N 4
order for payment out of money attached O 21 R 52 N 9
orders in execution proceedings S 104 N 7
order in respect of proclamation of sale O 21 R 66 N 20
order of forfeiture of deposit of 25 per cent of the purchase money in execution sale O 21 R 86 N 4

Execution—APPEAL
order on application for deficiency against defaulting purchaser on resale O 21 R 71 N 16
order postponing sale, to enable decree amount to be raised O 21 R 83 N 11
order refusing simultaneous execution O 21 R 21 N 2
order refusing to grant sale certificate O 21 R 94 N 16
order relating to notice to show cause against execution O 21 R 22 N 17
order releasing property from attachment O 21 R 60 N 6
order requiring security—for stay of execution O 21 R 26 N 2
order returning execution application for amendment O 21 R 17 N 10
order setting aside or refusing to set aside execution sale whether appealable O 21 R 90 N 50
order setting aside or refusing to set aside sale O 21 R 92 N 13
  in favour of decree-holder for want of leave to bid O 21 R 72 N 13
  on depositing decree amount O 21 R 89 N 29
  on ground of judgment-debtor's want of title O 21 R 91 N 10
proceedings relating to delivery of possession—order in O 21 R 101 N 7
Small Cause Court decree sent to original side—appeal if lies against order S 47 N 84

APPLICATION FOR O 21 Rr 10 to 23
amendment O 21 R 11 N 6; O 21 R 17 Nn 2, 3
application for transfer of decree whether application for execution O 21 R 10 N 8
attachment of immovable property—extracts from Collector's register to be given O 21 R 14
attachment of immovable property—application for—contents O 21 Rr 13, 14
attachment—particulars in application for—of immovable property O 21 R 54
at time of passing decree O 21 R 11
certified copy of decree, if necessary O. 21 R 11
contents of O 21 R11 (2)
  execution against movable property not in judgment-debtor's possession O 21 R 12
  when immovable property to be attached O 21 R 13
  value of property attached, under a money decree O 21 R 17
copy of decree whether to be filed O 21 R 11 (3)
decree-holder, application by, for execution O 21 R 10
defect in—want of verification—effect of O 21 R 11 N 4
enforcement of decree—application of decree-holder necessary for S 51 N 8
form of O 21 R. 11

Execution—APPLICATION FOR

- form and contents of—execution of decrees under other Acts O 21 R 11 N 2-A
- fresh application on decree being confirmed or reversed in appeal, pending execution O 21 R 10 N 8
- irregularity in form of—effect O 21 R 11 N 2
- mode of execution to be specified in application O 21 R 11 (2) (j)
- movable property application for attachment of—contents O 21 R 12
- oral application O 21 R 11
- particulars in application for attachment of immovable property O 21 R 13
- rejection of O 21 R 17 (1)
- share of judgment-debtor in property to be specified in O 21 R 13
- successive applications O 21 R 10 N 1
- verification of O 21 R 11 N 4
- (by) whom to be signed O 21 R 11
- written application for execution, O 21 R 11 (2)

ARBITRATION

- execution proceedings —arbitration provisions—applicability of, Sch II P 1 N 4

ARREST AND DETENTION

- of judgment-debtor S 55
- application for insolvency
  - court's duty to inform judgment-debtor that he may apply to be declared insolvent S 55 N 10
  - judgment-debtor expressing intention to file insolvency petition—release is discretionary S 55 N 14
  - judgment-debtor intending to apply in insolvency—security bond to be given by judgment-debtor S 55 N 11
  - judgment-debtor not expressing any intention to apply in insolvency —not precluded from afterwards applying S 55 N 14
  - security for applying in insolvency
    - discharge of surety S 55 N 12
    - liability of surety S 55 N 12
- (for) contempt of court
  - contempt of court, arrest for, if governed by S 58 S 58 N 8
- decree for specific movable O 21 R 31
- discharge and release
  - discharge from arrest pending application for stay O 21 R 26 (2)
  - discharge of judgment-debtor from arrest O 21 R 40
  - payment of money, judgment-debtor may be released on S 55
  - release from arrest in exercise of discretionary power of court—grounds of O 21 R 40
  - release from detention under S 58
    - re-arrest of judgment-debtor cannot be made S 58 N 4
    - what constitutes S 58 N 4
  - release, if operates as a discharge, of debts S 58 N 7
  - release of judgment-debtor on obtaining interim protection from insolvency court—re-arrest if can be ordered S 58 N 5

Execution—ARREST AND DETENTION—Discharge etc.

  - release of person detained in civil prison, in what cases S 58
  - release pending disposal of, application for arrest O 21 R 40
- exemption from
  - judgment-debtor— inability of, to pay decretal money—power of court to refuse to arrest O 21 R 40
  - illness of judgment-debtor — cancellation of warrant on the ground of illness S 59
  - insolvency, when a protection from arrest S 55 N 16
  - persons whose arrest might be attended with danger and inconvenience to the public—procedure for arrest of S 55 N 9
  - power of court to refuse to order arrest, for sufficient cause O 21 R 40
  - privilege from arrest O 21 R 11 N 3
  - privilege from arrest, none, when order made for immediate arrest S 135 (3)
  - women, prohibition of, from arrest or detention S 56
- how made
  - as soon as practicable, judgment-debtor to be brought to court S 55 N 5
  - dwelling house, not to be entered after sunset and before sunrise S 55
  - outer door of dwelling house when can be broken S 55 N 7
  - room in the occupancy of a woman, when may be entered S 55 N 8
- (under) money decree O 21 R 30
- notice
  - money decree—arrest O 21 R 37
- period of detention S 58 N 6
- place of detention of judgment-debtor S 55 N 6
- subsistence allowance S 57; O 21 R 39
  - how paid, O 21 R 39
  - omission to pay — release of judgment-debtor S 58 N 3
  - what is S 58 N 2
- surety for judgment-debtor
  - realisation of security S 55 N 13
- warrant
  - arrest without warrant—legality O 21 R 24 N 4
  - contents of O 21 R 38
- when can be made
  - judgment-debtor—detention of, pending disposal of application for arrest O 21 R 40
  - judgment-debtor may be arrested at any time S 55 N 4
  - judgment-debtor when can be arrested S 55 N 3
  - order for arrest on application at time of passing decree O 21 R 11

ATTACHMENT O 21 Rr 41-63

- (of) agricultural produce O 21 R 44

Execution—ATTACHMENT

- attachment of—disposal of produce under attachment O 21 R 45
- attachable property
  - agricultural produce, partial exemption from attachment may be declared by local Government S 61
  - agriculturist, property not necessary for agriculturist, attachable S 60 N 10
  - allowance of, public officer etc., S 60 (1) (h) ; S 60 N 15
  - ancestral property S 53
  - attachment and sale, applicability of S 60
    - to mortgage decree S 60 N 3
    - saleable property, what is S 60 N 5
    - under any special or local law—liability if affected by S 60 S 60 N 3
  - books of account S 60 N 11
  - certificate of deficiency on resale in execution sale, whether attachable O 21 R 53 N 3
  - compulsory deposits, S 60 N 19
  - contingent or possible rights, S 60 N 21
  - cooking vessels, S 60 N 8
  - doors and windows of a house S 60 N 5
  - houses and other buildings belonging to agriculturist S 60 N 10
  - implements of husbandry S 60 N 9
  - liability of property for sale O 21 R 64 N 5
  - mangal sutra of Hindu married woman, S 60 N 80
  - mere expectancy, S 60 N 21
  - musical instrument S 60 N 9
  - necessary wearing apparel, S 60 N 8
  - occupancy tenure, S 60 N 5
  - priest's share of offerings, S 60 N 5
  - property liable to attachment and sale S 60
  - property liable and not liable S 60
  - property, meaning of S 60 N 4
  - property not liable to attachment and sale in execution S 60
  - provident fund, S 60 N 19
  - religious endowment, properties of, S 60 N 5
  - religious office, S 60 N 5
  - right to future maintenance S 60 N 22
  - right to get reconveyance of property S 60 N 12
  - right of management of temple S 60 N 5
  - right of personal service, S 60 N 13
  - right to sue for damages S 60 N 12
  - right of residence S 60 N 5
  - saleable property belonging to judgment-debtor S 60 N 6
  - saleable property — disposing power of judgment-debtor S 60 N 6
    - illustration of S 60 N 6
  - service tenure S 60 N 5
  - stipends and gratuities allowed to pensioners, when attachable S 60 N 14
  - tools of artisans, S 60 N 9
  - vested remainder, S 60 N 21
  - wages of labourers, S 60 N 20

Execution—ATTACHMENT—**Attachable Property**

  - women's stridhana, S 60 N 8
- attaching creditor, position of
  - right to continue appeal against decree O 22 R 10
- attachment before judgment
  - application for execution—dismissal for default—effect on attachment before judgment O 21 R 57 N 8
  - re-attachment whether necessary where there is attachment before judgment O 21 R 10 N-8
- custody of attached property
  - crop attached O 21 R 45
  - leaving attached property in judgment-debtor's custody O 21 R 43 N 5
  - movable property attachment of—custody of property O 21 R 43
  - sapurdar — responsibility of, after dismissal of execution application for default O 21 R 57 N 6
- (of) debt
  - debts, if can be attached S 60 N 7
  - debt or share not in possession of judgment-debtor, O 21 R 46
  - decree for money whether debt O 21 R 53 N 3
  - mode of attachment O 21 R 46
  - mortgage debt O 21 R 46 N 4
  - payment by debtor into court—effect of— O 21 R 46
- (of) decree O 21 R 53
  - attached decree
    - adjustment of O 21 R 53 N 11
    - execution of O 21 R 53 N 9
  - decree for dissolution of partnership where, partnership assets are immovable property O 21 R 53 N 3
  - decree for mesne profits, attachment of O 21 R 53 N 3
  - decree for money—attachment of O 21 R 53 N3
  - decree for rent O 21 R 53 N 3
- (under) decrees of several courts S 63
  - attachment must be existing at the same time S 63 N 4
  - court of highest grade
    - comparison possible only if all are civil or revenue courts S 63 N 3
    - meaning of S 63 N 8
    - to realise property—principle is one of procedure S 63 N 2
    - sale, power to order S 63 N 5
  - inferior court
    - refusing to proceed with execution—appealability of order S 63 N 11
    - sale by, effect of S 63 N 9
    - selling property—procedure S 63 N 10
    - Small Cause Court, applicability of S 63 to S 63 N 3
- garnishee O 21 R 46
  - if necessary for sale in all cases S 51 N 4; O 21 R 30 N 6; O 21 R 64 N 4
  - sale without attachment—validity of O 21 R 54 N 12

    - whether necessary for sale under mortgage decree O 34 R 5 N 20
- immovable property
  - Hindu co-parcener, share of, in immovable property belonging to family O 21 R 54 N 3 A
  - mode of attachment O 21 R 54
  - proclamation of attachment O 21 R 54 N 6
- irregularity in order of attachment
  - attachment without warrant—legality— O 21 R 24 N 4
  - effect— O 21 R 20 N 12
  - failure of judge to sign order of attachment—effect O 21 R 90 N 36
  - invalid attachment—sale validity O 21 R 54 N 12
  - irregularity of attachment—validity of sale O 21 R 54 N 12
- (of) mortgaged property
  - in execution of money decree for mortgage claim O 34 R 14 N 9
- (of) movable property O 21 R 43
- negotiable instrument O 21 R 51
- of property in custody of court or public officer O 21 R 52
  - anticipatory attachment of property in expectation that it would come into the hands of public officer or court O 21 R 52 N 5
  - official assignee—property in the hands of O 21 R 52 N 4
  - property in custody of receiver O 21 R 52 N 3
- partnership property O 21 R 49
  - judgment-debtor's share in partnership property—attachment of— O 21 R 49
- pending inquiry into amount due O 21 R 42
  - security for avoiding attachment O 21 R 42 N 1
- priority
  - questions of, by what court to be determined O 21 R 52
- prohibitory order O 21 R 46
  - prohibiting payment or transfer of attached property—inherent power of court O 21 R 46 N 17
  - service of—proof of O 21 R 54 N 5
- property not in possession of judgment-debtor O 21 R 46
- rights under
  - alienation—of attached property, how far void S 64
    - with leave of Court O 21 R 83
  - alienation of property—after attachment S 64
  - attachment—effect of on adverse possession-- O 21 R 63 N 24
  - attachment under Code and vesting order in insolvency, distinction between S 64 N 5
  - certificate — judgment-debtor—authorising to mortgage, etc., his attached property O 21 R 83
  - claims enforceable under attachment, illustrations of S 64 N 12

  - coin or currency notes attached—order for payment of, to party O 21 R 56
  - contract for sale of property before attachment—effect of S 64 N 15
  - effect of attachment S 64 N 5
  - irregularity of—effect of—private alienation O 21 R 54 N 12
  - private transfer after attachment—effect of S 64
    - provision to be strictly construed S 64 N 2
  - private transfer before attachment—effect of S 64 N 3
  - private transfer—claims enforceable under attachment, void only as against S 64 N 12
  - private transfer contrary to attachment, what amounts to S 64 N 11
  - private transfer prohibited only so far as it is contrary to attachment S 64 N 11
  - private transfer of property, for raising amounts of decree—postponement of sale for O 21 R 83
  - private transfer of attached property to raise decree amount O 21 R 83
  - private transfer, restriction against—
    - attachment before judgment, applicability to S 64 N 4
    - perfected attachment, necessity of S 64 N 3
  - private transfer resulting in satisfaction of decree—transfer if contrary to attachment S 64 N 11
  - private transfer, if wholly void S 64 N 12
  - rateable distribution, claim for—if a claim enforceable under attachment S 64 N 13
  - restriction against private transfer, meaning of S 64 N 10
  - sale in pursuance thereof—, enlargement of property accruing after attachment—effect on S 64 N 5
  - survivorship among members of Hindu joint family, right of—effect on attachment S 64 N 10
  - transfer after order of attachment but before it is actually effected—effect of S 64 N 3
  - transfer by successful claimant after claim order before claim suit—effect of S 64 N 2
  - vesting order after attachment—effect of, on S 64 N 14
  - waiver of benefit under attachment S 64 N 17
  - winding up order after attachment—effect of S 64 N 14
- revival of
  - S 64 N 9; O 21 R 55 N 4; O 21 R 57 N 7
- (of) salary
  - Government—order against, for recovery of salary of public officer, paid out in contraven-

Execution—ATTACHMENT—(of) salary

- tion of—attachment order O 21 R 48 N 3
- mode of attachment of salary of
  - public officer O 21 R 48
  - railway servant O 21 R 48
  - servant of local authority O 21 R 48
- pay of persons to whom Indian articles of war apply, if attachable S 60 N 18
- railway company—order against, for recovery of salary paid by, in contravention of attachment order O 21 R 48 N 3
- salary or allowance of public officer or railway servants, O 21 R 48
- salary of officers exempted from attachment under special law S 60 N 17
- salary of public officer, if attachable S 60 N 16
- salary of public officer or railway servant, and jurisdiction O 21 R 48
- salary whether debt O 21 R 46 N 3

share in corporation
- share capital of company O 21 R 46

share in movables
- judgment-debtor's share in movable property O 21 R 47

subject to encumbrance O 21 R 62 N 3

termination of O 21 R 55
- abandonment of attachment S 64 N 7
- application for fresh attachment—abandonment, if implied in S 64 N 7
- discontinuance of attachment S 64 N 7
- on dismissal of execution application O 21 R 57
- effect of removal of attachment S 64 N 6
- judgment-debtor, death of—attachment if abates S 64 N 7
- removal of attachment, by satisfaction of decree or reversal thereof O 21 R 55
- striking off of execution proceedings—effect of on attachment S 64 N 8
- in what cases S 64 N 7
- withdrawal of attachment O 21 R 55

value of property attached O 21 R 17

CLAIMS AND OBJECTIONS

attachment—claims and objections
- continuance of attachment subject to incumbrances O 21 R 62
- damages for wrongful attachment O 21 R 63 N 10
- disallowance—of claim or objection O 21 R 61
- order as to—suit by party against whom order is passed O 21 R 63
- order dismissing objection—objector's remedy O 21 R 63 N 13
- order on, operates in respect of which property O 21 R 63 N 17
- refusal to investigate O 21 R 63 N 5

attachment—claim to attached property O 21 R. 58

Execution—CLAIMS AND OBJECTIONS

- dismissal for default O 21 R 63 N 4
  - investigation O 21 Rr 58 63
  - property attached under mortgage decree O 21 R 58 N 11
- attachment — claim—property attached under rent decree O 21 R 58 N 12
- attachment—claim to debts attached O 21 R 58 N 8
- attachment—claims to decree attached O 21 R 58 N 9
- attachment—dismissal of objection—claimant can pay under protest, to prevent sale O 21 R 63 N 12
- attachment—objections and claims
  - delay in making—effect O 21 R 58
  - disallowance of claim O 21 R 61
  - release of property from attachment O 21 R 60
  - who can prefer O 21 R 58 N to 19
- attachment—objections to—investigation of O 21 Rr 58—63
  - by party must be raised before sale S 60 N 23
- claim proceedings—proceedings for delivery of possession—conclusiveness of order in O 21 R 103
- claimant—to adduce evidence O 21 R 59
- decree for specific moveable property—seizure of—objection to O 21 R 31 N 4
- decisions of—effect of O 21 R 63 N 18
- objections to attachment S 64 N 16

COLLECTOR

- *See also* EXECUTION—PARTITION DECREE
- alienation by judgment-debtor, restrictions as to, scope of Sch III P 11 N 1
- alienation by judgment debtor subsequent to adjustment Sch III P 11 N 2
- ancestral property Sch III P 1 N 2; S 70 N 3
  - sale of—Allahabad Government notifications—jurisdiction of civil court to sell S 70 N 3
- appealability of orders of collector S 70 N 7
- application to set aside sale S 70 N 2
- charges, meaning of, in respect of sale Sch III P 9 N 3
- collector's orders, suit to set aside when maintainable S 70 N 4
- collector representing public sale of land objectionable—temporary alienation—court may authorise collector to discharge decree by S 72
- collector, temporary alienation by—representation by collector if necessary S 72 N 2
- collector to render account to court Sch III P 9
- collector, transfer of decree for execution—object of provisions as to S 68 N 1
- collector, transfer of execution to—collector, meaning of S 72 N 3
- competency of court to call back records Sch III P 1 N 4; S 54 N 7; S 70 N 2
- court-fee on appeals against orders on claims Sch III P 6 N 2
- court's power to issue new process, when exists Sch III P 11 N 4

Execution—COLLECTOR
execution by S 68; Sch III
extent of power of local government to make rules S 70 N 1
judicially, collector deemed to be acting S 71
jurisdiction of collector and civil court S 70 N 2
maintenance of judgment-debtor's family is a matter for court Sch III P 9 N 2
mortgage of part of property, if can be made Sch III P 1 N 5
notice to decree-holders Sch III P 3 N 1
notifications of Local Government S 68 Nn 3, 4
notification under S 68, sale by court —effect of S 68 N 5
orders about claims, if appealable Sch III P 6 N 1
order by collector, when appealable S 70 N 7; Sch III P 1 N 7
order under S 476, Cr. P. C., power of collector to pass S 70 N 9
period of limitation when and how excluded Sch III P 11 N 6
permission of collector, nature of Sch III P 11 N 3
postponement of sale O 21 R 83 N 3
powers of collector to compel attendance and production of documents Sch III P 13
powers of, in execution Sch III P 1
power to hear objections, if any Sch III P 3 N 2
procedure in special cases Sch III P 2
property in several districts, procedure Sch III P 12
public sale of land, stay of, may be made by collector S 72
recovery of balance after letting for management Sch III P 8
revision against order of collector S 70 N 8
rules of procedure, local government may make S 70
sale held by collector, suit to set aside for fraud, if maintainable S 70 N 5
sale how to be conducted Sch III P 10
sale, power of collector to set aside S 70 N 6
sale setting aside, by depositing decree amount O 21 R 89 N 9
scheme for liquidation of money decrees, scope of Sch III P 7 N 1
statement of debts Sch III P 4
temporary alienation by collector—
  authority in general term, court may give collector S 72 N 8
  discretion of court S 72 N 5
  sale in execution of land prohibited—temporary alienation if can be ordered S 72 N 7
  collector's order, if appealable S 72 N 10
  court authorising—appealability of order S 72 N 10
  of land by collector—instalments, court cannot allow payments by S 72 N 6
  of land—provisions of Ss 69 to 71 applicable to S 72 N 9
termination of collector's powers Sch III P 11 N 5
third schedule, applies to proceedings S 69

Execution—COLLECTOR
transfer to collector of execution of decrees—power of local government to direct S 68
CORPORATION
  decree for specific performance or injunction against corporation—mode of execution O 21 R 32 (2)
  share in, sold in execution—delivery of share O 21 R 79
COSTS
  executing court—power of in respect of costs not awarded by decree O 34 R 10 N 7
  execution for costs consequent on Privy Council decree O 45 R 15 N 14
  execution of decree before ascertainment of costs S 118
  objection to execution of decree as regards costs is a question relating to execution S 47 N 80
COURT EMPOWERED TO EXECUTE S 38
  application for execution to which court to be made O 21 R 10
  court by which decree may be executed Ss 37, 38
  court by which decree may be executed—concurrent jurisdiction, two courts having within the same limits S 38 N 1
  court to which application for execution to be made O 21 R 10
  court which passed a decree—
    appellate jurisdiction, decree passed in the exercise of S 37 N 3
    court of first instance ceasing to exist S 37 N 4
    court of first instance ceasing to have jurisdiction to execute S 37 N 5
    meaning of S 37
    transfer of territorial jurisdiction subsequent to decree—jurisdiction of court to execute the decree S 37 N 5
  local limits of jurisdiction of courts uncertain S 18 N 1
  pecuniary jurisdiction of court, decretal amount exceeding—power of court to execute the decree S 38 N 7
  property outside jurisdiction, execution against S 17 N 8
  sale of property outside jurisdiction O 21 R 64 N 1
  territorial jurisdiction of court executing the decree necessary—exceptions to the rule S 38 N 6
  territorial jurisdiction is a condition of court's power to execute S 38 N 6
  when court passing decree ceases to have jurisdiction to execute its decree, S 37
  when judgment-debtor's property is in several districts Sch III P 12
  when lands, situate in more than one jurisdiction O 21 R 3
CROSS DECREES AND CROSS CLAIMS O 21 Rr 18, 19
  application for execution, where cross claims are made O 21 R 19

Execution—CROSS-DECREES
application to execute cross-decrees O 21 R 18
assignment of cross-decree and execution O 21 R 18
cross claims under same decree—procedure O 21 R 19
cross claims under same mortgage decree O 21 R 20
cross decree—private award if can be set off O 21 R 18 N 4
decree for recovery of money by sale of immovable property whether decree for money for purposes of set off in execution O 21 R 18 N 3
mortgage decree— O 21 R 20
mortgage suits, cross-decrees and cross-claims in O 21 R 20
order for restitution under S 144 is cross decree for purposes of set off O 21 R 18 N 4
satisfaction
cross claims, under same decree O 21 R 19
cross-decrees O 21 R 18
transferee of decree—execution of cross decrees O 21 R 18
decree for delivery of movable property O 21 R 31
DECREE FOR EXECUTION OF DOCUMENT OR ENDORSEMENT OF NEGOTIABLE INSTRUMENT
document to be executed by court for transfer or endorsement of negotiable instrument or share in corporation— O 21 R 80
mode of execution O 21 R 34
DECREE FOR RESTITUTION OF CONJUGAL RIGHTS—*See* EXECUTION—DECREE FOR SPECIFIC PERFORMANCE, INJUNCTION OR RESTITUTION OF CONJUGAL RIGHTS
decree for specific movable O. 21 R 31
DECREE FOR SPECIFIC PERFORMANCE, INJUNCTION OR RESTITUTION OF CONJUGAL RIGHTS O 21 R 32
against whom decree for injunction may be executed—vendee from defendant O 21 R 32 N 6
discretion of court in execution of decree for restitution of conjugal rights O 21 R 33
disobedience of decree by judgment debtor O 21 R 32
mode of execution O 21 R 32
of decree for restitution of conjugal rights O 21 R 32; O 21 R 33
power to grant possession under decree for specific performance where decree does not do so O 21 R 32 N3
restitution of conjugal rights, decree for, against husband—discretion of court to order defendant to make periodical payments O 21 R 33
sale of judgment-debtor's property for disobedience of decree O 21 R 32
specific performance of contract of sale, decree for—power of court to grant possession O 21 R 32 N 3

Execution
DELIVERY OF PROPERTY
coin, delivery of O 21 R 56
currency notes—delivery after attachment O 21 R 56
(delivery of) debt sold O 21 R 79
decree for movable property—compensation in case of non-delivery O 21 R 31
immovable property. *See* EXECUTION IMMOVABLE PROPERTY—POSSESSION OF
(delivery of) movable property sold O 21 R 79
share in corporation—delivery of O 21 R 79
DISMISSAL OF EXECUTION APPLICATION FOR NON-PROSECUTION OR FOR DEFAULT
application for execution—dismissal for default—execution, removal from file for statistical purposes O 21 R 53 N 5
of execution application for default O 21 R 10 N 9
inability of court to proceed with O 21 R 57
striking out execution proceedings, effect of O 21 R 57
EXECUTING COURT, POWER OF
account books of judgment-debtor—power to order their delivery into court O 21 R 41 N 5
bound by order of court passing decree O 21 R 28
construction of decree, power as to S 47 N 76
construction of decree, rules of S 47 N 77
decree not awarding interest specified in judgment—whether recoverable in execution O 20 R 6 N 7
examination of judgment-debtor as to his property O 21 R 41
if can go behind decree S 38 Nn 8, 9
may construe decree if ambiguous S 38 N 9
execution in foreign territory—*See* EXECUTION—TRANSFER OF DECREE, TO ANOTHER COURT FOR EXECUTION
FIRM
co-partner's execution in suits between O 30 R 9
decree against O 21 R 50
mode of execution O 21 R 50
proceedings for determination of liability of person as partner—nature of O 21 R 50 N 6
defence of party appearing under protest O 30 R 8 N 4
partner mode of execution against O 21 R 49
(OF) FOREIGN DECREES
execution of decree passed in Native States Ss 43, 44
(of) foreign decrees Ss 43; 45
if and when can be refused S 44 N 4
judgment of Native States when enforceable by proceedings in execution S 44
GARNISHEE—*See* EXECUTION—ATTACHMENT—GARNISHEE
IMMEDIATE EXECUTION
arrest in, privilege from O 21 R 11 N 3
oral application for, of money-decree O 21 R 11 (1)

Execution—IMMEDIATE EXECUTION

- on passing decree O 21 R 11

IMMOVABLE PROPERTY, POSSESSION OF

- auction-purchaser
  - delivery of possession to, O 21 Rr 95 96
    - property in occupation of judgment-debtor, O 21 R 96
    - property in occupation of tenants, O 21 R 96
  - dispossession by O 21 R 100
- building or enclosure, delivery of possession of—mode of execution O 21 R 35
- decree for delivery of—property in occupation of tenant O 21 R 36
- decree for—mode of execution O 21 R 35
- decree for possession
  - meaning of O 21 R 97 N 2
  - possession, taken without the intervention of the court—effect O 21 R 36 N 3
  - property in occupancy of tenant—mode of execution O 21 R 36
- delivery of possession of property to purchaser O 21 Rr 95, 96
- delivery of—suit by purchaser for possession—maintainability of O 21 R 95 N 5
  - undivided share of immovable property O 21 R 96 N 4
- dispossession by decree-holder or purchaser O 21 R 100
  - of *bona fide* claimant procedure O 21 R 101
  - transferee from judgment-debtor *pendente lite* O 21 R 102
- dispossession of person other than judgment-debtor—complaint by such person O 21 R 100
- execution sale—delivery of property in occupancy of tenant O 21 R 96
- joint possession—decree for—mode of execution O 21 R 35
- order for delivery in, effect of, on proceedings under Criminal Procedure Code, S. 145 O 21 R 36 N 4
- proceedings for delivery of—adverse order under—suit by decree-holder or auction-purchaser—if lies O 21 R 103 N 2
- proceedings for delivery of possession—conclusiveness of order in O 21 R 103
- property sold in execution—delivery of possession to auction-purchaser O 21 R 95
- purchaser, whether can sue for possession O 21 R 95 N 8
- remedies of auction-purchaser O 21 R 95 N 8
- sale in execution—delivery of property in occupancy of judgment debtor O 21 R 95
- symbolical possession O 21 R 96
- symbolical possession—delivery of O 21 R 35
- transferee *pendente lite* from judgment debtor—applicability of Rr. 99 and 101 O 21 R 102
- whether execution purchaser is bound to apply for possession O 21 R 95 N 5

Execution

JOINT DECREE-HOLDER

- application for execution by O 21 R 15
  - amendment of O 21 R 15 N 9
  - contents of O 21 R 15 N 4
- decree, adjustment of—joint decree-holder whether can certify satisfaction of decree beyond his own interest O 34 R 5 N 30
- execution by, for his share only O 21 R 15 N 5
- one of several joint decree-holders purchasing and setting off against decree amount—recovery of share of other decree-holders, suit for S 66 N 13
- payment out of court to one joint decree-holder—effect O 21 R 15 N 8
- transferee from, right of, to execute decree O 21 R 16 N 7

JOINT POSSESSION—*See* EXECUTION—IMMOVABLE PROPERTY, POSSESSION OF

(BY OR AGAINST) LEGAL REPRESENTATIVES Ss 50 52 53 O 21 R 32 N 6

- accounts, power to compel legal representative to produce S 50 (2)
- appeal against order under S 50 S 50 N 19
- application to execute against legal representative S 50 N 13
- *bona fide* purchaser, property in the hands of if can be proceeded against S 50 N 15
- court which passed the decree, application for execution to be made to S 50 N 13
- death of legal representative—legal representative of legal representative can be brought on record S 50 N 17
- "dies" in S. 50 means natural death S 50 N 10
- enforcement of decree obtained against legal representative S 52
- execution against
  - one of several legal representatives S 50 N 14
  - wrong legal representative, effect of S 50 N 14
- execution without legal representative—effect of S 50 N 14
- extent of liability of legal representative S 52 N 13
- failure to implead legal representatives in sale proceedings—effect O 21 R 90 N 34
- fresh application for execution if necessary S 50 N 13
- Hindu ancestor, decree against—
  - applicability of S. 53 only when ancestor is deceased S 53 N 4
  - enforcement against property in descendant's hand if limited to money decree against ancestor S 53 N 5
  - enforcement against property in hands of descendant property of the deceased ancestor, meaning of S 53 N 6
  - liability of property in descendant's hands for the debts of deceased ancestor S 53 N 3

Execution—(BY OR AGAINST)—LEGAL REPRESENTATIVES

- liability of son in respect of decree S 53 N 1
- liability of son or descendant, only in cases of survivorship S 53 N 2
- impleadment of legal representative O 22 R 3 N 4
  - failure to implead—sale, effect on S 50 N 12
- injunction, decree against a judgment-debtor—if can be executed against legal representative S 50 N 18
- inquiry as to who is representative of party S 47 (3)
- judgment-debtor becoming insolvent after attachment—sale without impleading official receiver, effect of S 50 N 12
- judgment-debtor dying after attachment—if necessary to implead legal representative S 50 N 12
- legal representative brought on record becomes party to suit S 50 N 5
- (by) legal representative of decree-holder O 21 R 10 N 2
- liability to account for assets of deceased S 52 N 13
- liability of legal representative co-extensive with that of deceased judgment-debtor S 50 N 7
- liability of legal representative, extent of S 50
- limitation for substitution of legal representative S. 50 N 16
- manner of execution against S 52 N 14
- official assignee, property of judgment-debtor vesting in—If he can be proceeded against S 50 N 10
- proceedings against judgment-debtor legal representative is bound by S 50 N 7
- property in the possession of third party, decree-holder if can proceed against S 50 N 15
- substitution of legal representative
  - application for, to be made to court passing decree S 42 N 1
  - on death of a party O 22 R 3 N 4
- validity of decree against judgment-debtor, legal representative if can question S 57

LIMITATION

- acknowledgment-petition asking for time for payment of decretal amount O 21 R 69 N 15
- appellate decree—time runs from the date of appellate decree S 38 N 5
- application for payment out, of attached money whether step-in-aid O 21 R 58 N 8
- application to set aside sale on ground of fraud or material irregularity—limitation for O 21 R 90 N 49
- arrest, application for, if a step-in-aid of execution S 55 N 17
- bar of execution, after 12 years S 48
- claim suit, limitation for O 21 R 63 N 15
- decree for injunction—limitation for execution S 48
- effect of uncertified payment out of court O 21 R 2 N 27

Execution—LIMITATION

- fraud, where execution of decree is prevented by S 48
- instalment decree limitation for O 20 R 11 N 13
- law of limitation, if effect is to supersede S 48 S 48 N 2
- limit of time for execution S 48
  - appeal from order under S. 48 granting or refusing execution S 48 N 16
  - applicable to all kinds of decrees excepting decree granting injunction S 48 N 2
  - applicability to Chartered High Courts S 48 N 9
  - application to execute decree—should not be merely incidental application S 48 N 4
  - at a certain date or at a recurring period, decree directing payment of money or delivery of property S 48 N 12
  - bars execution only and not rights of decree-holder S 48 N 2
  - computation of 12 years period for execution S 48 N 10
  - date of decree sought to be executed, computation of period from S 48 N 10
  - deduction of time, in what cases can be made S 48 N 14
  - force, execution prevented by judgment-debtor on account of—computation of time S 48 N 15
  - fraud, execution of decree prevented by judgment-debtor's—computation of time S 48 N 15
  - fraud, execution prevented by—what amounts to fraud S 48 N 15
  - fresh application after 12 years—ancillary when is and when not S 48 N 7
  - fresh application—continuation of previous application, as contradistinguished from S 48 N 7
  - fresh application means substantive application and not ancillary one S 48 N 7
  - minority or other disability of decree-holder, exclusion of time S 48 N 13
  - object of fixing S 48 N 2
  - order after decree for payment by instalments S 48 N 11
  - order for execution not to be made on application after 12 years S 48 N 2
  - order on application can be made after 12 years if application is within time S 48 Nn 2 and 6
  - period to be computed from when S 48 N 2
  - plea of bar—when to be raised S 48 N
  - Presidency Small Cause Court decree, applicability to S 48 N 2
  - subsequent order, meaning of S 48 N 11
  - subsequent order,—which court should pass order S 48 N 11

Execution—LIMITATION—Limit of time

- successive applications for execution of decrees of courts other than Chartered High Courts S 48 N 8
- objection as to—if can be taken at any stage S 47 N 83
- punishment for disobedience of injunction etc—limitation for O 21 R 32 N 11
- restoration of property sold or delivered in excess of decree, application for—limitation S 47 N 88
- sale, setting aside of—limitation for application S 47 N 88
- step-in-aid of execution S 39 N 12; S 45 N 4
  - application for execution of document by court O 21 R 34 N 7
  - applications for payment out of money attached whether application for execution O 21 R 52 N 8
  - application for proclamation of sale O 21 R 66 N 24

MODE OF S 51 N 7; O 21 Rr 30-36

- arrest and detention S 51 N 5
- attachment and sale S 51 N 4
- decree-holder's right to select any one mode S 51 N 2; O 21 R 30 N 4
- equitable execution—appointment of receiver O 40 R 1 N 19
- execution against legal representative S 52
- money, decree for payment of, O 21 R 30
- O 21 R 30 whether exhaustive of modes O 21 R 30 N 7
- property if cannot be attached and sold—receiver if can be appointed in respect of S 51 N 6
- receiver, appointment of O 21 R 30 N 7
- receiver, execution by appointing a S 51 N 6
- receiver, execution by appointment of—appealability of order S 51 N 9

NOTICE TO SHOW CAUSE AGAINST O 21 R 22

- application for execution
  - amendment of, after one year O 21 R 22 N 2
  - against legal representative of party to the decree, notice necessary O 21 R 22
- court by which notice is to be issued O 21 R 22 N 14
- court to which decree is transferred for execution—power of, to issue notice O 21 R 22
- failure to give notice—effect—sale whether can be set aside O 21 R 90 N 14
- failure to serve notice—effect on sale in execution O 21 R 90 N 36
- legal representative,—execution against O 21 R 22
  - notice to adult legal representative alone whether sufficient O 21 R 22 N 12
  - notice to show cause, by which court to be issued O 21 R 22 N 14
  - where application was originally made against original judgment-debtor O 21 R 22 N 2
- notice issued to one of many judgment-debtors—effect O 21 R 22 N 13

Execution—NOTICE TO SHOW CAUSE AGAINST

- notice to judgment-debtor before issue of execution O 21 R 22; O 21 R 37
- notice to legal representative of a party to the decree O 21 R 22
- notice when to be given O 21 R 22
- objection to execution
  - duty of court to consider O 21 R 23 N 2
  - failure to raise after notice to show cause against execution—effect O 21 R 23 N 1
- procedure after issue of notice O 21 R 23
- when decree more than a year old O 21 R 22

OBSTRUCTION OR RESISTANCE TO EXECUTION S 74

- decree for possession—constructive possession, if also included S 74 N 6
- door, breaking open of, for delivery of possession, to decree-holder O 21 R 35 (3)
- High Court, disobedience of judicial orders of—contempt proceedings, power to take S 74 N 2
- immovable property O 21 R 97
- obstructing execution of decree, power of court to which it is transferred for execution S 42
- obstruction
  - by *bona fide* claimant O 21 R 99
  - by judgment-debtor O 21 R 98
  - to delivery of possession O 21 R 97
- possession by purchaser—resistance or obstruction to O 21 R 97
- possession
  - decree for—resistance to delivery of possession O 21 R 35
  - delivery of, to auction-purchaser—resistance to O 21 R 97
- possession of immovable property, resistance to—punishment S 74
- possession—resistance or obstruction
  - by *bona fide* claimant O 21 R 99
  - by judgment-debtor—procedure O 21 R 98
  - inherent power to order removal of O 21 R 99 N 7
  - remedies O 21 R 97 Nn 4, 5
- punishment—detention, order of—appealability of order S 74 N 7
- punishment for S 74
- punishment — judgment-debtor or some person on his behalf, resistance must be by S 74 N 4
- purchaser of immovable property,
  - resistance to
  - punishment S 74
  - obtaining possession of immovable property O 21 R 97
- resistance
  - by *bona fide* claimant O 21 R 99
  - by judgment-debtor O 21 R 98
  - to delivery of possession, O 21 Rr 35, 97
  - to execution S 74
  - or obstruction to possession O 21 R 97
- sale—immovable property—delivery of—resistance to O 21 R 97
- what is resistance S 74 N 5

ORDER, EXECUTION OF

- application to orders, of provisions relating to execution of decrees S 36

Execution

- (OF) PART OF DECREE
  - application for execution O 21 R 10 N 1; O 21 R 15 N 2
- "PARTIES TO SUIT" AND THEIR REPRESENTATIVES
  - auction-purchaser and judgment-debtor, dispute between in delivery proceedings
    - appeal if lies from order on enquiry S 47 N 19
    - separate suit, dispute if can be agitated in S 47 N 19
  - auction-purchaser and party or his representative, question between S 47 N 19
  - benamidar, decree obtained by, question as to who is true owner to be decided in execution S 47 N 16
  - co-defendants, questions between S 47 N 5
  - co-judgment-debtors, dispute between —when can be said to be between parties S 47 N 5
  - custodian of attached property, if a party to the suit S 47 N 11
  - decree-holder and judgment-debtor —auction-purchaser interested in question between, if a question between parties to suit S 47 N 49
  - decree-holder becoming auction-purchaser—party to suit, if retains his character of S 47 N 19
  - defendant against whom suit is dismissed—if a party to the suit S 47 N 8
  - exoneration of defendants on the ground of misjoinder—defendant if party to suit S 47 N 8
  - Government in proceedings in *forma pauperis* if party to suit S 47 N 10
  - intervenor impleaded as party, is party to suit S 47 N 13
  - joint decree-holders, question between—if between parties S 47 N 5
  - parties arrayed on the same side S 47 N 5
  - parties on the same side, question between—opposite side if should be interested S 47 N 5
  - party sued in representative capacity is a party in every capacity S 47 N 15
  - parties to the suit—meaning of S 47 N 7
  - persons not parties to suit, instances of S 47 N 7
  - plaintiff whose suit is dismissed—if a party to the suit S 47 N 8
  - questions under S 47 must be between the parties S 47 N 3
  - rateable distribution, question between rival decree-holders—when can be said to be between parties S 47 N 5
  - representative capacity, persons sued in—when can be said to be parties in suit S 47 N 7
  - representative of party
    - attaching creditor of decree-holder, if a representative of decree-holder S 47 N 25
    - auction-purchaser, position of S 47 N 19
    - collusive transferee of decree if a representative S 47 N 24
    - *de facto* representatives alone included S 47 N 17

Execution—"PARTIES TO SUIT" AND THEIR REPRESENTATIVES

- illustrations of S 47 N 17
- meaning of S 47 N 17
- official assignee claiming on behalf of creditors, if a representative or judgment-debtor S 47 N 23
- part transferee of decree, if a representative S 47 N 24
- purchaser from party to suit in which injunction has been granted affecting such party if a representative S 47 N 22
- question as to who is, to be decided by execution court S 47 N 27
- surety for performance of decree not personally liable, if a representative of party S 47 N 26
- transferee from auction-purchaser, position of S 47 N 20
- transferee from party, if included in the term S 47 N 21
- transferee from party when bound by decree S 47 N 21
- transferee from party, when not bound by the decree S 47 N 21
- transferee from transferee of decree if a representative S 47 N 24
- transferee of decree, if a representative S 47 N 24
- who is not S 47 N 17

- stranger purchaser and judgment-debtor, dispute between—question if to be decided only in execution proceedings S 47 N 19
- surety, execution against—if surety is party to the suit S 47 N 9
- trespasser obstructing decree-holder in getting possession, if party to suit S 47 N 14
- unnecessary party, if a party to suit S 47 N 8

- PARTITION DECREE
  - defendant when can apply for execution O 21 R 10 N 2
  - partition of estate or separation of share—Collector, to be made by S 54
    - partition of revenue paying estate
      - acts and orders of collector—
        - appeals against S 54 N 8
      - Collector's action, remedies against S 54 N 7
      - partition to be made by Collector reason for S 54 N 2
- PAYMENT OF MONEY UNDER DECREE
  - modes of, O 21 R 1
- PRECEPT
  - court—power of, to which precept is sent S 46 N 2
  - issue of, for attachment S 46
  - power to issue precepts S 46
- PRE-DECREE AGREEMENT IN BAR OF EXECUTION O 23 R 3 N 15; O 23 R 4 N 2
- PRIVY COUNCIL
  - appeal to, pending, O 45 R 13
  - decree or order of, execution of O 45 R 15
    - orders passed in—appealability of O 45 R 16
- PROCEDURE
  - applicability of O 9

Execution—PROCEDURE
to application to set aside sale on depositing decree amount O 21 R 89 N 7
(to) execution proceeding O 9 R 1 N 1
to proceedings by *bona fide* claimant for restoration of claimant O 21 R 101 N 6
applicability of O 17, R 2 to execution proceedings O 17 R 2 N 2
bar of O. 2, R. 2—applicability of to application for execution O 21 R 10 N 1
execution proceedings—failure of party to appear or produce witness—effect O 17 R 3 N 2
executing officer, examination of, as to his inability to execute process O 21 R 25 (2)
fresh vakalatnama, necessity of, in execution proceedings O 21 R 10 N 2
negotiable instrument—person, appointment of, to receive interest, pending transfer O 21 R 80
negotiable instrument—transfer of— O 21 R 80
payment into court—provisions as to—applicability of, to execution proceedings O 24 R 3 N 3
procedure on receiving application for execution O 21 R 17
splitting of reliefs and claims—applicability of rule as to, to execution proceedings O 2 R 2 N 31
PROCESS FOR
contents of O 21 Rr 24, 25
issue of O 21 R 24
return of process with endorsement O 21 R 25
time within which process is to be executed — extension of time O 21 R 24 N 6
warrant of arrest—contents of O 21 R 38
who can—execute process O 21 R 24
who can execute process—delegation of power by officer to whom process is issued O 21 R 24 N 3
QUESTION RELATING TO EXECUTION, DISCHARGE OR SATISFACTION OF DECREE—TO BE DETERMINED BY EXECUTING COURT
applicability of S. 47 to proceedings under other Acts S 47 N 3
court executing decree, meaning of S 47 N 74
court may treat a proceeding as a suit and *vice versa*—discretionary, the power is S 47 N 82
"determination" meaning of—finally disposed of, questions to be S 47 N 73
object of decision in execution proceedings O 47 N 2
separate suit, bar of—defence, if plea applicable to S 47 N 72
separate suit, prohibition of—*res judicata*, distinction from S 47 N 2
suit for enforcement of executable judgment if lies S 47 N 2
"QUESTION RELATING TO EXECUTION, DISCHARGE OR SATISFACTION OF DECREE—MEANING OF
acts done under colour of execution—question of damages for S 47 N 36
adjustment of decree, question of S 47 N 40

Execution—QUESTION RELATING TO ETC.
agreement against execution of decree, question of S 47 N 41
arising between parties—"arising," meaning of S 47 N 6
attached property, question if belongs to judgment-debtor S 47 N 46
attachment, question of liability of certain property to S 47 N 45
capability of execution of decree, question as to S 47 N 33
contribution among judgment-debtors, question of S 47 N 42
deficient execution, question as to S 47 N 35
excessive execution, question as to S 47 N 35
existence of decree, question as to S 47 N 30
fraud anterior to sale S 47 N 53
in execution proceedings S 47 N 53
in publishing and conducting the sale S 47 N 55
question of decree being obtained by S 47 N 52
fraudulent execution of decree, question of suit for damages S 47 N 36
immorality, question if debts were tainted with S 47 N 47
instances of S 47 N 71-A
interest, payment by way of compensation—question relates to execution S 47 N 81
legal necessity, question if debts were contracted without S 47 N 47
maladministration of estate of deceased judgment-debtor, question of S 47 N 43
mesne profits, question of S 47 N 38
mortgage decree,
objection of representative of judgment-debtor that property is not the latter's, if a question relating to execution S 47 N 46
pre-decree matters, questions as to S 47 N 31
objection to execution sale on ground of want of notice S 47 N 61
party, question as to who is legal representative of, to be decided by executing court S 47 N 16
preliminary and final decree, question arising between S 47 N 34
question if attached property is self-acquired or ancestral S 47 N 47
questions not relating to execution, instances S 47 N 71-A
sales in execution, question of setting aside of S 47 N 51
deposit, setting aside sale on S 47 N 63
on the ground of *ex parte* decree being set aside, S 47 N 60
grounds for setting aside sale S 47 N 71
injunction order, objection on the ground of sale in contravention of S 47 N 67
jurisdiction, sale without—objection on the ground of S 47 N 70
notice to judgment-debtor for settlement of proclamation, want of—objection on the ground of S 47 N 61
on the ground of reversal of decree S 47 N 58

Execution—QUESTION RELATING TO ETC.

- on the ground of want of notice to show cause against execution S 47 N 61
- property not saleable, S 47 N 45
- purchase by decree-holder without permission, S 47 N 62
- saleable interest; (on the ground of) judgment-debtor having none S 47 N 64
- sale not warranted by decree, objection on the ground of S 47 N 68
- stay order—objection on the ground of sale in contravention of S 47 N 66
- time-barred decree, sale under—objection on the ground of S 47 N 69
- Transfer of Property Act, sale in contravention of S 47 N 65
- seizure of wrong property, question as to S 47 N 37
- stay of execution, question of S 47 N 44
- transferability of property proceeded against, question of S 47 N 48
- validity of decree, question as to S 47 N 29
- who is representative of party, question as to S 47

RATEABLE DISTRIBUTION

- assets, distribution of S 73
- (if) mode of execution O 21 R 30 N 7

RES JUDICATA

- application of principle to proceeding to settle proclamation of sale O 21 R 66 N 22
- certificate of sale—if operates as O 21 R 94 N 12
- execution proceedings and *res judicata* S 38 N 11
- objection to irregularity in sale proceedings—order as to, effect of— O 21 R 90 N 41
- order of court declaring one of two rival bidders to be purchaser; whether *res judicata* O 21 R 88 N 5
- order as to irregularity in execution sale O 21 R 92 N 6
- order for delivery of possession of immovable property sold whether is O 21 R 96

REVENUE COURT

- benami purchase—revenue sales—applicability of S. 66 to S 66 N 2
- revenue sale what passes to purchaser under S 65 N 17
- sales by—arrears of revenue not existing—effect or sale S 65 N 17

REVISION

- order deciding—question relating to execution, revision when lies S 47 N 87

SALE

- adjournment of—*See* EXECUTION—SALE—POSTPONEMENT
- application for O 21 R 66
  - contents O 21 R 66
  - statement of particulars of property to be filed by decree-holder O 21 R 66

Execution—SALE

- attachment
  - objections to, raised after sale O 21 R 58 N 5
  - sale without attachment—effect of S 51 N 4
  - whether necessary for sale under mortgage decree O 34 R 5 N 20
- benami purchaser S 66
  - by decree-holder without leave of court O 21 R 72
  - beneficial owner in possession, suit by, for a declaration of his title against a certified purchaser—maintainability of suit S 66 N 10
  - certified purchaser, meaning S 66 N 17
    - name inserted in the certificate fraudulently or without consent of real purchaser—effect of S 66 N 19
    - representatives of certified purchaser, also if included S 66 N 16
    - suit against, by third party—benami of purchase, plea if can be raised S 66 N 11
    - suit by, against real owner—benami plea if maintainable S 66 N 8
    - suit by—for declaration of his own title—maintainability of S 66 N 9
    - waiver of, right of S 66 N 18
  - Hindu co-parcener, purchase by, of share of other co-parceners in property—suit for such share on the ground of its being bought with joint family funds not barred S 66 N 14
  - plea of benami if can be raised in defence S 66 N 8
  - purchase by one with joint funds—suit by the other for share of property—maintainability of S 66 N 15
  - purchaser, suit against on the ground of purchase being on behalf of plaintiff—maintainability of suit S 66
  - return of purchase money, suit for—maintainability of S 66 N 7
  - specific performance of agreement to sell after sale, suit for—maintainability of S 66 N 15
  - specific performance of agreement to sell before *sale*, suit for—maintainability of S 66 N 15
  - suit not maintainable against—, on ground of purchase being benami for plaintiff S 66
  - suit on the ground of benami—applicability of S 66, conditions for S 66 N 2
- bid
  - acceptance by court if necessary for completion of sale O 21 R 84 N 2
  - withdrawal of O 21 R 69 N 13
  - withdrawal of before acceptance O 21 R 84 N 1

Execution—SALE

- certificate of O 21 R 94
  - amendment of O 21 R 94 N 7
  - contents of O 21 R 94 N 5
  - court fee on O 21 R 94 N 15
  - irregularities in sale, cure of, by certificate of sale O 21 R 94 N 11
  - purchaser, who is—certificate to whom to be granted O 21 R 94 N 4
  - registration of O 21 R 94 N 14
  - rights of auction-purchaser O 21 R 94
  - variance between proclamation of sale and sale certificate O 21 R 94 N 9
  - whether operates as *res judicata* O 21 R 94 N 12
- confirmation of O 21 R 92
  - interest—right of decree-holder to—till confirmation O 21 R 72 N 12 ; R 84 N 7; R 92 N 2
  - reversal of decree before confirmation—effect on sale S 65 N 7
  - sale if can be set aside after—for fraud or material irregularity O 21 R 90 N 2
  - time for O 21 R 92 N 12
  - title does not vest in purchaser until confirmation S 65 N 8
- decree-holder, purchase by
  - bid by the decree-holder O 21 R 72
  - exemption from depositing 25 per cent. of the purchase money O 21 R 84
  - fixing of reserve price—Bombay rule O 21 R 72 N 15
  - leave to bid O 21 R 72
  - set off of decree amount against purchase money O 21 Rr 72, 84, 85
  - without leave of court—effect O 21 R 72 N 9
- defaulting purchaser
  - on default—suit for deficiency O 21 R 71 N 13
  - deficiency on re-sale—recovery of from O 21 R 86 N 3
  - forfeiture of deposit money—failure to pay in time O 21 R 86
  - purchase money—failure to pay within the prescribed period—effect O 21 R 86
  - re-sale
    - fresh proclamation—issue of O 21 R 87
    - in default of deposit of 25 per cent. by purchaser O 21 R 84
    - in default of payment of purchase-money, by purchaser O 21 R 86
    - on failure to deposit purchase money—recovery of deficiency on sale O 21 R 86 N 3
    - on failure to pay purchase money within prescribed period O 21 R 86
  - resale on purchaser's default—suit whether lies to set aside order against defaulting purchaser for deficiency O 21 R 71 N 15
  - responsible for loss on resale O 21 R 71

Execution—SALE

- encumbrance on property sold
  - encumbrance, notification of O 21 R 66
  - sale subject to encumbrance O 34 R 12 N 5
- illegality and irregularity in—
  - accepting lower bid when higher bidders are not *bona fide*—effect O 21 R 90 N 36
  - if can be pleaded in defence to suit by purchaser O 21 R 92 N 6
  - waiver of O 21 R 90 N 41
  - judgment-debtor — death of, pending execution O 21 R 66 N 23
  - low price—effect O 21 R 90 N 36
  - movable property—irregularity in sale—effect O 21 R 78
  - non-representation of minor in sale proceedings—effect O 21 R 90 N 35
  - omission to implead legal representative of the parties in sale proceedings O 21 R 90 N 34
  - omission to serve notice under R 22—effect O 21 R 90 N 36
  - sale after satisfaction of decree —effect O 21 R 90 N 31
  - sale held without notice to receiver of property—effect O 21 R 90 N 36
  - sale in contravention of attachment of the decree—effect O 21 R 90 N 33
  - sale in contravention of decree O 21 R 90 N 36
  - sale in one lot though property advertised for sale in separate lots—effect O 21 R 90 N 26
  - suit for possession by purchaser —irregularity in sale, if can be pleaded in defence O 21 R 92 N 6
  - under-valuation—effect O 21 R 90 N 37
- judgment-debtor's co-sharer, bid by to have preference O 21 Rr 77, 88
- mode of
  - court-sale as a rule to be held by public auction O 21 R 65
  - sale by whom conducted and how made O 21 R 65
  - sale of agricultural produce O 21 R 74
  - sale of movable property O 21 R 77
  - share in corporation—transfer—how effected O 21 R 80
- notification of. *See* EXECUTION—SALE—PROCLAMATION OF
- officer, bid by
  - restriction on bidding O 21 R 73
- place of O 21 R 66
  - omission to hold sale at stated place—effect of O 21 R 90 N 25
- postponement or adjournment of O 21 R 69
  - adjournment—to enable judgment-debtor to raise the amount of decree O 21 R 83
  - mortgage, decree on—postponement of sale, under, to enable judgment-debtor to raise decree amount by private transfer O 21 R 83
  - postponement of sale of immovable property O 21 R 83

Execution—SALE—Postponement etc.

- postponement pending investigation of objection to attachment O21 R58
- sale held in contravention of, order for O 21 R 90 N 32
- sale held in court precincts—adjournment of sale O 21 R 69

priority
- sale under rent decree and mortgage decree O 34 R 15 N 7
- successive sales, purchasers at—titles of purchasers S 65 N 12

proceeds, application of S 73
- disbursement of O 21 R 64 N 8
- rateable distribution S 73
- wrongly paid, refund of S 73

proclamation of O 21 R 66
- ascertainment of particulars of property by court O 21 R 66
- contents of O 21 R 66
- date of sale—omission to mention O 21 R 87 N 1
- decree amount—notification of O 21 R 66
- examination for settling O 21 R 66 (4)
- failure of judge to sign—effect on sale O 21 R 90 N 36
- fresh proclamation
  - of re-sale, on purchaser's default O 21 R 87
  - omission to issue—effect O 21 R 90 N 22
  - waiver of O 21 R 69 N 9
  - when necessary O 21 R 69 N 8
- how made O 21 R 67
- irregularity—effect O 21 R 90
- irregularity in O 21 R 66
- misdescription of property—effect O 21 R 90 N 16
- mode of making O 21 R 67
- notification for re-sale O 21 R 87
- notification of sale in execution of two decrees—procedure— O 21 R 90 N 36
- publication in gazette O 21 R 67
- re-sale—of immovable property—fresh proclamation O 21 R 87
- separate proclamation in respect of separate lots, if necessary O 21 R 67
- value of property, notification of O 21 R 66 N 14

purchase money, payment of
- deposit by purchaser of 25 per cent O 21 R 84
- deposit of 25 per cent, failure to make—effect— O 21 R 84 N 4
- time for payment O 21 R 85
- time for—pendency of suit by third person for declaration of properties sold—whether enlarges the time O 21 R 9 N 1

right and title of auction-purchaser O 21 R 92
- auction-purchaser's title third person if can question O 21 R 92 N 6
- confirmation of sale—relation back of title to date of sale S 65 N 8
- date of sale, property vests in the purchaser from S 65
- defect in judgment-debtor's title—effect O 21 R 93 N 3

Execution—SALE—right and title etc.

- effect of new interpretation of law O 21 R 94 N 10
- Hindu joint family property—sale of—effect O 21 R 94 N 8
- interest of Hindu widow—what passes at sale of O 21 R 94 N 8
- judgment-debtor having no interest in property sold—remedy of purchaser O 21 R 91
- judgment-debtor's title to the property, defect in—effect— O 21 R 91 N 1
- judgment-debtor's want of title—effect O 21 R 93
- judgment-debtor's want of title—suit by purchaser for return of purchase-money, whether lies O 21 R 93 N 4
- mesne profits, right to, when arises S 65 N 10
- mortgage decree, sale under—what passes at sale O 21 R 94 N 8
- movable property,—whether mortgagee can follow property in hands of purchaser O 21 R 81 N 1
- possession, right to, when accrues S 65 N 9
- pre-emption, right of O 21 R 88
- property, not belonging to judgment-debtor, sale of O 21 R 64 N 6
- purchasers' title S 65
- purchaser, who is O 21 R 84 N 1
- rent and revenue of property,—liability of purchaser for, when arises S 65 N 11
- right, title and interest of judgment-debtor—meaning of O 21 R 94 N 8
- sale, when becomes absolute O 21 R 92
- sale, when complete O 21 R 84 N 4
- share in corporation—sale of—what passes to purchaser O 21 R 79 N 2
- title of auction-purchaser— O 21 R 94 N 8
  - of movable property at a court sale O 21 R 81
  - when becomes complete O 21 R 94 N 3
- vesting of property S 65
  - auction-purchaser S 65
- what passes at court sale O 21 R 94 N 8

rules as to,
- power of local government to make sale of any class of interest in land in execution of money decrees S 67

setting aside of
- application by purchaser on ground of judgment-debtor having no interest in property O 21 R 91
- application for—duty of court to investigate O 21 R 90 N 2
- application for—nature of proceeding O 21 R 90 N 44
- auction-purchaser—compensation to, on setting aside O 21 R 89
- award—decree on—sale under—setting aside—on payment of decree amount O 21 R 89 N 4

Execution—SALE—Setting aside of

- bar of application to set aside sale—by depositing decree amount, due to application to set aside on ground of irregularity O 21 R 89
- compensation to purchaser on, O 21 R 89
  - on deposit of decree amount O 21 R 89
    - applicability to sale to compensate decree-holder for disobedience of decree for restitution of conjugal rights O 21 R 89 N 2
- effect of O 21 R 92 N 2
- for fraud or irregularity—application for—bar to application to set aside sale by depositing decree amount O 21 R 89
- for fraud or material irregularity O 21 R 90
  - mortgage decree O 21 R 90 N 2
  - sale if can be set aside after confirmation O 21 R 90 N 2
- grounds for O 21 R 90, Nn 10 to 40
  - objection that court had no jurisdiction O 21 R 90 N 2
  - objection that execution ought not to have been issued O 21 R 90 N 2
  - objection that execution was barred by limitation O 21 R 90 N 2
  - objection that decree is invalid O 21 R 90 N 2
  - objection that decree was obtained by fraud O 21 R 90 N 2
  - objection that property is not saleable O 21 R 90 N 2
  - objection that sale is illegal—application to set aside, if maintainable O 21 R 90 N 2
  - not taken in application to set aside O 21 R 90 N 43
- irregularity in sale O 21 R 90
- liability of purchaser for mesne profits O 21 R 93 N 10
- mesne profits—right of judgment-debtor to, when sale is set aside O 21 R 90 N 2
- money decree is not movable property and sale can be set aside for irregularity O 21 R 78 N 3
- mortgage decree—sale under—setting aside—on payment of decree amount O 21 R 89 N 3
- omission to apply for sale—effect O 21 R 90 N 36
- order for return of purchase money—whether executable O 21 R 93 N 12
- partially O 21 R 90 N 2
- poundage fee—refund of, to purchaser on sale being set aside O 21 R 93 N 9
- power of court to order restitution of possession on sale being set aside O 21 R 92 N 2
- proceedings for—O 9—applicability of O 21 R 90 N 48

Execution—SALE—Settting aside

- proceeding for—parties to— O 21 R 92 N 4
- proceedings to set aside—applicability of S 47 of the code to O 21 R 90 N 50
- publication of—sale—fraud or material irregularity in— O 21 R 90
- purchase money, 5 per cent of—deposit of, with decree amount. O 21 R 89
- purchaser—application by, O 21 R 91
- return of purchase money to auction-purchaser O 21 R 93
- rights of purchaser O 21 R 93
- sale for—disobedience by judgment-debtor of decree for restitution of conjugal rights—applicability of rule as to setting aside O 21 R 89 N 2
- saleable interest, absence of, O 21 R 91
  - return of purchase money O 21 R 93
- sale of immovable property under attachment—sale, when set aside for absence of saleable interest O 21 R 91
- section 47 of the Code, applicability of O 21 R 90 N 44
- suit
  - by purchaser against decree-holder for recovery of poundage O 21 R 93 N 5
  - limitation for O 21 R 92 N 8
  - maintainability of O 21 R 72 N 10 & R 92 N 5
- third party, property of, sale of—sale set aside on owner depositing decree amount—suit for refund against decree-holder, if maintainable O 21 R 89 N 31
- under inherent powers of court O 21 R 89 N 2; O 21 R 92 N 2
- valid sale—consent of auction-purchaser to set aside O 21 R 89 N 2
- valid sale—when may be set aside O 21 R 89 N 2
- where judgment-debtor has no saleable interest O 21 R 91
- who can apply O 21 Rr 89, 90
  - auction-purchaser O 21 R 90 N 6
  - auction-purchaser if can apply on ground of fraud or material irregularity O 21 R 90 N 6
  - benamidar O 21 R 90 N 8
  - court of wards O 21 R 90 N 8
  - guardian of judgment-debtor O 21 R 90 N 8
  - judgment-debtor who has sold away his property O 21 R 90 N 8
  - legal representative of deceased judgment-debtor O 21 R 90 N 8
  - official receiver O 21 R 90 N 8
  - one of several co-sharers of judgment-debtor O 21 R 90 N 8
  - person claiming paramount title O 21 R 90 N 9

Execution—SALE—Setting aside

- persons entitled to dividends in insolvency proceedings O 21 R 90 N 7
- persons entitled to rateable distribution O 21 R 90 N 7
- purchaser *pendente lite* from judgment-debtor O 21 R 90 N 8
- purchaser under rent decree O 21 R 90 N 8

- stay of
  - judgment-debtor at whose instance stay was ordered cannot subsequently appeal against stay O 41 R 6 N 10
  - pending appeal from decree O 41 R 6
    - which court may order O 41 R 6 N 9
  - sale held in contravention of order of injunction—effect O 21 R 90 N 32
- stoppage of O 21 R 69
  - by payment before lot is knocked down O 21 R 69
- temporary alienation if included in power to sell S 51 N 4
- time for O 21 R 62
  - to hold sale at stated time—effect of O 21 R 90 N 25
  - sale before the prescribed period—effect O 21 R 90 N 23
  - sale on date other than that to which it is adjourned O 21 R 69 N 12
  - sale on a holiday—effect O 21 R 90 N 24
  - specification in sale proclamation O 21 R 66
- what court may order
  - immovable property O 21 R 82
  - power to order O 21 R 64
  - which court to order O 21 R 64 N 1
- miscellaneous
  - growing crops O 21 R 75
  - moveable property — vesting order O 21 R 81
  - negotiable instrument O 21 R 76
  - portion of property attached O 21 R 64 N 7
  - saleable property S 60
  - shares in corporation O 21 R 76

SECURITY FOR RESTITUTION OF PROPERTY TAKEN IN EXECUTION O 41 R 6

- decree under, appeal—security for when may be required O 41 R 6
- order in—appeal against O 41 R 8
- surety—enforcement of liability S 145

SEIZURE OF MOVABLES

- access into house gained by person executing—door of inside room, no prohibition as to breaking open of S 62 N 2
- dwelling house not to be entered into by person executing—"dwelling house", meaning of S 62 N 3
- dwelling house when cannot be entered into by person executing S 62
- outer door of dwelling house when can be broken open S 62
- room in dwelling house in the occupancy of woman, when can be entered into S 62 (3)

Execution

SIMULTANEOUS EXECUTION

- against person and property S 51 N 2; O 21 R 21
- arrest— order for— simultaneously with attachment O 21 R 21
- concurrent execution O 21 R 21
- if and how far permissible S 38 N 10

SMALL CAUSE COURT

- decree of—transfer of, for execution O 21 R 6 N 5
- decree, transfer of, for execution to O 21 R 4
- immovable property, execution against S 7 N 5
- power of, to order sale of immovable property O 21 R 82
- transfer to Presidency Small Cause Courts, of decrees for execution O 21 R 4

STAY OF O 21 Rr 26, 29

- (by) appellate court O 41 R 5
- (on) appeal O 41 R 5
- appeal to Privy Council, no bar to execution O 45 R 13 (1)
- appeal whether operates as O 41 R 5
- attachment of decree in execution of another decree—stay as mode of attachment O 21 R 53
- award—stay pending suit between parties to award O 21 R 29 N 4
- (by) court passing decree O 41 R 5
- court to which decree is transferred for execution, by O 21 R 26
- (in view) of likelihood of cross-decree being passed O 21 R 18 N 2
- decree already executed—effect O 41 R 5 N 3
- discharge of judgment-debtor from arrest, pending, stay application—effect of—liability for re-arrest O 21 R 27
- discharge of judgment-debtor from arrest pending application for stay O 21 R 26
- effect of stay O 41 R 5 N 16
- effect of uncommunicated order for stay O 41 R 5 N 17
- execution—order in appeal against—stay of execution—pending appeal O 41 R 8
- exercise of powers of stay in appeal from orders made in execution O 41 R 8
- injunction restraining execution proceedings O 39 R 1 Nn 1, 7, 10, 11
- inherent power to stay O 21 R 29 N 3; O 41 R 5 N 21
- interim stay of execution—pending hearing of application for stay O 41 R 5
- (by) lower court in view of intended appeal—security for stay O 41 R 5
- order for—failure to communicate—effect O 41 R 5 N 17
- pending appeal to Privy Council O 45 R 13 (2) (c)
  - security for stay
    - when appellant is insolvent O 41 R 5 N 15
    - when cannot be demanded O 41 R 7
    - when respondent is insolvent O 41 R 5 N 14
- pending reference O 46 R 2

Execution—STAY OF

- pending suit between decree-holder and judgment-debtor O 21 R 29
- powers of court passing decree to stay execution before appeal is filed O 41 R 5
- power of court passing decree to stay execution before expiry of limitation for appeal O 41 R 5
- proceedings for execution of final decree for sale under mortgage—if can be stayed under O 41 R 6 O 34 R 5 N 20
- reference to High Court, decree not to be executed pending O 46 R 2
- restitution pending stay application, of property seized in execution O 21 R 26
- restitution of property pending, application for stay—liability of property to be seized again O 21 R 27
- restitution of property seized prior to stay O 21 R 29 N 1
- sale when may be stayed—pendency of appeal against decree O 41 R 6
- security for O 21 R 29
- (in) summary suit O 37 R 4
- when may be ordered O 21 R 26: O 41 R 5 N 2; O 41 R 5 Nn 5, 7
- (to) which court application for stay lies O 21 R 26
- who can apply for stay O 21 R 26 N 1

TRANSFEREE OF DECREE

- appellate decree without transferee on record—transferee if assignee of appellate decree also S 49 N 3
- application by O 21 R 16
- application by, for substitution on record O 21 R 16 N 19
- application for execution, by—discretion of court to refuse O 21 R 16 N 11
- application for execution by—whether judgment-debtor can plead uncertified payment of decretal amount O 21 R 2 N 23
- court to which application by, is to be made O 21 R 16 N 12
- equity enforceable against, in cases under O 34 R 14 S 49 N 4
- equity of judgment-debtor
  - against transferor S 49 N 1
  - assignee's knowledge necessary S 49 N 5
- effect S 49
  - set-off of cross decree against original decree-holder S 49 N 2
- execution by O 21 R 16
  - benamidar for transferee O 21 R 16 N 6
  - right to set off by defendant holding cross decree against original decree-holder O 21 R 18 N 10
  - where decree has been attached in execution against original decree-holder O 21 R 16 N 11
- to hold subject to equities of judgment-debtor S 49
- notice to show cause against execution—by which court to be given, in case of transfer of decree for execution O 21 R 22
- part of decree, transferee of, execution by O 21 R 16 N 7

Execution—TRANSFER OF DECREE

- recognition of assignment of decree of Privy Council—court of first instance can order O 45 R 15 N 9
- right of original decree-holder to apply for execution O 21 R 16 N 11
- setting aside of decree subsequent to transfer—right of transferee to apply for execution O 21 R 16 N 11
- transferee of property dealt with by decree, application by, for execution O 21 R 16 N 3

TRANSFER OF DECREE TO ANOTHER COURT FOR—COURT TO WHICH DECREE MAY BE TRANSFERRED S 39 N 5; O 21 R 5

- court in whose jurisdiction judgment-debtor's properties are situate S 39 N 7
- court in whose jurisdiction judgment-debtor resides S 39 N 6

TRANSFER OF DECREE TO ANOTHER COURT FOR—PROCEDURE O 21 R 6

- certificate by executing court S 41
- certificate, on transfer of decree for execution O 21 R 6
- copy of decree O 21 R 6
- documents to be sent to court to which decree transferred O 21 R 6
- executing court must certify result of execution S 41
- execution by court to which decree is sent for execution O 21 R 8
- mode of transfer O 21 Rr 5, 6
- mode of transfer—irregularity in—effect of O 21 R 10 N 6
- procedure where court desires execution by another court O 21 R 6

TRANSFER OF DECREE TO ANOTHER COURT FOR—TRANSFEREE COURT, POWERS OF S 42

- execution, mode of, by transferee courts O 21 R 8
- execution of transferred decrees S 42
- jurisdiction of transferee court—decree in excess of pecuniary jurisdiction of such court S 38 N 7
- power of transferee court to issue notice to show cause against execution O 21 R 22 N 14
- power of transferee court to issue notice under O 21, R 16 of execution application by transferee of decree O 21 R 22 N 2
- power of transferee court to stay execution O 21 R 26
- procedure of transferee court O 21 R 7
- transfer by court to which decree is transferred to another court O 21 R 8
- transferee court, jurisdiction of O 21 R 8 N2
- transferee court whether can question jurisdiction of court passing decree O 21 R 7 N 4
- value of decree exceeding pecuniary jurisdiction of transferee court—power to execute S 38 N 7

TRANSFER OF DECREE TO ANOTHER COURT FOR—MISCELLANEOUS S 39

- execution of decree in another province S 40

Execution—TRANSFER OF DECREE TO ANOTHER COURT
- execution of decree in foreign territory Ss 43, 45
- execution of decree by courts of Native States S 44
- execution proceedings—transfer of— S 24 N 7
- High Court, execution by, of decree sent by other Courts O 21 R 9
- jurisdiction of transferring court, after transfer O 21 R 10 N 6
- whether application for transfer is one for execution O 21 R 10 N 8

WHAT DECREE TO BE EXECUTED
- appellate decree affirming lower court's decree—competency of executing court to look at the latter S 38 N 5
- appellate decree is the executable decree S 38 N 5
- decree to be executed S 38 N 5; S 47 N 33; O 21 R 20 N 3
- Guardian and Wards Act, order under S 34—executability of S 36 N 4
- incapability of execution of decree. instances of S 47 N 33
- subsisting decree, in order to be executable must be subsisting S 38 N 5
- what decrees may be executed S 38 N 5

WHO CAN APPLY FOR
- application by guardian of minor after latter attains majority O 21 R 10 N 2
- benamidar O 21 R 16 N 6
- benamidar of decree-holder—if can execute O 21 R 16 N 6
- decree of appellate court in appeal by some from decree against several parties, proceeding on ground common to all of them—right of non-appealing party to apply for execution O 41 R 4 N 9
- stranger if can apply—representative suit, decree in O 21 R 10 N 2
- stranger, right of O 21 R 16 N 3
- succession certificate production of, along with application for execution O 21 R 10 N 2
- who may apply O 21 R 10 N 2

WITHDRAWAL AND COMPROMISE OF EXECUTION PROCEEDINGS
- application for entering up of satisfaction of decree—withdrawal of O 23 R 1 N 15
- applicability of provisions as to withdrawal and compromise of suit O 23 R 1; N 6; R 4
- application to set aside sale, compromise of, whether must be certified O 21 R 2 N 23-a
- compromise of execution proceedings validity of O 23 R 4 N 2
- O 23 does not apply O 23 R 4
- sale—setting aside—application for —compromise of O 21 R 90 N 2
- withdrawal of—application for—execution—effect O 23 R 1 N 14; O 23 R 4 N 2

Execution

MISCELLANEOUS
- declaratory decree—execution of S 38 N 5; S 47 N 33; O 21 R 10 N 3; O 21 R 17 N 6
- consent decree—execution of O 23 R 3 N 27
- devolution of interest during pendency of execution proceedings O 22 R 10 N 15
- execution
  - against ambassadors, and envoys S 86 (3)
  - (against) Chiefs or Princes S 86 (3)
  - forms of Sch I App E
  - meaning of S 36 N 3
  - (against) minor O 21 R 11 N 11
  - (of decree against) public officer S 82
  - (against) Secretary of State S 82
- final decree in mortgage decree for sale—execution of O 34 R 5 N 20
- maintenance decree—execution of O 21 R 17 N 8
- power to grant relief against forfeiture S 47 N 79
- rent decree under Tenancy Act—execution of O 21 R 17 N 7

Executor
- claim by or against O 2 R 5
- suit by or against O 31

Executor and Administrator
- beneficiaries—representation of, in suits as to property vested in trustees O 31 R 1
- joinder of claims—in suit by or against O 2 R 5
- joinder of executors etc.—in suits concerning property vested in them O 31, R 2
- married executrix, husband of—need not be joined as party O 31 R 3

Exhibits
- appeal—furnishing copies of exhibits in O 41 R 13
- endorsement on O 13 R 4
- return of O 13 R 9

Ex parte decree
- appeal from—dismissal of appeal for default—application to set aside *ex parte* decree, whether maintainable O 41 R 17 N 8
- appeal—*ex parte* decree in—setting aside O 41 R 21
- appeal—when appeal is heard *ex parte* O 41 R 17
- appeal—lies from decree S 96 (2)
- appellate decree—passed *ex parte*—appeal from S 100 (2)
- declaring suit *ex parte*—procedure O 9 R 6 N 2
- defendant—remedies of, open to O 9 R 6 N 3; O 9 R 13 Nn 8, 9
- *ex parte* proceedings—issues O 14 R 3 N 2
- (against) firm O 30 R 3 N 9; O 30 R 8
- meaning of O 9 R 13 N 6
- notice to opposite party—no decree to be set aside without O 9 R 14
- remand in appeal from O 41 R 23 N 17
- second appeal—from appellate decree passed *ex parte* S 100 (2)
- setting aside O 9 R 13
  - after decree had been satisfied O 9 R 13 N 21
  - appeal from decree—dismissal of appeal for default—application to set aside, whether lies O 41 R 17 N 8

Ex parte decree
- appeal lies from order rejecting application to set aside O 43 R 1 (d)
- appeal, re-hearing of appeal disposed of *ex parte* O 41 R 21
- applicability of provision, as to, to insolvency proceedings O 9 R 13 N 2
- application for, and appeal from decree O 9 R 13 Nn 10, 11
- application to set aside *ex parte* decree O 9 R 13
- application to set aside *ex parte* decree—appellate court—power to entertain S 107 N 19
- costs of O 9 R 13 N 22
- effect of O 9 R 13 N 25
- *ex parte* decree in appeal O 41 R 21
- grounds for O 9 R 13 Nn 17, 18
- in favour of one defendant, when operates in favour of all O 9 R 13 N 23
- legal representative, if can apply O 9 R 13 N 16
- minor defendant O 9 R 13 N 20
- no appeal from order setting aside O 43 R 1 (d)
- notice to opposite party O 9 R 14
- order refusing to set aside—appeal from—remand O 41 R 23 N 18
- power of court to set aside, on its own motion O 9 R 13 N 15
- provisions as to, applicability of, to decrees in arbitration proceedings O 9 R 13 N 2
- sufficient cause meaning of O 9 R 13 N 19
- suit to set aside O 9 R 13 N 12
- summons not duly served O 9 R 13 N 18
- when may be set aside against all defendants O 9 R 13 prov
- who can apply to set aside O 9 R 13 Nn 15, 16
- suit declared *ex parte* and adjourned—defendant appearing on adjourned date—procedure O 9 R 7
- suit—hearing of, *ex parte* O 9 R 6
- when court may proceed *ex parte* O 9 R 6 N 2
- when may be passed O 9 R 13 N 6
- when may be passed—duty of plaintiff to prove his case O 9 R 11 N 1
- when suit may be heard *ex parte*—due service of summons O 9 R 6 (a)
- where defendant appears at adjourned *ex parte* hearing O 9 R 7

Extension of time S 148
- decree for redemption of mortgage—extension of time for payment of mortgage money O 34 R 8 N 7
- execution sale—payment of purchase money-extension of time for O 21 R 85 N 5
- (in) foreclosure decrees O 34 R 3 N 4
  - (for) payment of mortgage money under mortgage decree O 34 R 2 N 18
  - (for) payment of mortgage money in suit for sale O 34 R 4 N 8
- (for) payment of sum due under mortgage decree, by appeal being filed O 34 R 3 N 5
- power to enlarge time S 148
- (in) redemption suits O 34 R 8
- security for costs of appeal—time for—O 41 R 10 N 10
- security for production of property—O 38 R 5 N 16

Facts

F

- High Court may determine issues of fact in second appeal S 103
- illegality, showing, must be specially pleaded in defence O 8 R 2
- inconsistent allegations of, to be raised only by way of amendment O 6 R 7
- issues of fact, what are O 14 R 1 (4)
- not denied, to be taken as admitted O 8 R 5
- notice to admit O 12 R 4
- pleading to state material facts only O 6 R 2
- presumed by law—need not be alleged in pleadings O 6 R 13
- (may be) proved by affidavit S 30 (c)
- (to be) proved by affidavit, power of court as to S 30 (c)
- question of fact—*See* SECOND APPEAL
- specially pleaded, what facts to be O 8 R 2

Female
- *See also* WOMAN

Final Decree
- *See also* DECREE
- administration suit in O 20 R 13
- appeal from, where no appeal preferred from preliminary decree S 97
- defined S 2 (2) Expl
- (in a) foreclosure suit O 34 Rr 2, 3
- mesne profits, in respect of O 20 R 12 (2)
- mortgage suit—sale, in suit for O 34 R 5
- partnership suit, in O 20 R 15
- principal and agent, suit between O 20 R 16
- redemption, in suit for O 34 R 8
- rent, in respect of O 20 R 12 (2)

Findings
- on remand O 41 R 26

Fine
- for disobeying summons by a witness S 32 (c); O 16 R 12

Firm
- arbitration award against—execution of award O 21 R 50 N 3
- co-partners— suit between—procedure O 30 R 9
- decree against, effect of O 21 R 50 N 1
- execution against—defence of party entering appearance under protest O 30 R 8 N 4
- *ex parte* decree against firm O 9 R 13 N 26
- execution of decree, against O 21 R 50
- insolvency—execution of decree against firm O 21 R 50 N 9
- manager
  - need not appear though served, unless he is a partner O 30 R 7
  - notice to, as to in what capacity he is served O 30 R 5
  - partnership business, and service of summons on firm O 30 R 3 (b)
- meaning of O 30 R 1 N 3
- partners may sue or be sued in firm name O 30 R 1
- PARTNER
  - notice to one partner to produce documents O 11 R 14 N 6
  - parties to suit O 1 R 10 N 15
  - (s) as joint decree-holders—payment out of court to one of them O 21 R 15 N 8
  - property of—attachment of—mode of O 21 R 49
  - suit against individual O 30 R 1 N 15

Firm—PARTNER
- parties to O 1 R 6 N 5
- suit by or against, in name of firm—pleadings—signing and verification of O 30 R 1
- suit for dissolution of partnership—
  - decree in, form of O 20 R 15
  - security for costs if may be required O 25 R 1 N 12
- suit on behalf of—plaint, contents of O 7 R 4 N 2
- suit relating to—frame of, whole claim to be included O 2 R 1 N 3
- whether can sue in his own name, on cause of action which has arisen in favour of the firm O 30 R 1 N 2

- place, where firm carries on business, for service of summons O 30 R 3 N 6
- proceedings to continue in firm name O 30 R 6
- service of summons, where partners sued in firm name O 30 R 3
- SINGLE PERSON CARRYING ON BUSINESS IN NAME OF FIRM
  - suit by, in name of firm, not competent O 30 R 1 N 2
  - such person resident in foreign territory—suit by or against—procedure O 30 R 10 N 2
- signature and verification of pleadings O 30 R 1 (2)
- SUIT AGAINST
  - appearance of persons served under protest O 30 R 8
  - appearance to be by partner only O 30 R 7
  - decree against firm in default of appearance of any of the partners O 30 R 8
  - defence of partner appearing under protest in proceeding in execution O 30 R 8 N 4
  - dissolution of firm before institution of suit—summons, service of O 30 R 3
  - in name of firm—service of process—mode O 30 R 3
  - partners, in name of firm
    - partners to appear in their own names, but subsequent proceedings to continue in name of firm O 30 R 6
    - separate defences if and when may be raised O 30 R 6 N 3
  - party appearing under protest
    - if can question liability of firm O 30 R 8 N 3
    - not entitled to file written statement O 30 R 8 N 2
  - person carrying on business in name other than his own O 30 R 10
  - persons served, denying to be partners—procedure O 30 R 8
  - summons
    - contents of—to state in what capacity it is served O 30 R 5
    - service of,
      - by post O 30 R 3 N 3
      - persons served both as manager and partner O 30 R 5 N 3
      - place of business of firm, what is O 30 R 3 N 6
      - upon person in control of partnership business—his appearance whether necessary O 30 R 7
    - time for appearance—runs from when O 30 R 3 N 5
- suit between firms having one or more persons in common, as partner—procedure O 30 R 9
- SUIT BY
  - disclosures of partner's names O 30 R 2
  - partners when to be deemed, as named, as plaintiffs in the plaint O 30 R 2
  - stay of proceedings, pending disclosure of names and addresses of partners O 30 R 2
- SUIT BY OR AGAINST O 30
  - death of partner
    - before suit O 30 R 1 N 14
    - joinder of legal representative O 30 R 4
  - decree against firm—suit on O 30 R 6 N 4
  - decree in suit O 30 R 6 N 4
  - disclosure of partner's names to be made on demand by defendant O 30 R 2
  - dissolution of firm, after accrual of cause of action but, before filing of suit O 30 R 1 N 10
  - *ex parte* decree—against firm O 30 R 3 N 9
  - firm as agriculturist O 30 R 1 N 8
  - minor partner O 30 R 1 N 4
  - mortgage suit—service of summons O 30 R 3 N 8
  - no suit allowed in firm name, if firm outside British India O 30 R 1 N 6
  - partners in name of firm O 30 Rr 1, 6
  - procedure O 30 Rr 1 to 9
  - reference to arbitration O 30 R 1 N 11
  - right of suit on death of partner O 30 R 4
  - statement of names and addresses of partners O 30 R 1 N 12
  - suit by firm on promissory note O 30 R 1 N 9
  - when can be brought O 30 R 1
  - whether pauper, for purposes of pauper suit O 33 R 1 N 10

Foreclosure
- *See* MORTGAGE
- charge, no foreclosure, in suits to enforce a O 34 R 15
- discharge of debt, on O 34 R 3 (3)
- final decree in, suit for O 34 R 3
- (of) mortgage or charge—suit for, place of suing S 16 (c)
- parties to suit for O 34 R 1
- place of suing in suits for, in cases governed by the code S 16 (c)
- SUIT FOR
  - decrees, preliminary and final in O 34 Rr 2, 3
  - decreeing sale, in O 34 R 4 (3)
  - extension of time O 34 R 3 N 4
  - procedure as to final decree applies to preliminary decrees passed on compromise O 34 R 3 N 7

Foreign Company
- suit by or against—procedure O 29 R 1 N 5

Foreign Courts
- *See* FOREIGN JUDGMENTS
- commissions—issued at instance of O 26 Rr 19, 22
- decrees of Native States—execution in British India S 44
- execution of decree, by S 45
- jurisdiction of, presumption as to S 14
- letter of request by, to High Court, for examination of witness O 26 R 19

Foreign Courts
- meaning of S 2 (5) N 1
- pendency of suit in, no bar to suit in British Indian court S 10 Expln
- proceedings in—temporary injunction in restraint of O 39 R 1 N 7
- provisions relating to commission, applicable to S 77

Foreign Decrees
- execution of, in British India S 43

Foreign Judgment
- Act of State passed in its Sovereign capacity, if a Ss 13, 14 N 3
- appeal against, pending in foreign court—effect of Ss 13, 14 N 18
- based on incorrect view of international law S 13 (c)
- British India, when no bar to suit in S 13
- CONCLUSIVENESS OF S 13
    - may be set up as defence Ss 13, 14 N 2
    - when not Ss 13, 14 N 8
- court of competent jurisdiction—meaning of, for purposes of actions relating to office of trusteeship Ss 13, 14 N 9
- courts of Native States—enforceability of judgments Ss 13, 14 N 19
- (on a) decree of British Indian court—execution of British Indian decree, if barred Ss 13, 14 N 21
- definition of S 2 (6)
- effect of, in British India Ss 13, 14 N 18
- enforcement,
    - modes of S 14 N 19
    - by suit S 14 N 2
- enforcing foreign judgment and plea of bar to suit, distinction between Ss 13, 14 N 18
- enforceability
    - by suit Ss 13, 14 N 2
    - principle of Ss 13, 14 N 2
- execution--enforcement of foreign judgment by proceedings in S 44
- FOREIGN COURT
    - competency of
        - competence exists in what cases Ss 13, 14 N 9
        - international law, governed by Ss 13, 14 N 9
        - presumption as to Ss 13, 14 N 11
        - submission to jurisdiction Ss 13, 14 N 12
    - illustrations of Ss 13, 14 N 3
    - jurisdiction is territorial Ss 13, 14 N 9
    - jurisdiction over non-resident foreigner Ss 13, 14 N 9
    - must have been of competent jurisdiction Ss 13, 14 N 9
    - pleader, employment of—if submission to jurisdiction Ss 13, 14 N 12
    - Privy Council, if a Ss 13, 14 N 3
    - service of summons on agents—decree when binding on principal Ss 13, 14 N 12
    - subject-matter of suit not within jurisdiction—effect of Ss 13, 14 N 9
    - submission to jurisdiction,
        - kinds of Ss 13, 14 N 12
        - what amounts to Ss 13, 14 N 12
        - when voluntary Ss 13, 14 N 12
- fraud, obtained by
    - effect of Ss 13, 14 N 16
    - nature of fraud Ss 13, 14 N 16

Foreign Judgment
- (by) incompetent court S 13 (a)
- interest not granted—interest if can be claimed in suit upon Ss 13, 14 N 18
- international law, based upon the incorrect view of—effect of Ss 13, 14 N 14
- irregularities not affecting jurisdiction—effect of, upon judgment Ss 13, 14 N 9
- judgment, by way of penalty—conclusiveness of Ss 13, 14 N 13
- law of British India, refusal to recognize—effect of Ss 13, 14 N 14
- limitation, dismissal on the ground of—if on merits Ss 13, 14 N 13
- limitation for enforcing Ss 13, 14 N 23
- meaning of Ss 13, 14 N 3
- merits, adjudication must have been on Ss 13, 14 N 13
- merits, judgment on —Illustrations of Ss 13, 14 N 13
- NATURAL JUSTICE
    - judgment opposed to, S 13 (d)
    - proceedings opposed to,
        - effect of S 13, 14 N 15
        - instances of Ss 13, 14 N 15
        - judgment based on incorrect view of law, if will render proceedings opposed to natural justice Ss 13, 14 N 15
- non-recognition—of British Indian Law, S 13
- NON-RESIDENT FOREIGNER—JUDGMENT
    - against, application to set aside *ex parte* decree, if submission to jurisdiction Ss 13, 14 N 12
    - judgment against, effect of Ss 13, 14 N 9
    - officer of incorporated company, effect of Ss 13, 14 N 10
    - partner of a firm, personal decree against— effect of Ss 13, 14 N 10
- not on merits S 13 (b)
- obtained by fraud S 13 (e)
- onus of proof, based on a wrong view of—if on the merits Ss 13, 14 N 13
- order enforcing award in England—judgment, if a Ss 13, 14 N 3
- order which is not a judgment, if can be Ss 13, 14 N 3
- presumption as to S 14
- suit on
    - if can be brought against persons not parties Ss 13, 14 N 22
    - small cause court, if lies in Ss 13, 14 N 22
- unascertained sum of money granted—suit, if lies upon Ss 13, 14 N 22
- when conclusive or not S 13

Foreign Prince
- *See* PRINCE
    - meaning of S 45 N 3

Foreign State
- consent of Governor-General to Council in suit against ambassador of S 86
- execution in British India—decrees of courts established by Governor-General-in-Council in territories of S 43
- meaning of S 45 N 3
- services of summons in, through political agent O 5 R 26
- suit against ambassador or envoy of S 86
- SUITS BY S 84
    - form of S 84 N 2

Foreign state—SUITS BY
- private rights, suit in respect of—
  - private rights meaning of S 84 N 3
- transfer of decrees of court in British India for execution to courts in S 45
- when may sue in British India S 84

Foreign Summons
- service of S 29

Foreign territory
- property situated in—attachment before judgment O 38 R 5 N 17
- person resident in—trading in British India in name of firm—suit by or against firm O 30 R 10 N 2
- witness resident in—examination of on commission O 26 R 5

Foreigner
- trading in British India in name of firm —but resident abroad—suit by or against such foreigner O 30 R 10 N 2

Forma Pauperis
- appeal—*See* PAUPER APPEAL
- suit in—*See* PAUPER SUIT

Former suits
- meaning of S 11 Expl 1

Form of decree
- *See* DECREE

Forms
- APPEAL REFERENCE AND REVIEW
  - application to appeal in *forma pauperis* (O 44 R 1) Sch I App G 10
  - decree in appeal (O 41 R 35) Sch I App G 9
  - intimation to lower court of admission of appeal (O 41 R 13) Sch I App G 5
  - memorandum of appeal (O 41 R 1) Sch I App G 1
  - memorandum of cross objection (O 41 R 22) Sch I App G 8
  - notice of appeal in *forma pauperis* (O 44 R 1) Sch I App G 11
  - notice to party to a suit not made a party to the appeal but joined by the court as a respondent Sch I App 7
  - notice to respondent of admission of appeal to the King in Council (O 45 R 8) Sch I App G 13
  - notice to respondent of the day fixed for the hearing of the appeal (O 41 R 14) Sch I App G 6
  - notice to show cause why a certificate of appeal to the King in Council should not be granted (O 45 R 3) Sch I App G 12
  - notice to show cause why a review should not be granted (O. 47 R 4) Sch I App G 14
  - security bond to be given during the pendency of appeal (O 41 R 6) Sch I App G 3
  - security bond to be given on order being made to stay execution of decree (O 41 R 5) Sch I App G 2
  - security for costs of appeal (O 41 R 10) Sch I App G 4

Forms—APPEAL, REFERENCE AND REVIEW
- application for an order of reference Sch II App 1
- award Sch II App 5
- DECREE
  - against mortgagor personally for balance after the sale of the mortgaged property (O 34 Rr 6 and 8-A) Sch I App D 8
  - to set aside a transfer in fraud of creditors Sch I App D 13
  - for recovery of land and mesne profits Sch I App D 23
  - for rectification of instrument Sch I App D 12
  - in original suit O 20 R 6 7 Sch I App D 1
  - final decree
    - for foreclosure O 34 R 3 Sch I App D 4
    - for foreclosure in a redemption suit on default of payment by mortgagor (O 34 R 8) Sch I App D 7-D
    - for sale O 34 R 5 Sch I App D 6
    - for sale in a redemption suit on default of payment by mortgagor (O 34 R 8) Sch I App D 7-E
    - in an administration suit by a legatee Sch I App D 18
    - in an administration suit by next of kin Sch I App D 20
    - in a suit for dissolution of partnership and the taking of partnership accounts Sch I App D 22
    - in a suit for foreclosure, sale or redemption where the mortgagor pays the amount of the decree (O 34 Rr 3, 5 and 8) Sch I App D 7-F
  - injunction
    - against building higher than old level Sch I App D 15
    - against private nuisance Sch I App D 14
    - restraining use of private road Sch I App D 16
  - preliminary decree for foreclosure Sch I App D 9
    - (O 34 R 2—where accounts are directed to be taken) Sch I App D 3
    - (O 34 R 2—where the court declares the amount due) Sch I App D 3-a
  - preliminary decree for redemption—
    - of prior mortgage and foreclosure or sale on subsequent mortgage Sch I App D 10
    - where on default of payment by mortgagor a decree for *foreclosure* is passed (O 34-R 7—where accounts are directed to be taken) Sch I App D 7
    - where on default of payment by mortgagor a decree for *foreclosure* is passed (O 34 R 7—where the court declares the amount due) Sch I App D 7-B
    - where on default of payment by mortgagor a decree for *sale* is passed (O 34 R 7—where

- the court declares the amount due) Sch I App D 7-C
  - where on default of payment by mortgagor a decree for *sale* is passed (O 34 R 7—where accounts are directed to be taken) Sch I App D 7-A
- preliminary decree for sale Sch I App D 11
  - (O 34 R 4)—when the court declares the amount due Sch I App D 5-a
  - (O 34 R 4—where accounts are directed to be taken) Sch I App D 5
- preliminary decree in an administration suit Sch I App D 17
  - by a legatee, where an executor is held personally liable for the payment of legacies Sch I App D 19
- preliminary decree in a suit for dissolution of partnership and the taking of partnership accounts Sch I App D 21
- simple money decree (S 34) Sch I App D 2

DISCOVERY, INSPECTION AND ADMISSION
- admission of facts pursuant to notice (O 12 R 5) Sch I App C 11
- affidavit as to documents (O 11 R 13) Sch I App C 5
- answer to interrogatories (O 11 R 9) Sch I App C 3
- interrogatories (O 11 R 4); Sch I App C 2
- order for delivery of interrogatories (O 11 R 1) Sch I App C 1
- notice to admit documents (O 12 R 3) Sch I App C 9
- notice to admit facts (O 12 R 5) Sch I App C 10
- notice to inspect documents (O 11 R 17) Sch I App C 8
- notice to produce documents (O 11 R 16) Sch I App C 7
- notice to produce (general form) (O 12 R 8) Sch I App C 12
- order for affidavit as to documents (O 11 R 12) Sch I App C 4
- order to produce documents for inspection (O 11 R 14) Sch I App C 6

EXECUTION
- application for execution of decree (O 21 R 11) Sch I App E 6
- attachment—prohibitory order
  - where the property consists of debts not secured by negotiable instruments (O 21 R 46) Sch I App E 17
  - where the property consists of immovable property (O 21 R 54) Sch I App E 24
  - where the property consists of money or of any security in the custody of a court of justice or officer of government (O 21 R 52) Sch I App E 21
  - where the property to be attached consists of movable property to which the defendant is entitled subject to a lien or right of some other person to the immediate possession thereof (O 21 R 46) Sch I App E 16
  - where the property consists of shares in the capital of a corporation (O 21 R 46) Sch I App E 18
- authority of the collector to stay public sale of land (S 72) Sch I App E 42
- certificate
  - by officer, holding a sale of the deficiency of price on a re-sale of property by reason of the purchaser's default (O 21 R 71) Sch I App E 31
  - of execution of decree transferred to another Court (O 21 R 6) Sch I App E 5
  - of non-satisfaction of decree (O 21 R 6) Sch I App E 4
  - of sale of land (O 21 R 4) Sch I App E 38
  - to judgment debtor authorising him to mortgage, lease or sell property (O 21 R 83) Sch I App E 35
  - notice of atachment
    - of a decree to the court which passed it (O 21 R 53) Sch I App E 22
    - of a decree to the holder of the decree O 21 R 53 Sch I App E 23
- notice
  - of the day fixed for settling a sale proclamation Sch I App E 28
  - to attaching creditor (O 21 R 58) Sch I App E 26
  - to person in possession of moveable property sold in execution (O 21 R 79) Sch I App E 32
  - to show cause
    - why execution should not issue (O 21 R 16) Sch I App E 7
    - why a payment or adjustment should not be recorded as certified (O 21 R 2) Sch I App E 1
    - why sale should not be set aside (O 21 Rr 90, 91, 92) Sch I App E 36, 37
    - why warrant of arrest should not issue O 21 R 37 Sch I App E 12
  - to state objection to draft of document (O 21 R 34) Sch I App E 10
- order
  - of attachment of negotiable instrument Sch I App E 20
  - for delivery to certified purchaser of land at a sale in execution (O 21 R 95) Sch I App E 39
  - for payment to the plaintiff etc., of money etc., in the hands of a third party (O 21 R 56) Sch I App E 25
  - for the release of a person imprisoned in execution of a decree (Ss 58, 59) Sch I App E 15
  - on the nazir for causing service of proclamation of sale (O 21 R 66) Sch I App E 30

Forms—EXECUTION—Order

- sending decree for execution to another court (O 21 R 6) Sch I App E 3
- to attach salary of public officer or servant of railway company or local authority (O 21 R 48) Sch I App E 19
- precept (S 46) Sch I App E 2
- proclamation of sale (O 21 R 66) Sch I App E 29
- prohibitory order
  - against payment of debts sold in execution to any other than the purchaser (O 21 R 79) Sch I App E 33
  - against the transfer of shares sold in execution (O 21 R 79) Sch I App E 34
- summons to appear and answer charge of obstructing execution of decree (O 21 R 97) Sch I App E 40
- warrant for seizure of specific moveable property adjudged by decree (O 21 R 31) Sch I App E 9
- warrant of arrest in execution (O 21 R 38) Sch I App E 13
- warrant of attachment of moveable property in execution of a decree for money (O 21 R 30) Sch I App E 8
- warrant of committal (O 21 R 98) Sch I App E 41
- warrant of committal of judgment-debtor to jail (O 21 R 40) Sch I App E 14
- warrant of sale of property in execution of a decree for money (O 21 R 66) Sch I App E 27
- warrant to the bailiff to give possession of land etc. (O 21 R 35) Sch I App E 11
- in general, use of, in appendices to schedule I of the Code O 48 R 3
- order for appointment of new arbitrator Sch II App 3
- order of reference Sch II App 2
- PLEADINGS
  - description of parties in particular cases Sch I App A 2
  - plaints
    - administration by creditor on behalf of himself and all other creditors Sch I App A (3) 41
    - administration by pecuniary legatee Sch I App A (3) 43
    - administration by specific legatee Sch I App A (3) 42
    - against a builder for defective workmanship Sch I App A (3) 17
    - against a fraudulent purchaser and his transferee with notice Sch I App A (3) 33
    - against surety for payment of rent Sch I App A (3) 12
    - on an agreement of indemnity Sch I App A (3) 20
    - on an award Sch I App A (3) 10
    - on a bond for the fidelity of a clerk Sch I App A (3) 18

Forms—PLEADINGS—Plaints

- breach of agreement to purchase land Sch I App A (3) 13
- breach of contract to serve Sch I App A (3) 16
- carrying on a noxious manufacture Sch I App A (3) 24
- deficiency upon a re-sale of goods sold at auction Sch I App A (3) 6
- diverting a watercourse Sch I App A (3) (27)
- execution of trusts Sch I App A (3) 44
- foreclosure or sale Sch I App A (3) 45
- on a foreign judgment Sch I App A (3) 11
- fraudulently procuring credit to be given to another person Sch I App A (3) 22
- goods made at defendant's request, and not accepted Sch I App (3) 5
- goods sold at a fixed price and delivered Sch I App A (3) 3
- goods sold at a reasonable price and delivered Sch I App A (3) 4
- injunction against the diversion of a water course Sch I App A (3) 38
- injunction restraining nuisance Sch I App (3) 36
- injunction restraining waste Sch I App (3) 35
- injuries caused by negligence on a railroad Sch I App A (3) 29
- injuries caused by negligent driving Sch I App A (3) 30
- interpleader Sch I App A (3) 40
- for malicious prosecution Sch I App A (3) 31
- money lent Sch I App A (3) 1
- money overpaid Sch I App A (3) 2
- movables wrongfully detained Sch I App A (3) 32
- not delivering goods sold Sch I App A (3) 14
- obstructing a highway Sch I App A (3) 26
- obstructing a right of way Sch I App A (3) 25
- obstructing a right to use water for irrigation Sch I App A (3) 28
- partnership Sch I App A (3) 49
- polluting the water under the plaintiff's land Sch I App A (3) 23
- procuring property by fraud Sch I App A (3) 21
- public nuisance Sch I App A (3) 37
- redemption Sch I App A (3) 46
- rescission of a contract on the ground of mistake Sch I App A (3) 34
- restoration of movable property threatened with destruction and for an injunction Sch I App A (3) 39
- services and materials at a reasonable cost Sch I App A (3) 8
- services at a reasonable rate Sch I App A (3) 7
- specific performance (No 1) Sch I App A (3) 47
- specific performance (No 2) Sch I App A (3) 48

- by tenant against landlord. with special damage Sch I App A (3) (19)
- use and occupation Sch I App A (3) (9)
- wrongful dismissal Sch I App A (3) (15)
- titles of suits Sch I App A 1
- written statements
  - defence
    - general defences Sch I App A (4)
    - in administration suit by pecuniary legatee Sch I App A (4) 14
    - in all suits for wrongs Sch I App A (4) 6
    - in any suit for debt Sch I App A (4) 4
    - in suits for detention of goods Sch I App A (4) 7
    - in suits for goods sold and delivered Sch I App A (4) 1
    - in suits for infringement of copyright Sch I App A (4) (8)
    - in suits for infringement of trade mark Sch I App A (4) 9
    - in suits for injuries caused by negligent driving Sch I App A (4) 5
    - particulars (O 6 R 5) Sch I App (4) 16
    - probate of will in solemn form Sch I App A (4) 15
    - to suit for specific performance Sch I App A (4) 13
    - in suits on bonds Sch I App A (4) 2
    - in suits on guarantees Sch I App A (4) 3
    - in suits relating to nuisances Sch I App A (4) 10
    - to suit for foreclosure Sch I App A (4) 11
    - to suit for redemption Sch I App A (4) 12

PROCESS
- to accompany return of summons of another court (O 5 R 23) Sch I App B 10
- affidavit of process server to accompany return of a summons or notice (O 5 R 18) Sch I App B 11
- notice to defendant (O 9 R 6) Sch I App B 12
- notice to person who, the court considers, should be added as co-plaintiff (O 1 R 10) Sch I App B 5
- order for transmission of summons for service in the jurisdiction of another court (O 5 R 21) Sch I App B 7
  - to be served on a prisoner (O 5 R 24) Sch I App B 8
  - to be served on a public servant or soldier (O 5 Rr 27, 28) Sch I App B 9
- proclamation requiring attendance of witness (O 16 R 10) Sch I App B 14 and 15
- summons
  - for disposal of suit (O 5 Rr 1, 5) Sch I App B 1
  - for settlement of issues (O 5 Rr 1, 5) Sch I App B 2

  - in summary suit on negotiable instrument (O 37 R 2) Sch I App B 4
  - (to) appear in person (O 5 R 3) Sch I App B 3
  - to legal representative of a deceased defendant (O 22 R 4) Sch I App B 6
  - to witness (O 16 Rr 1, 5) Sch I App B 13
- warrant of arrest of witness O 16 R 10 Sch I App B 17
- warrant of attachment of property of witness (O 16 R 10) Sch I App B 16
- warrant of committal (O 16 R 18) Sch I App B 18 & 19

special case Sch II App 4

(OF) SUPPLEMENTAL PROCEEDINGS App F
- appointment of a receiver (O 40, R 1) Sch I App F 9
- attachment before judgment, on proof of failure to furnish security (O 38 R 6) Sch I App F 7
- attachment before judgment with order to call for security for fulfilment of decree (O 38 R 5) Sch I App F 5
- order for committal (O 38 R 4) Sch I App F 4
- security for appearance of a defendant arrested before judgment (O 38 R 2) Sch I App F 2
- security for the production of property (O 38 R 5) Sch I App F 6
- summons to defendant to appear on surety's application for discharge (O 38 R 3) Sch I App F 3
- temporary injunctions (O 39 R 1) Sch I App F 8
- warrant of arrest before judgment (O 38 R 1) Sch I App F 1

MISCELLANEOUS
- agreement of parties as to issues to be tried (O 14 R 6) Sch I App H 1
- commission for a local investigation or to examine accounts (O 26 Rr. 9, 11) Sch I App H 9
- commission to examine absent witness (O 26 Rr, 4, 18) Sch I App H 7
- commission to make a partition (O 26 R 13) Sch I App H 10
- list of documents by plaintiff-defendant (O 13 R 1) Sch I App H 5
- letter of request (O 26 R 5) Sch I App H 8
- notice of application for transfer of a suit to another court for trial (S 24) Sch I App H 2
- notice of payment into court (O 24 R 2) Sch I App H 3
- notice to guardian appointed or declared or to father or other natural guardian, or to the person in charge of the minor (O 32 R 3 (5) Sch I App H 11
- notice to opposite party of day fixed for hearing evidence of pauperism (O 33 R 6) Sch I App H 12

Forms—MISCELLANEOUS
- notice to proposed guardian of minor defendant—respondent (O 32 R 4 (3) Sch I App H 11-A (Mad)
- notice to show cause (General form) Sch I App H 4
- notice to surety of his liability under a decree (S 145) Sch I App H 13
- register of appeals (O 41 R 9) Sch I App H 15
- register of civil suits (O 4 R 2) Sch I App H 14
- use of, in appendices O 48 R 3

Frame of suit
- successive claims O 2 R 2 (Expl)

Franchise
- right of—if of civil nature S 9 N 27

Fraud
- defence, fraud must be specifically pleaded, O 8 R 2
- execution of decree when prevented by fraud, and limitation, S 48 (2) (a)
- foreign judgment, obtained by S 13 (e)
- particulars of—to be stated in pleadings, O 6 R 4
- pauper, fraudulent disposal of property by, and applying to sue in *forma pauperis*, O 33 R 5 (c)
- sale, fraud in publishing or conducting, O 21 R 90
- (in) sale of immovable property O 21 R 90
- setting aside a sale on the ground of O 21 R 90
- suit against certified purchaser for obtaining certificate of sale by, S 66 (2)

Gazetted officer
- is public officer S 2 (17) (c)

Government
- act of state, suit in respect of S 9 N 57
- advocate-general, information exhibited by—not affected by S 79 S 79 N 9
- agent of, to receive process O 27 R 4
- appearance, fixing of day and extension of time for, O 27 R 5
- (to) apply for court-fee payable by pauper O 33 R 12
- attendance of person able to answer questions in suits against, O 26 R 6
- contract, suit against—notice, necessity of S 80 N 11
- decree against, time for payment to be specified S 82
- execution of decree against, S 82
- Government pleader, if recognised agent of Government O 27 R 2 N 2
- High Court to comply with requisition from, for records etc, L P cl 43
- joinder of, as party—principles of S 79 N 6
- jurisdiction—in suit against S 79 N 7
- local government—power of, to make rules as to persons to whom commission to make local investigation should be issued O 26 R 9
- (if) necessary party—to suit for possession of attached property O 1 R 10 N 18
- no security to be required from, O 41 R 7
- notice before institution of suit against, S 80
- officer of—commission to examine as witness O 26 R 4
- order for recovery of salary paid in contravention of attachment order O 21 R 48 N 3

Government
- (a) party in pauper suits, is O 33 R 13
- PARTY
  - when necessary party O 1 R 10 N 25
  - when to be deemed a party in a pauper suit, O 33 R 13
- pauper suits, court-fees in, recovery by O 33 R 10
- pauper suits, right of to apply for payment of court-fees in, O 33 R 12
- persons authorised to act for O 27 R 2
- public officer, where Government undertakes defence of suit against, O 27 R 8
- recognised agents of, O 27 R 2
- rateable distribution of assets, and rights of, S 73 sub-R 3
- RIGHTS OF
  - not affected to claim assets S 73 (3)
  - to court-fee, how realised—in pauper suit O 33 R 10
  - to first charge for court-fee in pauper suit O 33 R 10
- security for restitution in case of execution pending appeal not to be required from Government O 41 R 7
- signature and verification of plaint and pleadings O 27 R 1
- state railways,
  - suit against
  - how to be instituted S 79 N 5
  - notice S 80 N 9
- SUIT AGAINST
  - amendment of plaint—notice if necessary for S 80 N 16
  - attendance of person able to answer questions in suit against O 27 R 6
  - attendance of person on Government's behalf O 27 R 6
  - before expiry of period of notice—effect of S 80 N 18
  - cause of action, where arises S 79 N 7
  - claims and liabilities of, not dealt with by S 79 S 79 N 2
  - condition precedent, notice is S 80 N 10
  - form of S 79 N 8
  - for injunction—notice necessary S 80 N 11
  - notice
    - death of intending plaintiff after—effect of S 80 N 20
    - form and sufficiency of S 80 N 13
    - object of S 80 N 2
    - objection as to and want of waiver of objection S 80 N 15
    - (and) plaint—variance between S 80 N 19
    - of suit S 80
    - service of S 80 N 4
  - notice given—plaint, fact to be mentioned in S 80 N 17
  - without notice—rejection of plaint S 80 N 10
  - (in) what cases will lie S 79 N 3
- SUIT BY OR AGAINST S 79 and O 27 R 1
  - fixing day of hearing in, O 27 R 5
  - fixing of day for appearance on behalf of Government—reasonable time to be allowed O 27 R 5
  - how instituted, S 79 O 27
  - pleading to be signed and verified by whom O 27 R 1

Government—SUIT BY OR AGAINST
    power of court to direct attendance of person able to answer question O 27 R 6
    to be instituted by or against Secretary of State, S 79
  time, extension of, to enable public officer to make reference to O 27 R 7
  title to suits by or against, O 27 R 3

Government Pensioner
  gratuities to government pensioners exempt from attachment, S 60 (1) (g)
  stipends—allowed to Government pensioners, attachment of S 60 (1) (g)

Government Pleader
  (is) agent for Government to receive process, O 27 R 4
  definition, S 2 (7)
  dispaupering of plaintiff, on application by O 33 R 9
  notice to, of day for hearing of application for leave to sue as pauper O 33 R 6
  to receive process O 27 R 4

Government Revenue
  decree in suit for partition of immovable property paying, O 20 R 18 (1)
  dispossessing holder for default in payment of, O 39 R 9

Governor-General
  may authorise execution of decrees of Native States S 44
  may consent to suit against prince, etc, S 86
  power to transfer suits S 25

Governor-General in Council
  consent to suits against Princes, Ruling Chiefs and Ambassadors, S 86
  consent to, suits by alien enemies, S 83 (1)
  legislative powers of, L P Cl 44
  transfer of suits, and appeals from one High Court to another, by S 25

Growing crop
  attachment of O 21 Rr 44, 45
  execution sale of O 21 R 75
  whether movable property S 2 (13)

Guardian ad litem
  affidavit, in support of application for appointment of, O 32 R 3 (3)
  appointment of, O 32 R (3)
  compromise—leave of court— O 32 R 7
  consent, no person to be appointed guardian without his, O 32 R 4 (3)
  costs incurred by officer of court as, O 32 R 4 (4)
  death of, O 32 R 11
  leave of court for compromise of suit by, O 32 R 6
  minor defendant must be represented by, O 32 R 5
  notice of application for appointment of, to whom to be given, O 32 R 3 (4)
  officer of Courts, as, O 32 R 4 (4)
  removal of, O 32 R 11
  representation of minor, by O 32 R 5
  retirement of O 32 R 11
  security, when guardian *ad litem* is required to give O 32 R 6 (2)
  who may be appointed, O 32 R 4

Guardian for suit
  agreement or compromise by O 32 R 7
  competency to act O 32 R 4
  not to receive property for minor without leave of court O 32 R 6
  retirement, removal or death of O 32 R 11
  to be appointed O 32 R 3

Guardianship proceedings
  compromise of, whether permissible O 23 R 3 N14
  provisions of Code as to deposit into court pending decision of suit, applicability O 39 R 10 N 1

Hearing
  ADJOURNMENT
    appeal O 41 R 20
    failure to produce evidence, at adjourned hearing O 17 R 3
    procedure where parties fail to appear at adjourned hearing O 17 R 2
  appeal O 41 Rr 12, 16—29
  application for leave to sue as pauper—procedure at O 33 R 7
  ARGUMENTS
    right to advance O 18 R 2 N 4
    written arguments—whether permissible O 18 R 2 N 4; O 41 R 16 N 3
  ex parte, restoration of appeal heard O 41 R 21
  FIRST HEARING
    document, failure to produce at—effect of subsequent production O 13 R 2
    disposal of suit at O 15
    examination of parties at O 10
    failure to produce evidence at O 15 R 4
    interpleader suit—power of court to adjudicate the title to the thing claimed, at O 35 R 4
    production of documents at O 13 R 1
  interpleader suits—procedure, at first hearing in, O 35 R 4
  meaning of,—O 17 R 2 O 17 R 2 N 6
  PROCEDURE O 18 R 1
    suit to be heard from day to day when evidence is begun to be taken O 17 R 1
  special case—stated as O 36 R 5

Heir
  claim by or against O 2 R 5
  joinder of claims in suits by or against, O 2 R 5
  mortgage suit—personal decree whether can be passed against mortgagor O 34 R 6 N 5
  suit against—frame of O 2 R 5

High Court
  See also CHARTERED HIGH COURT
  APPEAL
    from interlocutory judgment L P Cl 40
    from provincial courts L P Cl 15
  applicability of Code to Ss 115, 116, 117, 120
  applicability of O 20 R 7 O 20 R 7 N 1
  applicability of S 96 to—*See* APPEAL
  BENCH OF JUDGES
    difference of opinion L P Cl 36 N 3
    difference of opinion among S 98; G I Act S 107 N I3; L P Cl 15 N 9; Cl 36 L P N 3
    reference when permissible L P Cl 36 N 3

High Court

- CHARTERED HIGH COURT
  - applicability of certain rules to O 49 R 3
  - applicability of Sch I to O 49 R 2
  - special provisions relating to Ss 116—120 Part IX
- constitution of G I Act S 101
  - additional High Courts—how to be created G I Act S 113
  - appointment of temporary judges G I Act S 101 N 2
  - establishment of, H C Act Ss 1 2
- courts subordinate to,—what are S 100 N 7
- decree—contents of O 20 R 6 N 1
- duty of—to comply with Government's requisitions L P Cl 43
- EVIDENCE
  - applicability of rule as to interpretation of notes of evidence to witness O 18 R 6 N 1
  - mode of taking O 18 R 5 N 1
  - recording of, in—mode of—rules O 49 R 2
- execution of decree transferred to O 21 R 9
- existing provisions applicable to Supreme Courts to apply to H C Act S 11
- interpretation of terms used in the High Courts Act, H C Act S 19
- judge—tenure of office G I Act S 102
- JUDGMENT
  - contents of— O 20 R 4 N 1
  - filing of— O 20 R 3 N 1
  - in appeal—contents of— O 41 R 31 N 14
  - meaning of L P Cl 15 N 2
  - need not give on each issue O 20 R 5 N 1
  - recording of—mode of— O 49 R 2
  - rules of O 20, applicability of O 20 R 1 N 2
- JURISDICTION
  - admiralty L P Cls 32, 33
  - and powers of H C Act S 9
  - criminal L P Cl 22
    - appellate L P Cl 27
    - decision how and when reviewable L P Cls 25 & 26 N 1
    - revisional L P Cl 28
    - transfer of criminal case L P Cl 29 N 1
  - disciplinary,—over advocates, vakils, and attorneys L P Cls 9, 10 N 3
  - exercise of, by single judges or Division Courts, provision for, H C Act S 13
  - extraordinary original civil L P Cl 13
    - extraordinary original, does not extend to receive plaint L P Cl 13 N 7
    - transfer of suit, whether appealable L P Cl 13 N 8
  - extraordinary original criminal L P Cl 24
  - Governor-General's power in respect of G I Act S 111
  - infants and lunatics, as to L P Cl 17
  - insolvency L P Cl 18
  - issue of process outside limits L P Cl 11 N 2
  - local limits of, alteration by Governor-General G I Act S 109
  - matrimonial L P Cl 35
  - none over legislatures, L P Cl 44
  - ordinary jurisdiction,—meaning of L P Cl 12 N 2
  - original L P Cl 12 N 1
    - local limits of L P Cl 11 N 1

High Court—JURISDICTION

- "all other cases," meaning of L P Cl 12 N 4
- 'defendant' means "defendants" L P Cl 12 N 12
- leave of court, appeal against order granting or refusing L P Cl 12 N 19
- leave of court, nature of L P Cl 12 N 9
- leave of court, rescission of L P Cl 12 N 11
- leave of court, waiver of want of L P Cl 12 N 10
- powers to make rules relating to S 129
- process of O 49 R 1
- provisions, not applicable to, S 120
- suit for land or other immovable property, meaning of L P Cl 12 N 3
- suit for land partly within jurisdiction L P Cl 12 N 5
- original criminal—appeal from L P Cls 25; 26
- over persons L P Cl 23
- over what matters G I Act S 106
- place of sitting L P Cl 31
- single judges G I Act S 108
  - cannot transfer or stay suit in moffusil L P Cl 11 N 3
- testamentary and intestate L P Cl 34
- transfer — from Presidency Small Causes Court L P Cl 13 N 5
- transfer of petition from Provincial Insolvency Court L P Cl 13 N 3
- who are exempted from G I Act S 110
- withdrawal of suit to its own file L P Cl 13 N 1

- law to be administered,—English law L P Cl 19 N 2
  - inheritance and succession G I Act S 112
  - nature of L P Cl 19
  - Penal Code L P Cl 30
  - under Cls 20 and 21 of the Letters Patent L P Cls 20; 21
- meaning of S 100 N 6
  - Chief Court included in S 3 N 3
  - Judicial Commissioners included in S 3 N 3
- order of—mode of recording O 49 R 2
- pauper suit—realisation of court-fee in O 33 R 10 N 1
- POWERS OF
  - admission of advocates, vakils and attorneys L P Cls 9; 10
  - commission to examine witness O 26 R 4
  - expunging from record, G I Act S 107 N 12
  - to frame new rules Ss 122; 125 to 131
  - to frame rules for matters other than procedure S 130
  - to grant temporary injunction O 39 R 1 Nn 22, 24
  - issue of writ of certiorari G I Act S 107 N 17
  - to punish for contempt of courts G I Act S 107 N 16
  - to decide, question of fact, S 103
  - in suits transferred to its file L P Cl 13 N 6
  - transfer, of suits G I Act S 107 N 15
- precedence of judges G I Act S 103
- Presidency Small Causes Court—rules for S 8 N 4

High Court
"PROCEEDINGS,"
definition of, in civil cases L P Cl 37
regulation of, in criminal cases L P Cl 38
procedure in—applicability of the Code S 96 N 2
process
costs of O 48 R 1 N 1
who may serve O 49
provisions
applicable to High Courts only S 116
as to pending proceedings in abolished courts, H C Act S 12
not applicable to High Court Original side S 120
reference—powers on O 46 R 5
S 113 and O 46 R 1
return of plaint—rule as to—applicability of O 7 R 10 N 10
salaries of judges G I Act S 104
sections of Code not applicable to S 120
subordinate courts, High Courts to superintend and frame rules for H C Act S 15
summary procedure on negotiable instrument O 37 R 1
SUPERINTENDENCE
courts, nature of G I Act S 107 N 3
insolvency judge, if can exercise G I Act S 107 N 14
land acquisition proceedings G I Act S 107 N 6
meaning of L P Cl 13 N 4; L P Cl 16 N 3; L P Cl 24 N 2
order in exercise of powers of—, not appealable to Privy Council G I Act S 107 N 16
original side judge, if can exercise G I Act S 107 N 14
over agency commissioner G I Act S 107 N 8
over commissioner acting under Defence of India Act G I Act S 107 N 9
over courts subject to appellate jurisdiction G I Act S 107 N 7
over criminal proceedings G I Act S 107 N 11
over election courts G I Act S 107 N 4
over proceedings under Legal Practitioner's Act G I Act S 107 N 10
over rent controller G I Act S 107 N 5
transfer of execution of decree to, O 21 R 9
transmission of records L P Cl 42
vacancies in office, provision for G I Act S 105

Highway
obstruction to, *see* NUISANCE
PUBLIC HIGHWAY
navigable river is S 91 N 3
village pathway is not S 91 N 3
religious procession—, right to conduct S 91 N 3

Hindu Joint Family
decree against—sale under—what passes at O 21 R 94 N 8
decree in favour of—payment out of court to one of the members O 21 R 15 N 8
MANAGER
right of, to withdraw money or give security O 32 R 6 N 1

Hindu Joint Family—MANAGER
suit against—splitting of reliefs O 2 R 2 N 21
suit by—plaint contents of O 7 R 4 N 2
mortgage by—parties to suit on O 34 R 1 N 12

Hindu Law
DEBTS
ancestral property, liability of— S 53
property in hands of Hindu son liable to S 53

Hindu reversioner
SUIT BY OR AGAINST
abatement—survival of right O 22 R 1 N 15
to set aside alienations by Hindu widow—splitting of reliefs O 2 R 2 N 21

Hindu widow
sale of interest of—in execution—effect O 21 R 94 N 8
suit by or against
compromise of O 23 R 3 N 22
abatement—survival of right O 22 R 1 N 15

Holiday
delivery of judgment on O 20 R 1 N 7
sale in execution on—effect of O 21 R 90 N 24

Honour
suit for upholding S 9 N 47

Houses
attachment of property in S 62

Husband
execution against, of decree passed against wife, O 22 R 7 (2)
suit against wife as executrix—husband need not be a party O 31 R 3

Idol
shebait—whether can sue as pauper O 33 R 1 N 13

Immovable property
ATTACHMENT O 21 R 54
compensation for wrongful—*See* ATTACHMENT
liability to, S 60 (1)
particulars to be specified in application for O 21 R 13
Small Cause Court cannot attach O 16 R 10 Proviso
claim to recover—joinder of other claims O 2 R 4
decree for partition O 20 R 18
DECREE FOR RECOVERY OF O 20 R 9
delivery of building or enclosure—execution O 21 R 35
mode of execution O 21 R 35
possession with tenant—execution O 21 R 36
dispossession of—by purchaser in execution O 21 R 100
execution against—lands in more than one jurisdiction. O 21 R 3
EXECUTION SALE OF O 21 Rr 82-103
See SALE
distribution of assets on S 73 (1)
purchaser's title S 65
stay of pending appeal O 41 R 6 (2)
meaning of O 21 R 89 N 8; O 21 R 90 N 3
for attachment in execution O 21 R 54 N 3
for security for costs O 25 R 1 N 5
partition—commission to make O 26 R 13

Immovable Property
SUITS RELATING TO
jurisdiction S 16
property situated in different jurisdictions S 17
plaint to contain description O 7 R 3
service of summons on agent in charge O 5 R 14
suit for compensation for wrong to S 16 (*e*)
suit for partition S 16 (*b*)
of estate paying revenue to Government S 54
suits for recovery of, what are, within the meaning of O 2 R 4 O 2 R 4 N 3
suit for right or interest in S 16 (*d*)
suit on mortgage or charge S 16 (*c*)
suit to recover S 16 (*a*)
where to be filed Ss 16, 17
Impounding
(of) documents S 30 (*a*) ; O 13 R 8
order for O 13 R 8
movable property pending appeal to Privy Council O 45 R 13 (1) (*a*)
Imprisonment
detention—period in civil prison S 58
for disobeying summons S 32 (*d*)
in execution of decree S 55
women exempted from S 56
for resisting execution S 74
Incidental proceedings Ss 75-78 (Part III)
Indian Civil Servant
is a public officer— S 2 (17) (*b*)
Information
Advocate General, power of, to exhibit S 79 (2)
Inherent powers of courts
ABUSE OF THE PROCESS OF COURT S 151
by court or its officers or by fraud of party S 151 N 6
by party, examples of S 151 N 6
every default does not amount to S 151 N 6
meaning of S 151 N 6
rightful act does not amount to, simply because it injures another S 151 N 6
additional evidence under S 151 N 2
amendments S 151 N 2
alteration of, or addition to judgment after signing, how far permissible S 151 N 2
decrees and orders S 152 N 6
judgments decrees or orders when made S 152 N 6
APPEAL
consolidation of O 41 R 1 N 15
right of, is not conferred, from non-appealable order S 151 N 2
when lies S 151 N 9
appellate court S 107 N 11
ATTACHMENT
prohibitory order, in respect of attached property—power of court to pass O 21 R 46 N 17
CONSOLIDATION
of proceedings O 2 R 6 N 4
ENDS OF JUSTICE
consolidation—of suits, appeals etc S 151 N 4
counsel shall not browbeat witness S 151 N 4

Inherent powers of courts—ENDS OF JUSTICE
laches—not to be encouraged S 151 N 4
manifestly unjust orders to be vacated S 151 N 4
other remedy open—no inherent power S 151 N 4
questions cutting at the root of controversy to be taken notice of S 151 N 4
reconstruction of records—lost or destroyed S 151 N 4
refund of excess court-fee S 151 N 4
rehearing S 151 N 4
rights of third parties—no interference with S 151 N 4
setting aside decree against minor defendant not properly represented—restoration of S 151 N 4
subsequent events, taking notice under S 151 N 4
substance of compromise not to be wrecked by the will of obstinate party S 151 N 4
technical defect, not to deprive party of relief S 151 N 4
what constitutes S 151 N 4
wrong section quoted, relief not to be denied S 151 N 4
execution—resistance or obstruction to—power of removal of O 21 R 99 N 7
EXERCISE OF
by insolvency court S 151 N 8
examples of reliefs granted S 151 N 1
for ends of justice or to prevent abuse of process of court S 151 N 1
miscellaneous instances S 151 N 2
extension of time—fixed by decree under S 151 N 2
INJUNCTION
contrary to provisions of S. 56 of the Specific Relief Act, invalid S 151 N 2
interim injunction S 151 N 2
temporary, power to grant O 39 R 1 N 3
interest after decree—decree silent, interest not to be granted under S 151 N 2
JOINDER OF PARTIES
power to add legal representative after abatement O 22 R 4 N 24
power to add parties to appeal O 41 R 20 N 8
under S 151 N 2
LIMITATION
application for restitution, Art 181 applies S 151 N 11
periods of, not to be disregarded S 151 N 2
LIMITS OF S 151 N 1
cases unprovided for—analogous provisions to be applied S 151 N 2
express provisions, inherent power cannot override S 151 Nn1,2
general principles of law not to be overriden—instances S 151 N 3
prohibitions of law not to be disregarded, instances S 151 N 2
want of express provision, no bar to exercise of S 151 N 1
when specific provision of a particular matter exists, no inherent power S 151 N 2
meaning of S 151 N 1
receiver—appointment of, S 151 N 2

Inherent powers of courts
- remand S 151 N 2
- restitution S 151 N 2
- RESTORATION OF SUIT
  - power to order S 151 N 2
- revision—when lies S 151 N 10
- REVIEW
  - no review of an order or decree under S. 9 of the Specific Relief Act S 151 N 2
  - power to—*See* REVIEW
- security for costs—power to require O 25 R 1 N 11
- setting aside *ex parte* decisions S 151 N 2
- SETTING ASIDE SALES S 151 N 2
  - of movable property for irregularity, forbidden S 151 N 2
  - power of O 21 R 92 N 2
- stay of criminal cases—pending decision in civil case S 151 N 7
- stay of execution S 151 N 2; O 21 R 29 N 3
- stay of suit S 151 N 2

Initials
- meaning of S 2 (20) Notes

Injunction O 39
- against corporation O 39 R 5
  - how may be enforced, O 21 R 32 (2); O 39 R 5
- appointment of receiver, differences between O 40 R 1 N 13
- decree for
  - disobedience of O 21 R 32
  - execution of S 48 (1); O 21 R 32
  - limitation, and execution of S 48 (1)
  - mode of execution O 21 R 32
  - special provisions for enforcing O 21 R 32
- mandatory injunction, power to grant temporary mandatory injunction O 39 R 2 N 7
- meaning of O 39 R 1 N 2
- notice—before granting O 39 R 3
- SUIT FOR
  - splitting of reliefs O 2 R 2 N 19
  - public nuisance, S 91
- TEMPORARY AND PERPETUAL
  - distinction between O 39 R 1 N 2
- TEMPORARY INJUNCTION
  - against whom, may be granted O 39 R 1 N 13
  - breach of—effect O 39 R 1 N 18
  - compensation for obtaining injunction on insufficient grounds S 95
  - conditions necessary to issue of—pendency of suit O 39 R 1 N 14
  - declaratory suit—whether temporary injunction may be issued O 39 R 1 N 15
  - discharge of O 39 R 4
    - appeal O 39 R 4 N 2
    - on application O 39 R 4
    - right to apply for fresh injunction O 39 R 4 N 1
  - disobedience of
    - effect O 39 R 2 N 6
    - remedy O 39 R 2
    - attachment O 39 R 2
    - duration of O 39 R 1 N 16
  - effect of O 39 R 1 Nn 17, 18
  - enforcement of, against property in the hands of purchaser O 39 R 1 N 13

Injunction—TEMPORARY INJUNCTION
  - exercise of religious office—restraint of O 39 R 1 N 9
  - execution proceedings O 39 R 1 N 7
    - restraint of O 39 R 1 N 10
  - *ex parte* order for O 39 R 3
  - fraudulent transfer of property—prevention of O 39 R 1 N 12
  - grant of S 94 (*c*)
    - subject to terms O 39 R 2 N 5
  - grounds for granting—property likelihood of being sold in execution O 39 R 1 N 10
  - inherent power to grant O 39 R 1 N 3
  - injunction restraining claimant—defendant in interpleader suit taking action against plaintiff O 35 R 4 N 2
  - injunction to restrain continuance of breach O 39 R 2
  - judicial proceedings—in respect of O 39 R 1 N 7
  - judicial proceedings in restraint of O 39 R 1 Nn 23, 24
  - mandatory injunction—power to grant O 39 R 2 N 7
  - marriage, restraining of O 39 R 1 N 19
  - notice—before granting O 39 R 3
  - orders as to—appeal O 39 R 1 N 20
  - power of High Court to grant O 39 R 1 N 22
    - to stay proceedings — lower courts O 39 R 1 N 24
  - probate proceedings—whether temporary injunction may be issued O 39 R 1 N 4
  - proceedings in criminal court O 39 R 1 N 7
  - right to worship—restraint of O 39 R 1 N 8
  - variation of order for an application O 39 R 4
  - when may be granted O39 R 1
  - when to be granted S 94 N 5
- undertaking to compensate defendant, for granting enforcement of S 95 N 10

Inquiry
- (into) appellant's pauperism O 44 R 2
- as to legal representative O 22 R 5
- as to pauperism—costs of O 33 R 16
- into valuation in appeal to Privy Council O 45 R 5

Insolvency
- adjudication—suit instituted after O 22 R 8 N 9
- EFFECT OF
  - claim suit after adjudication of judgment-debtor—leave of court if necessary O 21 R 63 N 23
  - claim to attached property—whether can be preferred after adjudication of judgment-debtor O 21 R 58 N 10
  - dismissal of suit on plaintiff's insolvency O 22 R 8 (2)
  - on suit O 22 R 8 N 10
- High Court Charter—provisions in, with respect to Insolvency Courts L P Cl 18
- INSOLVENCY APPEAL
  - admission of—High Court, power of O 41 R 11 N 18
  - security for cost, if may be required O 41 R 10 N 4
- insolvency court—power of—to order attachment before judgment O 38 R 5 N 10

Insolvency

- insolvency of defendant
  - after payment into court, of suit claim O 24 R 1 N 7
  - pending suit O 22 R 10 N 10
- insolvency of plaintiff
  - costs of defendant O 22 R 8 N 12
  - costs payable by him prior to insolvency O 22 R 8 N 11
  - effect O 22 R 8
  - if ground for demanding security for costs O 22 R 8 N 13
  - security for costs, if ground for O 22 R 8
- INSOLVENCY PROCEEDINGS
  - applicability of O 9 R 13 to O 9 R 13 N 2
  - applicability of O 9 to O 9 R 4 N 6
  - applicability of provisions as to withdrawal of suit to O 23 R 1 N 7
  - arbitration provisions, applicability of Sch II P 1 N 3
  - claim of set off O 8 R 6 N 11
- judgment-debtor—may apply in S 55 (3)
- mortgage suit—insolvency of mortgagor pending suit—procedure O 34 R 6 N 16
- OFFICIAL ASSIGNEE
  - right of, to object to attachment of insolvent's property in execution O 21 R 58 N 16
  - suit by
    - annulment of adjudication—right of insolvent to continue suit O 22 R 10 N 12
    - misdescription in O 1 R 10 N 37
- OFFICIAL RECEIVER
  - appointed by Calcutta High Court in particular case—is public officer S 2 (17) Notes
  - continuation of suit by official receiver—suit instituted as pauper O 33 R 8 N 5
  - if can apply to set aside execution sale O 21 R 90 N 8
  - if can sue as pauper O 33 R 1 N 12
  - property seized by—claims to O 21 R 58 N 10
  - whether necessary party to suit on mortgage of insolvent's property O 34 R 1 N 14
- protection order absence of—release of insolvent judgment-debtor from arrest in execution O 21 R 40 N 3
- SALES IN
  - default of purchaser—liability for deficiency on re-sale O 21 R 71 N 14
  - setting aside—applicability of Code to O 21 R 92 N 5
- SUIT AGAINST INSOLVENT
  - official assignee, if a necessary party O 1 R 10 Nn 13, 27
- vesting order in—effect on—attachment before judgment O 38 R 5 N 20
- whether abates execution proceedings O 22 R 8 N 4
- whether abates suit O 22 R 8

Inspection O 11

- books—banker's books and other books of account O 11 R 17

Inspection

- business books—giving copies of entries in, instead of inspection O 11 R 19
- business books—verified copies of entries in, instead of inspection O 11 R 19
- court can inspect O 18 R 18
- discovery, and O 11
- OF DOCUMENTS S 30 (*a*); O 11 R 15
  - forms of Sch 1 Appendix c
  - not referred to in pleadings and affidavits O 11 R 18 (2)
  - notice to produce—for inspection O 11 R 15; O 11 R 16
  - power of court to order inspection of S 30 (*a*); O 11 R 18
  - privileged documents—power of court to inspect O 11 R 19
  - referred to in pleadings and affidavits O 11 R 15
  - right to O 11 R 13 N 1
  - time for O 11 R 17
  - verified copies O 11 R 19
- local—by court O 18 R 18 N 1
- objection to O 11 R 20
- ORDER FOR
  - of documents O 11 R 18
  - in favour of party to suit O 39 R 7
  - non-compliance—dismissal of suits for O 11 R 21
  - non-compliance with O 11 R 21
  - of property by court O 18 R 18
- of property which is subject-matter of suit O 39 R 7
- time for O 11 R 17
- time of place and time appointing O 11 R 17

Instalments

- decree or order for O 20 R 11
- INSTALMENT BONDS
  - suit on—successive instalment—suit for O 2 R 2 N 9
  - default clause—suit on—frame of—splitting of claims O 2 R 2 N 10
- INSTALMENT DECREE
  - form of O 20 R 11
  - passing of O 20 R 11
  - provisions of code as to—whether applicable to personal decree in mortgage suit O 34 R 6 N 23

Insurance

- Marine Insurance—suit on policies of—right of defendant to discovery of document O 11 R 13 N 2

Interest S 34

- after decree S 34 N 5
- agreement to pay—express or implied S 34 N 7
- ASCERTAINED SUM S 34 N 2
  - interest on—unliquidated damages—if can be given S 34 N 2
- assignment—of interest in pending suit O 22 R 10
- BAR OF SUIT
  - separate suit barred S 34
  - splitting of claim O 2 R 2 N 25
- COSTS S 35
  - *See* costs
  - Privy Council appeal—valuation for S 110 N 5

Interest
  damages S 34 N 10
  damdupat—rule of S 34 N 16
  decree for—court-fee if payable thereon S 34 N 18
  DECREE SILENT AS TO S 34 N 17
    deemed as refused S 34 (2)
    judgment mentioning—whether recoverable in execution O 20 R 6 N 7
  deposit into court—payment into court of suit claim—interest whether ceases to run O 24 R 3
  deposit not allowed O 24 R 3
  discretion of court S 34 N 3
  incumbrances—keeping down interest Sch III para 9 (*c*) (*i*)
  liability for—proclamation for sale not covered by O 21 R 89 (3)
  mercantile usage S 34 N 8
  mesne profits O 20 R 12 N 6
    See also MESNE PROFITS
  PENDING SUIT S 34 N 1
    if plaintiff is entitled as of right S 34 N 4
  PRIOR TO SUIT
    is a matter of substantive law S 34 N 1
    principles governing award of such interest S 34 N. 6
  rate of—mortgage suits O 34 R 11
  REFUSAL OF
    when interest deemed to have been refused S 34 (2)
  rent—on arrears of S 34 N 14
  RESTITUTION
    reversal of decree, order for payment of interest on S 144 (1)
    variation of decree, order for payment of interest on S 144 (1)
  statutory provisions—right to interest under S 34 N 9
  SUIT ON MORTGAGE,
    See MORTGAGE SUITS
    award of interest in O 34 R 11
    foreclosure suit, interest in, O 34 R 11
  TENDER
    interest whether ceases to run O 24 R 2
    whether payable after S 34 N 12
Interim injunction
  appellate court—power to grant S 107 N 18
  interim sale O 39 R 6
Interlocutory Order S 94 (*e*)
  appeal from S 104; O 43 R 1
  appeal from, of High Courts, to Privy Council L P Cl 40
  appellate court—power to pass S 107 N 18
  defect, error or irregularity in
    if ground of objection in memorandum of appeal S 105 (1)
  immediate delivery of possession of certain lands—order for O 39 R 9
  immediate payment of money or delivery of movables, order for O 39 R 10
  order against trustee, for deposit of moneys, etc., in courts O 39 R 10
  order for detention of subject-matter of moneys, etc, in court O 39 R 10
Interlocutory order
  order for detention—preservation or inspection of subject-matter of suit O 39 R 7 (1)
  order for interim sale of movable property subject to speedy decay O 39 R 6
  passing of—to prevent ends of justice from being defeated S 94
Intermeddler
  meaning of O 22 R 3 N 10
International Law
  judgment based on incorrect view of S 13 (*c*)
Interpleader suit S 88; O 35
  admissions of parties—court may adjudicate title on O 35 R 4 (2)
  ADVERSE CLAIMS OF DEFENDANTS
    must be adverse to each other S 88 N 3
    must be *bona fide* S 86 N 3
  agent—if can institute O 35 R 5
  CHARGES AND COSTS O 35 Rr 3, 6
    charge for plaintiff's costs S 88; O 35 R 6
  DEPOSIT IN COURT
    direction to plaintiff to pay the thing claimed into court O 35 R 4 N 2
    of money or thing in dispute O 35 R 2
    payment of things claimed into court O 35 R 2
    payment of thing claimed to one of the contestants on security O 35 R 2 N 2
  DISCHARGE OF PLAINTIFF O 35 R 4
    from liability O 35 R 4
    from liability to claimants, on non-appearance of claimants at first hearing O 35 R 4 N 2
    non-appearance of claimants—procedure O 35 R 4 N 2
    procedure at first hearing O 35 R 4
  issues—framing of O 35 R 4
  PARTIES O 1 R 10 N 14; O 35 R 4
    addition or substitution of plaintiff O 35 R 4
    addition or substitution—power of court to make one of the claimants defendants a plaintiff O 35 R 4 N 2
    claimant other than plaintiff, joinder of, as plaintiff O 35 R 4 (3) (*b*)
  PLAINT IN O 35 R 1; App. A, Form No. 40
    and rules relating to O 35
    contents of O 35 R 1
  position of plaintiff—impartial position S 88 N 5
  power of court to decide at first hearing O 35 R 4
  STAY OF
    on account of another suit by defendant against plaintiff—costs of plaintiff to be provided in such suit O 35 R 3
    procedure, where defendant is suing plaintiff in respect of subject-matter of O 35 R 3
    restraining by injunction either claimants taking any proceedings against plaintiff O 35 R 4 N 2

Interpleader Suit
subject-matter, claim must be with reference to same S 88 N 4
suit by railway company—in respect of goods consigned for transportation O 35 R 5 N 2
TENANTS
may not institute interpleader suits O 35 R 5
suit by—against landlord O 35 R 5
what is S 88 N 2
when instituted S 88
Interpretation of Statutes
retrospective effect—none in certain cases S 157
Interrogatories O 11 R 1
affidavit in answer—exception O 11 R 10
ANSWER TO S 30 (*a*); O 11 R 8
affidavit of O 11 R 6; O 11 R 8
affidavit in regard to O 11 Rr 8-10
form of O 11 R 9
framing of issues, from O 14 R 3 (*b*)
omission to—procedure O 11 R 11
order to answer further O 11 R 11
use of at trial O 11 R 22
when not sufficient O 11 R 11
bona fides, absence of O 11 R 6 N 4
co-defendant—interrogatories upon O 11 R 1 N 11
commissions to examine on O 26 R 1
(to) corporation O 11 R 5
costs of O 11 R 3
delivery of—leave of court O 11 Rr 1, 2
discovery by O 11 R 1
FAILURE TO ANSWER O 11 R 1 N 12; R 21
dismissal of suit for O 11 R 21
"fishing" interrogatories O 11 R 6 N 7
form of O 11 R 4
irrelevant O 11 R 1 proviso; Rr 6; 7
interrogatories O 11 R 6 N 3
lunatic, or minor, where opposite party is O 11 R 23
meaning of O 11 R 1 N 1
minor, service of, on next friend or guardian O 11 R 1 N 11
not material at the stage they are delivered O 11 R 6
object of O 11 R 1 N 2
OBJECTIONS TO O 11 R 1 N 12; Rr 6, 7, 10
must be by affidavit in answer O 11 R 6
one set of interrogatories only allowed O 11 R 1 Proviso
oppressive O 11 R 7
order to answer, or answer further O 11 R 11
(and) pleadings—distinction between O 11 R 1 N 3
power of court—suit on contract—wagering contract, defence of, raised—court will refuse interrogatories on general transactions O 11 R 6 N 8
power to order S 30 (*a*)
prolix O 11 R 7
SCANDALOUS O 11 R 6 N 2; R 7
power of court O 11 R 1 N 12

Interrogatories
SETTING ASIDE AND STRIKING OUT O 11 R 7
when prolix, oppressive, unnecessary or scandalous O 11 R 7
time within which application lies for O 11 R 7
submission of—to court before delivery O 11 R 2
unnecessary O 11 R 7
unreasonable O 11 R 7
vexatious O 11 R 7
witness—examination of, on—commission for examination—when may issue O 26 R 1
Investigation (local)
commission for O 26 R 1
See COMMISSION
Irregularity
in attaching property O 21 R 90
objections to, in appeal—from decree S 105 (1)
sale of immoveable property O 21 R 90
(in) sale of movable property—not to vitiate sale O 21 R 78
second appeal—irregularity may be ground for S 100 (1) (*c*)
when ground for reversal or variation of decree S 99
Issues O 14
power of court to frame O 14 R 5 (1)
AMENDING O 14 R 5
by appellate court O 41 R 24
power of court O 14 R 5 (1)
burden of proof O 18 R 3
by consent O 14 R 1 N 6 Rr 6; 7
evidence on—right of parties to give O 18 R 3
OF FACT Ss 100, 103; O 14 R 2
High Court may decide S 103
meaning of O 14 R 1
second appeal, power of High Court to determine S 103
findings on—objection to, on issues referred to lower court O 41 R 26
FRAMING OF O 14 Rr 1, 3
by appellate court O 41 R 25
court to frame issues O 14 R 1 (5)
examination of parties in order to O 14 R 1 (5)
examination of witnesses and documents before framing O 14 R 4
in interpleader suit O 35 R 4
issues raised by consent cannot be objected to later O 14 R 1 N 6
materials for O 14 R 3
omission to frame, and try, by lower court O 41 R 25
omission to frame—irregularity O 14 R 1 N 4
questions of fact may by agreement be stated in form of O 14 R 6
when not necessary O 14 R 1
where defendant at first hearing of suit makes no defence O 14 R 1 (6)

Issues
  judgment on—court may pronounce at once—when O 15 Rr 1, 2
  jurisdiction—objection to, to be taken at or before settlement of issues S 21
  (OF) LAW S 100; O 14 R 2
    decision of suit on O 14 R 2
    determination of O 14 R 2
    meaning of O 14 R 1
      when may court try issues of, first O 14 R 2
  new issue O 14 R 1 N 9; R 3
  parties at issue—procedure O 15 R 3
  place of suing—objection to must be taken at or before settlement of S 21
  preliminary issue—as to maintainability of suit or appeal O 18 R 1 Nn 4, 5
  remittal of—by appellate court O 41 R 25
  settlement of O 14
  STATING ISSUE O 14 R 6
    judgment on questions stated by agreement in form of issues O 14 R 7
  STRIKING OUT
    or amending of O 14 R 5 (2)
    power of court, to O 14 R 5 (2)
  summons may be for settlement of O 5 R 5
  wrong issues O 14 R 1 N 5

Jail
  service on defendant in O 5 R 24

Joinder
  OF CAUSES OF ACTION O 2 R 3
    administrator or executor, joinder by or against O 2 R 5
    appeal, misjoinder of causes of action S 99
    heir, joinder of causes of action by or against O 2 R 5
    immovable property, in suits for recovery of O 2 R 4
    Letters Patent, joinders under L P Cl 14
    objection as to O 2 R 7
    separate trials of O 2 R 6
    separate trials, power to order, where joinder improper O 1 R 2
  OF DEFENDANTS O 1 R 3
    appeal, objection in S 99
    contract, parties liable on same O 1 R 6
    doubtful cases, in O 1 R 7
    judgment against one or more of the defendants O 1 R 4 (*b*)
    negotiable instrument, parties liable on same O 1 R 6
    numerous defendants having same interest O 1 R 8
    plaintiff when in doubt from whom redress is to be sought O 1 R 7
    relief claimed, every defendant need not be interested in the whole O 1 R 5
    who may be joined as defendants O 1 R 3
  OF PARTIES
    liable on the same contract O 1 R 6
   objection to S 99; O 1 Rr 9, 13
  OF PLAINTIFF
    appeal, misjoinder, of plaintiffs, in S 99

Joinder—Of plaintiff
    election, when plaintiffs may be put to O 1 R 2
    judgment may be given for one or more of the plaintiffs O 1 R 4 (a)
    joinder of plaintiffs and causes of action O 2 R 3
    numerous plaintiffs having same interest O 1 R 8
    who may be joined as plaintiff O 1 R 1
  other relief of—with relief about recovery of immovable property O 2 R 4
  of respondents O 41 R 20
  OF TRUSTEES, ADMINISTRATORS OR EXECUTORS O 31
    husband of married executrix, etc, not to be joined as a party O 31 R 3
    when to be joined as parties O 31 R 2

Joint decree-holders
  application by—for execution O 21 R 15

Joint Hindu Family
  compromise by adult members—whether binding on minor party O 32 R 7 N 7
  legal representative—meaning of O 22 R 3 N 13; O 22 R 4 N 11

Judge
  amendment of memorandum of appeal to be signed by O 41 R 3
  arrest, exemption from S 135
  death of, before completion of trial O 18 R 15
  decision, where appeal is heard by two or more judges S 98
  difference between judges on a point of law S 98
  disqualification of, to try case—disqualification ground of appeal S 2 (8) N 3; O 41 R 1 N 11
  DISSENTING FROM JUDGMENT
    of court O 41 R 34
    need not sign decree O 41 R 35 proviso
  execution of document by, on failure of judgment-debtor to do so O 21 R 34
  exemption from arrest under civil process S 135
  evidence, power of judge to deal with, taken before another judge O 18 R 15
  judgment written by predecessor, power of, to pronounce O 20 R 2
  meaning of S 2 (8)
  memorandum when evidence not taken down by O 18 R 8
  personal knowledge—not to be imported into decision O 20 R 4 N 4
  registration of documents by O 21 R 34 (6)
  sitting of, elsewhere than at usual place L P Cl 31
  SUCCESSOR OF
    evidence, by predecessor can be used O 18 R 15
    power of, to cancel commission to examine witness, issued by predecessor O 26 R 1 N 1
    power of, to pass judgment in case not heard by him O 18 R 2 N 4
    pronouncing judgment on evidence recorded by the predecessor—judgment is valid O 18 R 15 N 2

Judge—Successor of
- to pronounce judgment after hearing and not to adopt mere opinion recorded by predecessor O 18 R 15 N 2
- to sign decree O 20 R 8
- vacating office—before signing decree, procedure on O 20 R 8
- whether public officer S 2 (17) Notes

Judgment
- on admissions O 12 R 6
- AMENDMENT OF S 152; O 20 R 3
  - *See also* DECREE
  - accidental mistakes S 152
  - clerical mistake S 152
- OF APPELLATE COURT
  - contents of O 41 R 31
  - what it may direct O 41 R 32
- applicability of provisions as to judgment and decree to High Court O 49 R 3
- appreciation of evidence O 20 R 4 N 5
- arithmetical mistakes S 152
- arrest before judgment O 38 R 1
- attachment before judgment O 38 Rr 5, 6
- to be according to award Sch II para 16
- BASIS OF O 20 R 1 N 3
  - not to be based solely on local inspection O 18 R 18 N 1
  - to be the case set up by parties S 33 N 3
- case submitted for opinion of court by parties, judgment in O 36 R 5 (2)
- certified copy of, furnishing O 20 R 20, O 41 R 36
- confession of—one of several defendants confessing judgment O 15 R 2 N 1
- construction of O 20 R 4 N 7
- CONTENTS OF O 20 R 4
  - date and signature of O 20 R 3; O 41 R 31
  - decision on each issue to be given O 20 R 5
  - judgment to contain reasons O 20 R 5
  - personal knowledge of judge use of O 20 R 4 N 4
- COPY OF
  - copies of judgment and decree to be given O 20 R 20; O 41 R 36
  - to accompany appeal O 41 R 1
  - to be sent to lower court O 41 R 37
- date, omission to put O 20 R 3 N 5
- death of party after conclusion of hearing does not affect O 22 R 6
- decree should conform with O 20 R 6
- defined S 2 (9)
- FOREIGN
  - *See* FOREIGN JUDGMENT
- effect of judgment given without hearing case fully O 20 R 1 N 3
- on holiday, delivery of O 21 R 1 N 7
- interlocutory, appeal to Privy Council from L P Cl 40
- on issues stated O 14 R 7
- issue, when court to state its decision on each O 20 R 5
- joint parties, for or against, may be given O 1 R 4

Judgment
- JUDGE
  - power of to appoint assessors to appraise value of evidence O 20 R 1 N 3
  - successor of O 20 R 2; O 20 R 3 N
- meaning of L P Cl 15; Sch II P 15 N 14
  - opinion recorded is not O 18 R 15 N 2
- non-compliance with rules in O 20 as to, effect of O 20 R 1 N 10
- notice to parties O 20 R 1 N 9
- object of O 20 R 4 N 3
- oral judgment O 20 R 1 N 6
- passing of, if terminates suit S 33 N 5
- predecessor, judgment written by O 20 R 2
- PRONOUNCING OF S 33
  - after case has been heard, S 33 N 2
  - to be in open court O 20 R 1
  - when and where to be pronounced O 20 R 1
- several plaintiffs or defendants—court's power, in case of O 1 R 4
- signing of O 20 R 3
- of small cause court, contents of O 20 R 4
- by successor of judge O 18 R 2 N 4; O 20 R 2
- when one of several defendants not at issue O 15 R 2
- when parties at issue O 15 R 3
- when parties not at issue O 15 R 1
- by which judge to be given O 20 R 1 N 3

Judgment-debtor
- adjustment of decree out of court O 21 R 2 (2)
- arrest and detention of S 55 O 21 Rr 37, 40
- attachment of movable property not in possession of O 21 R 46
- attachment, property of, liable to S 60
- attachment of share of judgment-debtor in movables O 21 R 46
- certificate to, authorising him to alienate attached property O 21 R 83 (2)
- death of, before satisfaction of decree S 50
- decree—satisfaction of, by instalments O 20 R 11
- defined S 2 (10)
- discharge of, pending application for stay of execution O 21 R 26 (2)
- discharge of, under O 21 R 26—not exempted from re-arrest O 21 R 27
- examination of, as to his property O 21 R 41
- EXECUTION
  - against legal representative S 52
  - by immediate arrest of O 21 R 11
  - of document, failure of O 21 R 34
  - simultaneous, against person and property O 21 R 21
- exemption from arrest under civil process S 135
- failure of, to execute document or endorse negotiable instrument O 21 R 34
- may apply in insolvency S 55 (3)
- meaning of, for purposes of certifying payment O 21 R 2 N 16
- negotiable instrument, failure of judgment-debtor to endorse O 21 R 34
- not to alienate property during execution by Collector Sch III P 11

Judgment-debtor
- payment of decree out of court, may inform court of O 21 R 2 (2)
- postponement of sale to raise amount of decree O 21 R 83
- release of, on ground of illness S 59
- REPRESENTATIVE OF S 146
    - liability of S 50
- resistance by, to delivery of possession in execution O 21 R 98
- restrictions on alienation by Sch III P 11
- SALE, SETTING ASIDE
    - on deposit by judgment-debtor O 21 R 89
    - for material irregularity or fraud O 21 R 90
    - where judgment-debtor has no saleable interest O 21 R 91
- SATISFACTION OF DECREE
    - by instalments O 20 R 11
    - out of court—certification of O 21 R 2 (2)
- STAY OF EXECUTION
    - application for O 21 R 26; O 41 R 5
    - pending suit between decree-holder and O 21 R 29
- transfer of decree to court where judgment-debtor resides, justified S 39 N 6
- transfer *pendente lite* by O 21 R 102
- transferee of decree to hold subject to equity of judgment-debtor S 49

Judicial Committee
- rules of Appendix IV

Judicial Officers
- are public officers S 2 (17)

Jurisdiction
- ABSENCE OF
    - and error in its exercise—difference between S 9 N 4
    - effect on judgment and orders S 9 N 3
- acquiescence of defendant residing outside S 20 (*b*)
- appeal, irregularity not affecting jurisdiction S 99
- arrest of person residing outside jurisdiction in cases other than execution S 136
- ATTACHMENT
    - before judgment of property outside jurisdiction O 38 R 6
    - not in execution, of property outside jurisdiction S 136
- bar of jurisdiction of civil courts in executions transferred to Collector S 70 (2)
- CAUSES OF ACTION
    - and jurisdiction S 20 (*c*)
    - joined, determine jurisdiction O 2 R 3
- charge, suit on S 15 (*c*)
- of civil courts barred in decrees transferred Collector S 70 (2)
- civil courts to try only suits of a civil nature S 9
- COMMISSION TO EXAMINE WITNESSES
    - about to leave jurisdiction O 26 R 4 (1) (*b*)
    - residing beyond jurisdiction O 26 R 4 (1) (*a*)
    - residing within jurisdiction O 26 Rr 1, 3

Jurisdiction
- compensation for wrong to person or movables S 19
- compensation for wrongful arrest, etc, not to exceed S 95 Proviso
- conflict of—property being within different jurisdictions S 17
- consent cannot give S 9 N 5; S 96 N 4
- costs, want of jurisdiction no bar to power of court to award S 35 (1)
- OF COURTS S 9
    - necessary conditions stated S 9 N 2
    - pecuniary jurisdiction S 6
    - when causes of action joined O 2 R 3 (2)
- error not affecting, S 99
- examination of witness about to leave O 18 R 16 (1)
- execution of decree when lands situated in more than one, O 21 R 3
- failure to exercise jurisdiction vested in court, and revision, S 115 (*b*)
- FOREIGN JUDGMENT
    - and presumption as to S 14
    - passed without jurisdiction S 13 (*a*)
- immovable property situate in different jurisdictions, suit for, S 17
- INHERENT JURISDICTION
    - objection as to—can be raised in what stages S 21 N 3
    - to prevent injustice S 151
- irregular exercise of, and revision S 115 (*c*)
- kinds of S 9 N 3
- material irregularity in exercise of, and revision S 115 (*c*)
- meaning of, as regards nature of suits S 9 N 3
- objection to—when to be taken, S 21
- ordinary original, of High Court S 9 N 8
- OVER DEFENDANT
    - leave of court to sue where all defendants not within S 20 (*b*)
    - place of suing, and residence of defendant S 20
- PECUNIARY
    - limits of S 6
    - court's power to pass decree in excess of S 6 N 5
    - defendant's plea whether determines S 6 N 4
    - suit for damages S 6 N 5
- PERSON
    - about to leave before date of examination—commission to examine him as witness O 26 R 4
    - resident beyond—commission to examine him as witness O 26 R 4
    - resident outside—temporary injunction if may be issued against O 39 R 1 N 13
    - suit for compensation for wrong to S 19
- PLACE OF BUSINESS
    - of corporation S 20 Expl II
    - determines S 16 Proviso; S 20
- PLACE OF SUING
    - compensation for wrong
        - to immovable properties S 16 (*e*)
        - to person or movables S 19

Jurisdiction—PLACE OF SUING
- objection as to S 21
  - *See* PLACE OF SUING
- PLAINT
  - return of, for presentation to proper court O 7 R 10
  - to contain facts showing court has jurisdiction O 7 R 1 (*f*)
- plaintiff—right of, to relinquish part of the claim so as to bring suit within jurisdiction O 7 R 10 N 1
- reference as to, about small cause nature O 46 R 6
- relief *in personam*, S 16 Proviso
- relinquishment of part of claim to bring suit within O 2 R 2 (1)
- residence of defendant determines S 20 Expl 1
- of revenue courts is exclusive S 9 N 51
- service of summons outside O 5 R 9 N 6
- service of summons where defendant resides outside jurisdiction O 5 R 21
- set off beyond pecuniary jurisdiction cannot be claimed O 8 R 6 N 8
- several defendants—place of suing, S 20
- special tribunal have exclusive jurisdiction S 9 N 53
- subject-matter, with reference to S 9 N 7
- SUIT
  - against corporations S 20
  - of civil nature S 9
  - for immovable property S 16 (*d*)
  - on mortgage S 16 (*c*)
  - for compensation for wrong to person or movables. S 19
  - for "determination of any other right to or interest in immovable property" S 16 (*d*)
  - for immovable property, S 16
  - for immovable property under attachment or distraint S 16
  - for property situate in jurisdiction of different courts S 17
  - for property under distraint S 16 (*f*)
  - for redemption—value of suit O 34 R 7 N 19
  - for religious office S 9 Expl
  - for wrong to land S 16 (*e*)
  - to be instituted in courts of lowest grade, competent—, S 15
- temporary residence of defendant, and cause of action S 20 Expl
- TERRITORIAL
  - defendants, residence of—some defendants residing outside jurisdiction O 1 R 3 N 4
  - where limits uncertain S 18
- valuation in plaint, determines S 6 N 4
- witness residing within—commission to examine—when may be issued O 26 R 1

Laches
- delay in applying to continue the suit, in case of devolution of interest, pending suit O 22 R 10 N 16
- delay in raising issue O 14 R 1 N 8

Land
- attachment, liability to, in execution of decree S 60 (1)

Land Acquisition Act
- proceedings under—parties to O 1 R 10 N 10

Landlord
- interpleader suit by tenant against, O 35 R 5
- non-applicability of code for recovering rent of agricultural land S 4
- rent, suit for—successive claims—frame of suit O 2 R 2 N 9

Land Revenue
- neglect to pay, and delivery of possession to party who pays O 39 R 9

Language
- of court, different from that of witness O 18 R 7
- English, recording evidence in, S 138
- subordinate courts, language of S 137 N 1

Law
- appeal from decree in pauper suits when decree contrary to law O 44 R 1
- issues of, when may be tried first O 14 R 2
- pauper appeal, court may admit, when decree contrary to law O 44 R 1
- presumptions of, need not be stated O 6 R 13
- QUESTION OF
  - appeal to Privy Council S 110
  - may by agreement be stated in form of issues O 14 R 2
  - meaning of—waiver O 21 R 90 N 41
  - reference to High Court O 46 R 1
- second appeal—questions of S 100 (1) (*a*)
- savings of, special or local S 4 (1)
- usage having the force of S 100

Leave of Court
- to adjourn sale when held in precincts of court-house O 21 R 69 (1) Proviso
- to amend pleadings O 6 Rr 17, 18
- for appeal to Privy Council S 109; O 45 R 3
- compromise by next friend or guardian—leave required O 32 R 7
- concise statement—amending it with leave O 7 R 9 (3)
- to continue suit in case of transfer pending suit O 22 R 10
- to decree-holder, to bid at sale O 21 R 72
- to defend summary suit on negotiable instrument O 37 Rr 2, 3
- to deliver interrogatories O 11 Rr 1, 2
- for discharge of pleader, O 3 R 4 (2)
- document not produced when plaint filed O 7 R 18
- EXECUTION
  - against husband, of decree against wife O 22 R 7 (2)
  - against person not served as partner O 21 R 50 (2)
  - in suits between co-partners O 30 R 9
- to file fresh suit after withdrawal O 23 R 1 (2)
- to guardian, or next friend for compromise O 32 R 7
- for imprisonment of directors O 21 R 32 (2)
- for joinder of claims with recovery of land O 2 R 4
- omission to sue for all reliefs, must be with leave, in order to be no bar O 2 R 2 (3)

Leave of Court
- one person may sue on behalf of others with leave O 1 R 8
- persons under disability, consent on behalf of S 147
- to present pleading subsequent to written statement O 8 R 9
- to receive money on behalf of minor O 32 R 6
- to sue as pauper O 33 R 2
- to sue or be sued—numerous parties having same interest, O 1 R 8
- to sue where all defendants do not reside within jurisdiction S 20 (*b*)
- to urge grounds not taken in memo. of appeal O 41 R 2
- where minor elects to proceed with suit in his own name on attaining majority O 32 R 12 (2)
- withdrawing suit, with liberty to bring fresh suit O 23 R 1 (2)

Legal representative
- account books and papers, suit for return of—decree if can be passed against legal representative S 52 N 12
- addition of, as parties in their individual capacity O 1 R 10 N 10
- compulsion to produce accounts, by court executing decree S 50 (2)
- dead person, suit against without impleading legal representative—effect of decree S 52 N 8
- DECREE AGAINST S 52
  - charge, if decree creates on the assets of S 52 N 4
  - effect O 22 R 4 N 16
  - enforcement of S 52
  - form of S 52 N 4
  - mode of execution S 52
  - property of the deceased, to be proceeded against S 52 N 9
  - rents and profits of immovable property, if assets of deceased S 52 N 9
  - some of several representatives—effect of S 52 N 5
  - third party, property in the hands of, when can be proceeded against S 52 N 10
  - when and how to be passed S 52 N 4
- defendant, legal representative of, when to be brought on record O 22 R 4 (1)
- definition of S 2 (11)
- determination of question as to who is O 22 R 5
- execution—limitation for substitution of, in S 50 N 16
- execution, when decree passed against deceased S 50
- executor who has proved will—decree against—effect of S 52 N 7
- extent of liability of, in execution S 50 (2)
- Hindu son, property in the hands of, liable for father's debts S 53
- impleadment—what pleas may be taken by representative O 22 R 3 N 16
- insolvency of legal representative after decree—effect of S 52 N 11
- joint decree-holders, legal representative of, O 21 R 15

Legal Representative
- of judgment-debtor—liability under decree S 50 (2)
- MEANING OF O 22 R 3 N 10
  - intermeddler O 22 R 3 N 10
  - joint Hindu family O 22 R 3 N 13
  - two or more legal representatives O 22 R 3 N 11
- notice, where execution is applied against O 21 R 22
- partner in firm—joinder in suit by or against firm O 30 R 4
- personally liable, when S 52 (2)
- of plaintiff, when to be brought on record O 22 R 3 (1)
- right of, to apply to set aside *ex parte* decree O 9 R 13 N 16
- suit to establish title as O 22 R 5 N 9
- what plea may be taken by O 22 R 4 N 15
- who is, in cases governed by Indian Succession Act, O 22 R 4 N 13
- wrong legal representative, decree against—effect of S 52 N 6

Letter
- in lieu of summons O 5 R 30

Letter of request
- to examine person out of British India S 77
- for examination of witness residing outside British India S 77; O 26 R 5

Letters Patent
- High Courts to be established by H C S 1
- provisions of former, inconsistent with present, to be void L P Cl 45
- revocation of L P Cl 1

Letters Patent Appeal
- abatement—order setting aside—whether appealable O 22 R 9 N 14
- Agra Tenancy Act, S. 175 does not affect right of appeal L P Cl 15 N 10
- appeals from orders appealable under s. 104, when lie S 104 N 6
- cross-objections in O 41 R 22 N 9
- cross-objections, provisions of Code—not applicable L P Cl 15 N 12
- court-fee for appeal L P Cl 15 N 16
- JUDGMENT
  - meaning of L P Cl 15 N 2
    - order appointing a receiver is O 40 R 1 N 52
    - order directing receiver to advance money to minor's guardian in suit is not O 40 R 1 N 52
    - order of single judge refusing transmission of Privy Council appeal record for execution, is judgment O 45 R 15 N 16
    - 'judgment', order refusing application for review, if O 47 R 7 N 10
    - order for separate trials is O 1 R 3 N 14
    - order refusing extension of time for furnishing security for costs in Privy Council appeal is not a judgment O 45 R 7 N 10

Letters Patent Appeal—Judgment

order refusing stay by execution under O. 45, R. 15 is not a *judgment* O 45 R 13 N 13
limitation for L P Cl 15 N 15
ORDERS etc.
See L. P. APPEAL—JUDGMENT, ETC.
allowing or rejecting application for leave to sue as pauper O 33 R 5 N 8
appointing official receiver as receiver in partnership suit O 20 R 15 N 8
as to stay of execution whether appealable O 41 R 5 N 20
as to withdrawal of suit O 23 R 1 N 40
dismissing appeal for default O 41 R 17 N 15
dismissing petition asking court to demand security for costs of appeal O 41 R 10 N 14
for commission for local investigation —whether appealable O 26 R 9 N 9
for security for costs, whether appealable O 25 R 1 N 14
giving directions to commissioner in taking accounts O 20 R 15 N 8
granting leave to defend summary suit whether appealable O 37 R 3 N 5
granting or refusing an application to restore suit dismissed for default O 9 R 9 N 12
in appeal by High Court is appealable to Privy Council L P Cl 15 N 8
in appeal or revision against order of executing court in application to set aside execution sale O 21 R 90 N 50
in exercise of criminal jurisdiction are not appealable L P Cl 15 N 7
in exercise of superintendence are not appealable L P Cl 15 N 6
in proceedings other than suits and appeals—which are judgments and which are not L P Cl 15 N 5
in revision are not appealable L P Cl 15 N 5
issuing or refusing to issue commission whether appealable O 26 R 4 N 7
of remand whether appealable O 41 R 23 N 23
on application for leave to appeal as pauper O 44 R 1 N 11
on application for leave to sue as pauper, whether appealable O 33 R 7 N 9
refusing application of assignee of plaintiff to continue suit O 22 R 10 N 21
rejecting application for judgment on admission whether appealable O 12 R 6 N 10

Letters Patent Appeal—Orders

rejecting application for restoration, whether appealable O 41 R 19 N 10
remitting issues to lower court —whether appealable O 41 R 25 N 13
which are judgments and which are not judgments—instances of L P Cl 15 Nn 2, 3
points on which appeal may be heard L P Cl 15 N 14
S. 105, whether controlled by S 105 N 10
security for costs, if may be required O 41 R 10 N 5; L P Cl 15 N 3
summary rejection O 41 R 11 N 2

Limitation

abatement —*See* ABATEMENT
addition of parties O 1 R 10 (5)
against added defendant O 1 R 10 (5)
alien enemy debarred from suing—exclusion of period of suspension S 83 N 6
(for) amending pleadings O 6 R 18
(FOR) APPEAL O 41 R 1 Nn 8, 9
cross-objection, limitation for O 41 R 22 N 19
power of appellate court to add parties O 41 R 20 N 11
presentation of—date for O 41 R 1 N 5
APPLICATION
for ascertainment of mesne profits O 20 R 12 N 12
for final decree for redemption O 34 R 8 N 8
for fresh summons O 9 R 5
for leave to appeal in *forma pauperis* O 44 R 1 N 13
for leave to defend summary suit on negotiable instrument O 37 R 2 N 7
for postponement of payment of decretal amount O 20 R 11 N 12
to bring on record legal representative O 22 R 3 N 8
to certify payment out of court, of decretal amount O 21 R 2 N 18
to continue suit in case of devolution of interest pending suit O 22 R 10 N 22
to implead legal representative O 22 R 4 N 7
to re-hear appeal heard *ex parte* O 41 R 21 N 10
to restore appeal dismissed for failure to give security for costs O 41 R 10 N 13
to restore appeal dismissed for default O 41 R 19 N 9
to restore suit dismissed for failure of both parties to appear at hearing or for plaintiff's failure to pay process fees O 9 R 4 N 10
to restore suit dismissed for plaintiff's default O 9 R 9 N 11
to set aside abatement O 22 R 9 N 7
to set aside dismissal of suit for failure to give security for costs ordered O 25 R 2 N 4
to set aside sale on depositing decree amount O 21 R 89 N 28

Limitation

- decree granting injunction, not subject to S 48 (1)
- deficient court-fee made up after, effect of S 149 N 7
- (FOR) EXECUTION S 48
  - application
    - amendment of O 21 R 17 N 3
    - complaining of dispossession by third party O 21 R 100 N 6
    - complaining of resistance or obstruction to possession O 21 R 97 N 3
    - for arrest, when saves limitation S 58 N 9
    - for delivery, if could be revived O 21 R 95 N 5
    - for delivery of immovable property purchased at sale O 21 R 95 N 5
    - for delivery of property purchased at execution sale O 21 R 96 N 6
    - for execution of final decree for sale under mortgage O 34 R 5 N 28
    - for return of purchase money on setting aside sale O 21 R 93 N 11
    - for sale certificate O 21 R 94 N 13
    - to set aside sale for want of judgment-debtor's title O 21 R 91 N 5
  - (of) decree
    - against several persons—appeal by one—limitation when begins to run O 41 R 33 N 13
    - of foreign courts S 44 N 6
    - partly allowing plaintiff's claim—appeal against—limitation when begins to run O 41 R 33 N 13
    - transferred for execution to another court—period of limitation applicable O 21 R 9 N 3
  - delay in applying to set aside sale due to fraud—excuse if permissible O 21 R 92 N 2
  - instalment decree O 20 R 11 N 13
  - limit of time S 48
  - personal decree against mortgagor in mortgage suit O 34 R 6 N 17
  - punishment for disobedience of injunction, etc. O 21 R 32 N 11
  - step-in-aid
    - application
      - by decree-holder for dismissal of application to set aside sale O 21 R 92 N 15
      - by decree-holder for dismissal of judgment-debtor's application to set aside sale for fraud or material irregularity O 21 R 90 N 49-*a*
      - for, delivery of possession of property purchased by decree-holder O 21 R 95 N 6
      - for execution praying for relief not granted by decree O 21 R 10 N 8
      - for leave to bid O 21 R 72 N 14

Limitation—(For) EXECUTION—Step-in-aid

- for rateable distribution, if step-in-aid S 73 N 23
- for transfer is S 45 N 4
- for transfer of decree for execution O 21 R 10 N 8
- confirmation of sale O 21 R 92 N 15
  - decree, transfer of, for execution—application to transferring court, after transfer O 21 R 10 N 6
  - defective application O 21 R 11 Nn 8, 9, 11; O 21 R 13 N 2
  - joint decree-holder, application by O 21 R 15 N 11
  - notice to show cause why execution should not issue O 21 R 22 N 13
- uncertified payment out of court—effect of O 21 R 2 N 27

- exclusion of time required for getting copy of decree O 20 R 7 N 3
- exemption from, plaint to contain grounds of O 7 R 6
- *ex parte* decree—application to set aside O 9 R 13 N 28
- extension of time S 148
- fresh suit, after withdrawal of previous suit—limitation applicable O 23 R 2
- insolvency of plaintiff—application by receiver to continue suit O 22 R 8 N 10
- law applicable to suits withdrawn O 23 R 2
- MORTGAGE SUIT
  - application for final decree, limitation for O 34 R 5 N 12
  - personal decree against mortgagor—application for O 34 R 6 N 17
- must be specially pleaded in defence O 8 R 2
- negotiable instrument—summary suit on O 37 R 2 N 4
- parties, addition of O 1 R 10 N 41
- PAUPER SUIT
  - limitation where application to sue as pauper is refused O 33 R 7 N 5
  - suit deemed to be instituted on the date of presentation of application for leave to sue as pauper, where application is granted O 33 R 7 N 4
  - where plaintiff is dispaupered O 33 R 7 N 7
- (for) payment of full purchase money O 21 R 85
- power of court—power of appellate court to dismiss whole suit as time barred when appeal is as to part only of decree O 41 R 33 N 13
- POWER OF COURT TO EXCUSE DELAY
  - application for restoration of suit dismissed for default—rule made by Bombay High Court O 9 R 9 N 11
  - application to set aside sale O 21 R 90 N 49
  - under S. 5, Limitation Act—applicability to application to restore suit dismissed for default of both parties in appearing or plaintiff's failure to pay process fee O 9 R 4 N 10
- Privy Council appeal S 109 N 8

Limitation
- rejection of plaint as time barred O 7 R 11
- return of plaint for presentation to another court, limitation for representing O 7 R 10 N 9
- (for) striking out interrogatories O 11 R 7
- SUIT AGAINST
  - Government—period of notice, if to be excluded S 80 N 21
  - public officer—period of notice, if to be excluded S 80 N 21
  - Sovereign, Prince or Ruling Chief, time taken in obtaining consent, if can be excluded S 86 N 14
- SUIT BY
  - minor—limitation applicable O 32 R 1 N 12
- SUIT FOR
  - mesne profits O 20 R 12 N 12
  - to set aside execution sale O 21 R 92 N 8
  - to set aside execution sale on ground of want of permission to bid to decree-holder O 21 R 72 N 14
  - to set aside order of executing court in proceedings for delivery of possession O 21 R 103 N 5
- withdrawal of suit with permission to bring a fresh suit O 23 R 2

Lis pendens
- applicability of doctrine to pauper suits O 33 R 8 N 6
- assignment by either party, pending suit O 22 R 10
- decree for execution of document passed—*lis pendens* continues until execution of document O 21 R 34 N 6
- doctrine of—applicability to proceedings for personal decree against mortgagor in mortgage suit O 34 R 6 N 23
- transferee *pendente lite* not entitled to object in execution O 21 R 102

Local Government
- appointing officer for suit relating to public charities S 93
- personal appearance, power of Government to exempt certain persons from Ss 132, 133
- persons authorised to act for, in judicial proceedings O 27 R 2
- POWER OF
  - Government to declare language of subordinate courts S 137
  - to exempt certain women and persons from personal appearance S 132
  - to make rules as to sales of interests in land which cannot be valued S 67
  - to make rules for transfer to and for execution of decrees by collector S 70
  - to remit postage and registration-fee S 143
  - to require evidence to be recorded in English S 138

Local Inspection
- *See* INSPECTION

Local Investigation
- by court O 26 R 9 N 3
- COMMISSION FOR S 75 (*b*) & O 26 R 9
  - procedure of commissioner O 26 R 10
  - report of commissioner to be evidence O 26 R 10

Local Law
- minors or lunatics or Ruling Chief in suits by or against—local law not affected O 32 R 16
- procedure in appeals from order under S 108
- savings of S 4 (1)

Lunatic
- adjudication of person as being of unsound mind O 32 R 15 N 3
- Chartered High Courts, jurisdiction of, as to L P Cl 17
- compromise of suit by next friend or guardian of O 32 R 7
- consent of next friend or guardian on behalf of S 147
- decree against—if can be challenged in execution proceedings on ground of non-representation O 32 R 15 N 6
- defendant of unsound mind O 32 R 15
- discovery—order against next friend O 11 R 13 N 20
- documents, affidavit of O 11 R 23
- interrogatories, affidavit in answer to O 11 R 23
- non representation in suit—effect of decree against lunatic O 32 R 15 N 6
- persons not adjudged of unsound mind suit by or against O 32 R 15 N 4
- person of unsound mind—meaning of O 32 R 15 N 2
- saving of local law relating to suits by or against O 32 R 16
- SUIT
  - against—stay of proceedings, pending lunacy proceedings against defendant O 32 R 15 N 7
  - by or against, procedure in O 32 R 15

Madras District Municipal Rules
- cases under—amendment of pleadings O 6 R 17 N 1

Madras Estates Land Act
- decree under—execution of application for—form and contents of— O 21 R 11 N 2 A
- proceedings under
- order returning plaint, if appealable O 7 R 10 N 11
  - set off, claim of O 8 R 6 N 12
- sale under
  - setting aside—for fraud or material irregularity O 21 R 90 N 2
  - setting aside, on depositing amount due O 21 R 89 N 6
  - suit to set aside—maintainability of O 21 R 92 N 7
  - Section 192 S 92 N 2

Madras Rent Recovery Act
- sale under, setting aside—for fraud or material irregularity O 21 R 90 N 2

Magistrate
- exemption of, from arrest under civil process S 135 (1)

Mahomedan Law
- waqf, when valid S 92 N 5

Maintenance
  allowance for judgment-debtor under imprisonment S 57 O 21 R 39
  for judgment-debtor's family, in certain cases Sch III P 9
    right to future maintenance
    not attachable S 60 (1) (*n*)
      whether charge O 34 R 15 N 9
  suit for
      frame of, whole claim to be included O 2 R 1 N 3
      splitting of relief O 2 R 2 N 19

Malabar Tarwad
  compromise by adult members, whether binding on minors O 32 R 7 N 8
  karnavan—claim by, to attached property O 21 R 58 N 14
  manager—suit by—plaint, contents of O 7 R 4 N 2

Manager
  of business, service of summons on O 5 R 13

Marine Insurance
  See INSURANCE

Market value
  commission to ascertain, of property O 26 R 9
  enquiry as to—local investigation, issue of commission for making O 26 R 9
  Privy Council Appeals, subject-matter of S 110 N 3

Marriage
  effect of marriage of party on suit O 22 R 7
  injunction restraining O 39 R 1 N 19
  no abatement of suit, by reason of O 22 R 7

Master of ship
  service of summons on O 5 R 13 (2)

Material irregularity
  in conducting or publishing sale O 21 R 90
  not to vitiate sale of movables, O 21 R 78
  revision by High Court on the ground of S 115
  setting aside of sale on ground of,—or fraud, O 21 R 90

Material objects
  provisions as to O 13 R 11

Mesne profits
  amount of—enquiry as to—commission for local investigation O 26 R 9
  attachment before determination of O 21 R 42
  can be claimed with property O 2 R 4 (*a*)
  claim for,—may be joined with suit for recovery of immovable property O 2 R 4
  commission to ascertain O 26 R 9
  decree for
    enquiry as to amount due, directed—attachment pending enquiry O 21 R 42
    form of decree O 20 R 12
    possession and mesne profits O 20 R 12
  enquiry as to the amount of O 20 R 12
  future mesne profits—power of court to grant O 20 R 12 N 2
  interest as part of O 20 R 12 N 6
  meaning of S 2 (12); O 20 R 12 N 5
  onus of proof O 20 R 12 N 5
  order after preliminary decree determining mode of accounting, if decree O 20 R 12 N 14
  plaint, statement of approximate amount in, O 7 R 2

Mesne profits
  principles of assessment O 20 R 12 N 5
  Privy Council appeal—valuation for S 110 N 5
  reversal of decree, order for payments of mesne profits on S 144 (1)
  suit for—splitting of relief O 2 R 2 N 19

Military men
  authority to sue or defend, how given O 28 R 1
  Commanding officer, meaning of O 28 R 1 Expl.
  officers or soldiers who cannot obtain leave, may authorise others to sue and defend O 28 R 1
  person authorised by,
    may appoint pleader O 28 R 2
    may receive process O 28 R 3
  service on person authorized to sue or defend O 28 R 3
  service on soldiers O 5 R 28
  stipends and gratuities allowed by Government to, attachment of S 60 (*g*)
  or airmen—suits by or against O 28

Military officer
  is public officer S 2 (17) (*c*)

Minor
  abatement of suit—application by minor to set aside abatement O 22 R 9 N 6
  adjustment of decree against, by guardian O 21 R 2 N 11
  admission by O 12 R 1 N 3
  affidavit of documents, by next friend or guardian O 11 R 23
  appeal against—guardian *ad litem*—brought on record after limitation—appeal whether time barred O 41 R 1 N 5
  applicability of provisions—re discovery and inspection to O 11 R 23
  application for guardianship O 22 R 1 N 11
    abatement of, appeal in O 22 R 11 N 6
      death of party—survival of right, abatement of O 22 R 11 N 6
  application on behalf of,—procedure O 32 R 12
  suit *in forma pauperis* O 33 R 1 N 8
  arbitration, reference to—leave of court whether necessary O 32 R 7 N 15
  bond, executed by, under compromise of suit, without leave of court O 32 R 7 N 5
  Chartered High Courts, jurisdiction of, as to L P Cl 17
  certificated guardian—existence of—no other person to act as next friend or guardian *ad litem* O 32 R 4
  COMPROMISE
    by guardian *ad litem* O 32 R 7
    by next friend O 32 R 7
    by manager of joint Hindu family O 32 R 7 N 7
    by natural guardian O 32 R 7 N 7
    by father O 32 R 7 N 7
    leave of court whether necessary O 32 R 7 N 14
    fraud—setting aside compromise O 32 R 7 N 18
      gross negligence of next friend or guardian—effect O 32 R 7 N 17
      leave of court O 32 R 7
      minor attaining majority—leave of court O 32 R 7 N 19

- setting aside compromise decree—procedure O 32 R 7 N 20
- consent of next friend given on behalf of S 147
- costs—order for, when suit instituted on behalf of minor without next friend O 32 R 2
- custody of—suit for O 32 R 5 N 5
- decree in favour of
  - adjustment of—leave of court whether necessary O 32 R 7 N 14
  - execution, application for, by guardian after minor's attaining majority O 21 R 10 N 2
  - transfer of—leave of court whether necessary O 32 R 7 N 14
  - discovery
    - order against next friend O 11 R 13 N 20
    - and inspection—applicability of provisions in code as to O 11 R 23
- dismissal of suit for default of appearance by next friend O 9 R 9 N 7
- election by minor plaintiff on attaining majority O 32 R 12
- execution against O 21 R 11 N 11
  - private transfer of attached property to raise money due under decree O 21 R 83 N 7
  - sale—fresh proclamation—waiver by guardian O 21 R 69 N 9
- *ex parte* decree against—setting aside O 9 R 13 N 20
- gross negligence of next friend or guardian O 32 R 7 N 17

GUARDIAN
- *See* MINOR—NEXT FRIEND

GUARDIAN AD LITEM
- appointment of O 32 R 3
  - application for—contents of O 32 R 3 N 9
  - consent of the proposed person O 32 R 4
  - duration of O 32 R 5 N 3
  - minor's wishes, if to be considered O 32 R 4 N 10
  - notice to minor and proposed guardian O 32 R 3 N 11
- costs, order for O 32 R 11 N 4
- court guardian O 32 R 4
  - appointment of O 32 R 4
- death of O 32 R 11
- duties of—gross negligence O 32 R 3 Nn 12,13
- no other than guardian appointed under the Guardian and Wards Act to be appointed O 32 R 4
- no person to be appointed, without his consent O 32 R 4 (3)
- officer of court—appointment of, as guardian O 32 R 4
- retirement O 32 R 11
  - procedure or removal of—appointment of fresh guardian O 32 R 11
- who may be appointed O 32 R 4

- guardianship proceedings—compromise of O 23 R 3 N 14
- interrogatories—service of on next friend or guardian O 11 R 1 N 11
- leave of court
  - for compromise of suit by or against minor O 32 R 7

  - to receive property under a decree on behalf of O 32 R 6
- majority attained, pending suit—compromise on behalf of minor O 32 R 7 N 19
- minor co-plaintiff—minor attaining majority pending suit—procedure O 32 R 13
- minor partner—execution of decree against firm O 21 R 50 N 8
- minor partner in firm—suit by or against firm O 30 R 1 N 4
- minor plaintiff residing out of British India—security for costs if may be required O 25 R 1 N
- natural guardian—compromise of suit by O 32 R 7 N 7

NEXT FRIEND
- *See also* MINOR
- adverseness of interest—justifies removal O 32 R 9
- application by certificated guardian to be substituted as next friend—procedure O 32 R 9
- compromise by—leave of court O 32 R 7
- death of, stay of proceedings on O 32 R 10 (1)
- failure of duty by—justifies—removal of O 32 R 9
- failure of, to appear if justifies removal of O 32 R 9
- no person to be added as, without his consent O 1 R 10 (3)
- order for costs against, when minor on attaining majority applies for dismissal of suit as being unreasonable or improper O 32 R 14
- qualifications O 32 R 4
- removal or retirement O 32 R 9
  - further procedure—stay of proceedings pending appointment of new next friend O 32 R 10
  - new next friend, appointment of—procedure O 32 R 10

NEXT FRIEND OR GUARDIAN
- order for costs against, in pauper suit O 33 R 11 N 4
- retirement of O 32 R 8
- who may be appointed O 32 R 4
- non-representation in execution proceeding
- sale, effect on O 21 R 90 N 35

- notice
  - of application for appointment of guardian *ad litem* O 32 R 3 (4)
  - to next friend
    - of taking plaint off the file O 32 R 2 (2)
    - when minor elects to proceed with suit in his own name O 32 R 12 (5)
- officer of court as guardian *ad litem* O 32 R 4 (4)
- order
  - against—without his being represented by guardian *ad litem* or next friend—discharge of order O 32 R 5
  - made in suit in which a minor is concerned, when discharged O 32 R 5 (2)
- partner, attachment O 21 R 50 (1)
- plaint to state fact of minority O 7 (*d*)
- plaintiff—security for costs if may be required O 25 R 1 N 9

Minor

- pleader's liability, for costs in suit without next friend O 32 R 2 (1)
- proceedings taken without his being represented by next friend or guardian—effect O 32 R 5
- property, receipt of, on behalf of minor, under a decree O 32 R 6
- receipt of money by next friend or guardian, under a decree O 32 R 6
- removal
  - of next friend O 32 R 9
  - of next friend, stay of proceedings O 32 R 10 (1)
  - of guardian *ad litem* O 32 R 11
- representation of, by next friend or guardian for suit O 32 R 5
- repudiation of suit by plaintiff becoming major O 32 Rr 13,14
- retirement
  - of guardian *ad litem* O 32 R 11
  - of next friend O 32 R 8
  - of next friend, of stay of proceeding on O 32 R 10 (1)
- right of
  - to extension of limitation under S 7, Limitation Act—applicability to application to set aside execution sale O 21 R 90 N 49
  - to extension of time under Limitation Act, S 7—applicability of, to payment of decree amount for setting aside execution sale O 21 R 89 N 28
- saving of local law relating to suits by or against O 32 R 16
- stay of proceedings on retirement, removal or death of next friend O 32 R 10
- SUIT BY OR AGAINST
  - abandonment of suit by minor on attaining majority O 32 R 12
  - application in suit, by whom to be made O 32 R 5
  - compromise
    - abandonment of issue, if compromise O 32 R 7 N 11
    - by adult members of minor's family, in case of joint Hindu families O 32 R 7 N 8 (*a*)
    - by agreement to be bound by oath by next friend or guardian whether amount to O 32 R 7 N 10
    - by court of wards, on behalf of ward O 32 R 7 N 9
    - by natural guardian O 32 R 7 N 7
    - leave of court O 32 R 7
    - of, by adult members of tarwad of which minor is member O 32 R 7 N 8
    - when can be set aside O 32 R 7 Nn 16-18
    - whether withdrawal of suit is O 32 R 7 N 12
  - costs
    - of attorney or solicitor, incurred by minor's guardian or next friend—recovery of costs from minor's estate O 32 R 1 N 13
    - to be paid when suit is struck off as being filed without next friend O 32 R 2

Minor—SUIT BY OR AGAINST

- decree
  - against major treating him as major O 32 R 3 N 8
  - against minor treating him as major O 32 R 3 N 8
  - without minor being represented by proper guardian, validity of O 32 R 3 N 5
- enquiry as to minority O 32 R 3 N 4
- failure to appoint guardian *ad litem*—effect O 32 R 3 N 5
- suit without next friend—costs, whether may be recovered from minor's estate O 32 R 2 N 4
- guardian *ad litem*—
  - absence of formal order of appointment of guardian, substantial representation O 32 R 3 N 6
  - appointment of O 32 R 3
    - application for O 32 R 3
  - illegal procedure in appointing O 32 R 3 N 7
- improper or unreasonable suit—minor on attaining majority applying to dismiss suit—order for costs against next friend O 32 R 14
- institution of, without next friend—effect O 32 R 2
  - meaning of—institution of suit by person other than certificated guardian O 32 R 2 N 1
- leave to sue or defend on behalf of minor, if and when necessary O 32 R 4 N 12
- minor attaining majority pending suit—unreasonable or improper suit—right of minor to apply for dismissal of suit O 32 R 14
- minor co-plaintiff attaining majority pending suit—procedure O 32 R 13
- next friend
  - liability for costs O 32 R 1 N 9
  - minor attaining majority
    - can apply for dismissal of suit as unreasonable or improper O 32 R 14
    - pending suit—procedure O 32 R 12
  - omission to sue for a part of claim—bar of suit, if applies O 2 R 2 N 11
  - or guardian
    - powers of O 32 R 5
    - to withdraw money or give discharge —manager of joint Hindu family O 32 R 6 N 1
    - suit by, against guardian in possession — maintainability O 32 R 1 N 15
- non-representation of minor in suit—effect O 32 R 3 N 5
- payment to next friend without leave of court—effect O 32 R 6 N 2
- person in possession as guardian of minor O 32 R 1 N 15
- provisions of code as to, applicability of, to proceedings under local and special Acts O 32 R 16
- procedure when defendant pleads minority O 32 R 3 N 4
- question of minority, dispute on O 32 R 3 N 4

Minor—SUIT BY OR AGAINST
- receipt of money or property by next friend or guardian on behalf of minor under decree in favour of minor leave of court if necessary O 32 R 6
- security, enforcement of O 32 R 6 N 3
- security by guardian O 32 R 6
- service of summons O 32 R 3 N 10
- specific performance, suit for O 32 R 1 N 14
- succession certificate or probate or letters of administration, production of O 32 R 1 N 9
- title of suit O 32 Rr 1, 3
- to be by next-friend O 32 R 1
- unreasonable or improper suit—right of minor on attaining majority to apply for dismissal of suit O 32 R 14
- who may act as next friend or guardian *ad litem* O 32 R 4
- withdrawal of O 23 R 1 N 17
  - by next friend or guardian—whether amounts to compromise O 32 R 7 N 12
- without next friend
  - enquiry into question of minority O 32 R 2 N 2
  - waiver of objection by defendant O 32 R 2 N 3
- suit unreasonable or improper O 32 R 14
- suit, when minor elects to proceed with, on majority O 32 R 12 (3)
- suit without next friend, procedure O 32 R 2
- summons—service of, on O 5 R 12 N 2
- unreasonable suit, application for dismissal O 32 R 14
- who may be next friend or guardian—married woman, if can be O 32 R 4

Miscellaneous proceedings.
- application of Code to S 141

Misjoinder
- of causes of action, O 2 R 3
  - in suits by or against executors, administrators or heirs O 2 R 5
  - in suits for recovery of immovable property O 2 R 4
  - no ground for reversing decree in appeal S 99
  - objection as to, when to be raised O 2 R 7
  - separate trials of causes of action O 2 R 6
- of defendants O 1 R 3
- of parties—
  - no ground for reversing decree in appeal S 99
  - not to defeat suit, O 1 R 9
  - objection as to, when to be raised O 1 R 13
- of plaintiffs O 1 R 1

Misrepresentation
- particulars of, must be stated in pleadings O 6 R 4

Mistake
- in judgments, decrees and orders, how amended S 152
- permission for compromise on behalf of minor granted by court under mistake—effect O 32 R 7 N 4
- review, mistake apparen on face of record is ground for O 47 R 1 (1)

Money
- attachment of S 60 (1)

Money
- attachment of decree for payment of O 21 R 53
- cross claims in suit for payment of—execution O 21 R 19
- cross decrees in suits for payment of—execution O 21 R 18
- execution, immediate in case of money decree O 21 R 11 (1)
- instalments, decree for payment by O 20 R 11
- may be raised by judgment-debtor on his property O 21 R 83 (2) proviso
- mode of paying, under a decree O 21 R 1
- notice, issue of, before arrest in execution of, decree for O 21 R 37
- payment out of court of, payable under decree O 21 R 2
- plaint in suits for recovery of O 7 R 2
- Privy Council, money payable under order of, how calculated O 45 R 15 (3)

Mortgage
- assignee, whether neccessary party to suit on mortgage O 34 R 1 N 13
- attachment,
  - continuance of, subject to mortgage O 21 R 62
  - of mortgage decree O 21 R 53
- equitable mortgage, meaning of O 34 R 15 N 11
- by deposit of title deeds, meaning of O 34 R 15 N 11
  - suits on, applicability of provisions as to simple mortgage O 34 R 15
- charge, provisions respecting sale and redemption apply to O 34 R 15
- COMPROMISE DECREE O 34 R 5 N 5
  - applicability of provisions as to sale O 34 R 4 N 15
  - applicability of provisions to consent decree O 34 R 4 N 15
  - for money in satisfaction of mortgage claim—sale of mortgaged property in execution whether permissible O 34 R 14 N 14
  - decree on award O 34 R 5 N 5
  - invalid mortgage O 34 R 5 N 5
  - personal remedy under O 34 R 6 N 8
  - preliminary decree passed on compromise—applicability of procedure as to final decree O 34 R 3 N 7
  - redemption suit—whether final decree is necessary O 34 R 7 N 3
  - suit for sale O 34 R 5 N 5
  - time for payment of mortgage money O 34 R 4 N 15
  - whether final redemption decree is necessary O 34 R 7 N 3
- COSTS O 34 R 2 N 11
  - awarded by decree—mode of realisation O 34 R 10 N 8
  - personal liability of mortgagor for O 34 R 10 N 8
  - of mortgagee subsequent to decree O 34 R 10
  - of mortgagor set off against mortgage money O 34 R 9 N 2
- cross-claims and cross-decrees in suits on mortgage O 21 R 20
- DECREE ON
  - amount due on mortgage, payment of—time for O 34 R 2 N 17

Mortgage—DECREE ON
- amount due, payment of—time for, extension of O 34 R 2 N 18
- attachment of—objections and claims in respect of O 21 R 58 N 11
- decree is moveable property for execution O 21 R 90 N 3
- effect of decree in foreclosure suit O 34 R 3
- execution by transferee of decree O 21 R 16 N 2
- final decree application for
  - for foreclosure O 34 R 3
  - for sale—dismissal for default—whether legal O 34 R 5 N 16
  - limitation O 34 R 5 N 12
  - several applications—if may be filed O 34 R 5 O 16
  - to which court to be made O 34 R 5 N 9
- for balance due on mortgage O 34 R 6
- for money in satisfaction of claim under mortgage—sale of mortgaged property in execution, not permissible O 34 R 14
- foreclosure decree, discharge of debt on passing of, O 34 R 3 (3)
- money decree for claim under mortgage—meaning of O 34 R 14 N 15
- preliminary and final decree in suit for redemption O 34 R 7 N 12
- preliminary, for foreclosure O 34 R 2
- sale under—what passes at O 21 R 94 N 8
- where nothing found due to mortgagee O 34 R 9

equitable mortgage—suit relating to—procedure—applicability of provisions as to simple mortgage O 34 R 15

extension of time for payment under decree O 34 R 5 N 18; O 34 R 7 N 13; O 34 R 8 N 7; O 34 R 4 N 8
- by appeal being filed O 34 R 3 N 5

FORECLOSURE O 34 R 3
- decree for
  - accounts, order for O 34 R 2 N 6
  - amount due to mortgagee O 34 R 2 Nn 6 to 13
  - application for O 34 R 3 N 7
  - contents of O 34 R 2
- final decree
  - contents of O34 R 3
  - discharge of liabilities on passing of O 34 R 3 (2)
  - discharge of mortgage on passing of O 34 R 3
  - effect of discharge of debt etc. O 34 R 3 N 9
  - extending time for payment O 34 R 2 (2)
  - execution of O 34 R 3 N 12
  - *ex parte* O 34 R 3 N 7
- form of preliminary decree O 34 R 2 N 5
- form of, subsequent mortgagee where impleaded in suit O 34 R 2 N 15
- in redemption suit O 34 R 8 N 6
- notice, if necessary before passing final decree O 34 R 3 N 7
- object of preliminary decree O 34 R 2 N 3
- partial foreclosure O 34 R 3 N 8

Mortgage—FORECLOSURE
- persons entitled to foreclose O 34 R 2 N 4
- power to decree sale in suit O 34 R 4
- power to decree in suit for sale O 34 R 4
- preliminary decree in O 34 R 2
- preliminary decree for—application for final decree O 34 R 2 N 19
- suit for
  - parties O 34 R 1
  - subsequent mortgagee impleaded as party—form of preliminary decree O 34 R 2 N 15

interest
- in suits on mortgage O 34 R 11
- right to O 34 R 2 Nn 8 to 10
- subsequent to date fixed for payment O 34 R 11 (b)

invalidity of—suit on mortgage—compromise decree O 34 R 5 N 5

compromise decree—preliminary and final decree provisions whether apply to decree on award O 34 R 4 N 14

marshalling of securities O 34 R 4 N 10

MONEY DECREE FOR CLAIM UNDER
- attachment of property under decree not prohibited O 34 R 14 N 9
- effect of sale in execution of such decree O 34 R 14 N 7
- sale of mortgaged property in satisfaction of claim unconnected with mortgage O 34 R 14 N 12
- sale of property in execution not permissible O 34 R 14
- transferee of decree cannot bring to sale mortgaged property in execution O 34 R 14 N 10

MORTGAGE BOND
- is movable property for O. 21, R. 89 O 21 R 89 N 8
- is movable property for execution O 21 R 90 N 3

mortgage by conditional sale—mortgagee, if can sue for sale O 34 R 4 N 3

mortgagee in possession—account against O 34 R 2 N 13

of chattels—suit to enforce mortgage, procedure O 34 R 2 N 20

of intangible property—suit to enforce mortgage—procedure O 34 R 2 N 20

overpayments to mortgagee claim for—suit if lies O 34 R 9 N 3

PARTIES—TO SUIT ON O 34 R 1
- appeal—parties to O 34 R 1 N 18
- kanomdar O 34 R 1 N 17
- landlord O 34 R 1 N 16
- lessee, if necessary party O 34 R 1 N 15
- misjoinder of parties O 34 R 1 N 21
- necessary parties—non-joinder, effect of O 34 R 1 N 19
- person claiming paramount title O 34 R 1 N 5
- persons interested in mortgage security to be parties to suit O 34 R 1
- prior mortgagee, if necessary O 34 R 1 Expln
- puisne mortgagee, if necessary O 34 R 1 Expln
- receiver in insolvency, whether necessary O 34 R 1 N 14

Mortgage—PARTIES TO SUIT ON

- same person, whether can be plaintiff and defendant O 34 R 1 N 20
- trustees executors or administrators O 34 R 1 N 7

PERSONAL DECREE AGAINST MORTGAGOR

- *See also* MORTGAGE—SALE
- in redemption suit O 34 R 8 A
- in suit for sale O 34 R 6

PERSONAL LIABILITY OF MORTGAGOR

- *See also* MORTGAGE—SALE
- for costs of mortgage suit O 34 R 5 N 26
- limitation for, enforcement of O 34 R 6 N 17
- mortgagee's right, nature of—mortgagee whether can sue to set aside alienation of non-mortgaged properties as fraudulent under T. P. Act, S. 53 O 34 R 6 N 23

PRIOR AND PUISNE

- account, mode of taking, in suit on mortgage O 34 R 7 N 4
- adjudication of rights of puisne mortgagee in suit on prior mortgage O 34 R 4
- parties to suit O 34 R 1
- puisne mortgagee—whether personal decree may be passed against O 34 R 6 N 14
- sale under decree on puisne mortgage—payment of amount due to prior mortgagee O 34 R 13
- suit by first mortgagee—contents of decree for sale in such suit O 34 R 4 N 6
- suit on mortgage—costs—personal decree for, if may be passed against puisne mortgagee O 34 R 6 N 15
- suit on mortgage—splitting of claim O 2 R 2 N 21
- suit on puisne mortgage—power of court to direct sale free of the prior mortgage O 34 R 12

property subject to prior mortgage—when court can direct sale of same O 34 R 12

REDEMPTION

- decree for
  - application for final decree—limitation O 34 R 8 N 8
  - costs O 34 R 7 N 6
  - debt, discharge of, on passing of final decree O 34 R 8
  - decree, when nothing is found due to mortgagee—form and contents of O 34 R 9
  - decree, where the mortgagee has been overpaid O 34 R 9
  - extension of time for payment of mortgage money O 34 R 8 N 7
  - final decree for foreclosure or sale in redemption suit O 34 R 8 N 6
  - final decree for redemption whether mortgagor has to apply O 34 R 8 N 8
  - final decree for redemption when may be passed O 34 R 8

Mortgage—REDEMPTION

- final decree in—form and contents of O 34 R 8
- form and contents of O 34 R 7
  - applicability of provision to suit by one co-mortgagor for redemption against another co-mortgagor who has redeemed the mortgaged property O 34 R 7 N 3
- interest
  - right to, of mortgagee O 34 R 7 N 5
  - subsequent interest O 34 R 7 N 8
- mode of taking accounts O 34 R 7 N 4
- mortgagor's default in paying the decree amount within the time allowed—application for personal decree O 34 R 7 N 12
- mortgagor's right to redeem till confirmation of sale or foreclosure O 34 R 8 Nn 4, 5
- only one preliminary decree to be passed O 34 R 7 N 3
- payment of mortgage money—time for O 34 R 7 N 9
- personal decree against mortgagor O 34 R 8 A
- personal liability of mortgagor—enforcement of—on deficiency on sale under redemption decree O 34 R 8 A
- preliminary and final decree O 34 R 7 N 12
- procedure after decree O 34 R 7 N 12
- separate suit
  - for mesne profits whether maintainable, by mortgagor after recovering property O 34 R 9 N 3
  - for over-payments whether maintainable O 34 R 9 N 3
- trespass by mortgagor before paying mortgage money O 34 R 7 N 17
- where mortgagee is overpaid O 34 R 9

suit and not application is the remedy O 34 R 7 N 3

suit for
- parties O 34 R 1
- value of, for purposes of jurisdiction O 34 R 7 N 19
- who can redeem O 34 R 7 N 16

SALE

- application of proceeds of O 34 R 13
- application of proceeds, mode of O 34 R 13
- attachment whether necessary O 34 R 5 N 20
- balance due on mortgage after sale—personal liability of mortgagor—decree for O 34 R 6
- co-mortgagee impleaded as defendant—direction in decree for payment of sum to O 34 R 5 N 7
- costs of—whether recoverable from mortgagor personally O 34 R 5 N 26

Mortgage—SALE
- court, if can go behind preliminary decree O 34 R 5 N 8
- decree for—prior sale for arrears of revenue—adjustment of equities O 34 R 4 N 7
- decree on, for sale—decree directing payment to co-mortgagee impleaded as defendant O 34 R 5 N 7
- decree on for money O 34 R 4 N 4
- decree on—direction to pay co-mortgagee impleaded as defendant O 34 R 5 N 7
- distribution of sale proceeds O 34 R 13
- effect of sale in the mortgage decree O 34 R 5 N 19
- *ex parte* personal decree against mortgagor O 34 R 6 N 19
- expenses of sale O 34 R 13
- final decree—contents of O 34 R 5
- final decree, execution of—postponement of sale to enable decree amount to be raised by transfer of mortgaged property whether permissible O 34 R 5 N 20
- final decree for sale passed—court if can thereafter issue injunction restraining mortgagor from receiving income of property mortgaged O 34 R 5 N 22
- final decree for sale
  - form of O 34 R 5 N 7
  - when can be passed O 34 R 5 N 4
- final decree in—execution of O 34 R 5 N 20
- final decree in suit O 34 R 5
- final decree—return of documents relating to property O 34 R 5 N 15
- final decree—sale of property under O 34 R 5 N 17
- impossibility of—power of court to adjust equities O 34 R 4 N 7
- injunction restraining mortgagor from receiving income of mortgaged property O 34 R 5 N 22
- insolvency of mortgagor—pending suit—procedure O 34 R 6 N 16
- in suit for redemption O 34 R 8 N 6
- interest, payment of, from proceeds of sale under decree O 34 R 13
- joint decree-holders O 34 R 5 N 30
- mortgage decree—construction of O 34 R 5 N 23
- mortgagee's right to proceed against non-mortgaged properties in execution O 34 R 6 N 3
- mortgagor's rights before confirmation of sale O 34 R 5 N 13
- notice to judgment-debtor, if necessary before passing final decree O 34 R 5 N 11
- of mortgaged property—without bringing suit for sale—consent decree for money O 34 R 14 N 14
- only one final decree to be passed O 34 R 5 N 6

Mortgage—SALE
- order in which properties should be sold O 34 R 4 N 10
  - power of court to adjust equities O 34 R 4 N 10
- payment of balance to persons interested in the property sold O 34 R 13
- payment into court O 34 R 5 N 14
- proceedings for—nature of proceedings O 34 R 6 N 22
- personal decree against mortgagor
  - absence of prayer is no ground for refusing O 34 R 6 N 3
  - against mortgagor when may be passed O 34 R 6
  - amount for which personal decree may be passed O 34 R 6 Nn 11, 12, 13
  - application for—doctrine of *lis pendens* whether applies O 34 R 6 N 23
  - application for such decree whether necessary O 34 R 6 N 3
  - assignment of mortgage decree includes the personal decree O 34 R 6 N 23
  - circumstances and conditions for the passing of O 34 R 6 N 3
  - conditions and circumstances under which such decree can be passed—deficiency on sale under mortgage O 34 R 6 N 10
  - court to which application for decree must be made O 34 R 6 N 23
  - execution of personal decree O 34 R 6 N 20
  - if may be passed where he has been adjudicated insolvent pending suit O 34 R 6 N 16
  - limitation for application for O 34 R 6 N 17
  - notice to mortgagor—whether necessary O 34 R 6 N 19
  - personal liability of mortgagor—mortgagee's right to attach non-mortgaged properties before date fixed for payment of mortgage money O 34 R 6 N 9
  - personal liability, a question of construction of document O 34 R 6 N 5
  - person not mortgagor O 34 R 6 N 6
  - provisions as to instalment decrees whether applicable O 34 R 6 N 23
  - stage at which decree is to be passed in the suit for sale O 34 R 6 N 3
  - succession certificate whether necessary for passing decree in favour of mortgagee's heirs O 34 R 6 N 18
  - when may be passed O 34 R 6 Nn 12, 13
  - whether barred by *res judicata* by decision at time of original decree for sale O 34 R 6 N 3

Mortgage—SALE—Personal decree against mortgagor
- whether must be separately passed O 34 R 6 N 3
- personal decree against whom may be passed
  - heirs of mortgagor O 34 R 6 N 7
  - puisne mortgagee O 34 R 6 N 14
  - purchaser from mortgagor O 34 R 6 N 4
- personal liability of mortgagor O 34 R 10 N 8
  - how to be enforced, where he becomes insolvent pending suit O 34 R 6 N 16
- power of court to adjust equities O 34 R 4 N 10
- power of court to sell non-mortgaged properties under decrees O 34 R 5 N 20
- power of court under T. P. Act, S. 57 not affected O 34 R 13
- preliminary and final decree—application for final decree if and when necessary O 34 R 5 N 10
- preliminary decree for sale, contents of O 34 R 4
- proceedings for final decree—nature of O 34 R 5 N 29
- property subject to prior mortgage—sale free of the prior mortgage—power of court O 34 R 12
- provision by court for sale free of encumbrance O 34 Rr 12, 13
- right of mortgagee to charge on surplus in proceeds on sale of mortgaged property for arrears of revenue or rent O 34 R 15 N 13
- subsequent mortgagees, adjudication of rights of, in same suit O 34 R 4
- succession certificate—production of O 34 R 4 N 13
- suit for
  - costs O 34 R 4 N 12
  - decree on award O 34 R 5 N 5
  - parties O 34 R 1
  - power to decree foreclosure O 34 R 4
  - sale of mortgaged property—right of mortgagee to bring mortgaged properties to sale otherwise than by instituting a suit for sale O 24 R 14
  - who may sue for sale O 34 R 4 N 3

SUB-MORTGAGE
- sub-mortgagee whether necessary party to suit relating to mortgage O 34 R 1 N 9
- suits by or against sub-mortgagee—accounts in O 34 R 2 N 14

suit for merely accounts—whether maintainable by mortgagor O 34 R 7 N 3

suit—personal decree for balance due on mortgage after sale O 34 R 6

SUIT ON
- amount due to mortgagee, meaning of O 34 R 2 Nn 6 to 13
- appointment of receiver—*See* RECEIVER
- attachment before judgment whether permitted O 38 R 5 N 3

Mortgage—SUIT ON
- compromise of O 23 R 3 N 4
- cross-claims and cross-decrees O 21 R 20
- frame of—splitting of claim O 2 R 2 N 10
- frame of—whole claim to be included O 2 R 1 N 3
- interest O 34 R 11
- mortgage money—how to be computed O 34 R 7 N 4
- procedure, general principles of O 34 R 1 N 1
- priority between purchaser under rent decree and purchaser under mortgage decree O 34 R 15 N 7
- splitting of relief O 2 R 2 N 18

usufructuary mortgage—mortgagee, if can sue for sale O 34 R 4 N 3
- whether usufructuary mortgage is immovable property for execution O 21 R 89 N 8

Movable property

ATTACHMENT
- liable to S 60 (1)
- not in judgment-debtor's possession O 21 R 12; O 21 R 46
- in possession of judgment-debtor, mode of O 21 R 43
- share of judgment-debtor in movable property, procedure O 21 R 47

decree for delivery of, to state amount to be paid in alternative O 20 R 10

decree for partition of O 20 R 18 (2)

decree for specific movables—execution O 21 R 31

defined S 2 (13)

delivery of, order for O 39 R 10

deposit in court of, order for O 39 R 10

growing crops included S 2 (13) Notes

impounding of, pending appeal to Privy Council O 45 R 13 (2) (a)

interim sale of, where subject to speedy decay O 39 R 6

minor, receipt of movable property on behalf of O 32 R 6

mortgage of—suit to enforce mortgage—procedure O 34 R 2 N 20

place of suing S 16 (f)

SALE OF
- in execution O 21 Rr 74-81
- under attachment O 21 R 43
- when subject to speedy decay O 21 R 43

seizure of, in dwelling house S 62

suit to recover—place of suing S 16 (*f*)

suit for compensation for wrong—place of suing S 19

Multifariousness
- no ground for reversing decree in appeal S 99

Municipalities
- suit against S 80 N 7

Mutawalli
- whether may sue as pauper O 33 R 1 N 13

Mutt
- *See* TRUST

N

Native States
- courts of, execution of decrees, passed by S 44

Native States
- execution of decree passed by British Court in S 43

Negotiable Instrument
- ATTACHMENT OF S 60 (1); O 21 R 51
  - debt not secured by O 21 R 46 (1) (a)
  - mode of O 21 R 51
- courts to which summary procedure on, applies O 37 R 1
- deposit in court O 37 R 1
- endorsement of—decree for—execution O 21 R 34
- lost instrument, suit on O 7 R 16
- meaning of O 37 R 2 N 9
- sale of, in execution O 21 R 76
- SUIT
  - on lost instrument O 7 R 16
  - parties to O 1 R 10 N 23
- SUMMARY SUIT O 37
  - contents of plaint in O 37 R 2
  - courts empowered to try O 37 R 1
  - defence O 37 R 3
  - defendant cannot defend without prior leave O 37 R 2 (2)
  - form of summons in O 37 R 2
  - institution of, manner of O 37 R 2
  - leave to defend
    - application for—limitation O 37 R 2 N 7
    - conditional leave O 37 R 3 N 3
    - failure to obtain leave O 37 R 2 N 5
    - when to be given O 37 R 3
  - limitation O 37 R 2 N 4
  - ordinary suits also may be filed O 37 R 1 N 2
  - power to order negotiable instrument to be deposited with officer of court O 37 R 5
  - power to set aside decree—and rehear suit O 37 R 4
  - procedure in O 37 R 7
  - recovery of costs of noting non-acceptance of dishonoured bill or note O 37 R 6
- transfer of—in execution O 21 R 80

Next friend
- agreement by O 32 R 7
- appointment of—new application for O 32 R 8 (2)
- compromise by O 32 R 7
- consent by—effect S 147
- minor to sue by O 32 R 1
- not to receive property without leave of court O 32 R 6
- notice to, when minor elects to proceed with suit in his own name O 32 R 12 (5)
- pleader, liability of, for costs, in suit for minor without O 32 R 2 (1)
- removal of O 32 R 9
- retirement of O 32 R 8
- SECURITY
  - for costs, retiring next friend to give O 32 R 8 (1)
  - when next friend required to give O 32 R 6 (2)
- stay of proceeding—on retirement, removal or death of O 32 R 10 (1)

Next friend
- SUIT WITHOUT
  - notice of application for taking plaint off file O 32 R 2 (2)
  - procedure O 32 R 2
- WHO CAN ACT AS O 32 R 4
  - defendant cannot O 32 R 4

Non-appearance
- neither party appearing O 9 R 3
- of defendant O 9 R 6
  - sufficient cause shown O 9 R 7
  - of one or more of several defendants O 9 R 11
- of parties O 9
  - at adjourned hearing O 17 R 2
- of plaintiff O 9 R 8
  - of one or more of several plaintiffs O 9 R 10

Non-joinder
- *See also* MISJOINDER OF CAUSES OF ACTION—PARTIES O 1 R 9
- irregularity not to defeat suit O 1 R 13
- objection as to O 1 R 13

North-West Frontier Provinces Judicial Commissioner's Court
- evidence—mode of taking in O 18 R 5 N 1; O 18 R 6 N 1

Notice
- allegation of, in pleadings O 6 R 11
- before arrest—issue of O 21 R 37
- before granting injunction O 39 R 3
- by collector, to decree-holder, in certain cases Sch III P 3
- for recording payment to decree-holder out of court O 21 R 2 (2)
- in lieu of warrant of arrest O 21 R 37
- in representative suit O 1 R 8 (1)
- of admission of a case O 12 R 1
- of admission of opponent's case O 12 R 1
- OF APPEAL O 41 Rr 13—15
  - contents of O 41 R 15
  - may be served by appellate court O 41 R 14
  - to court passing decree appealed from O 41 R 13
  - to lower court O 41 R 13 (1)
- OF APPLICATION
  - for appointment of guardian for minor O 32 R 3 (4)
  - for order for detention, preservation, or inspection of subject-matter of suit O 39 R 8
  - to file an agreement to refer to arbitration Sch II P 17 (3)
- of appointment of guardian of minor O 32 R 3
- of deposit by defendant O 24 R 2
- of execution against legal representative O 21 R 22 (1) (b)
- of execution by transferee of decree O 21 R 16
- of execution more than one year after date of decree O 21 R 22 (1) (a)
- of execution—procedure after issue O 21 R 23
- of execution—required in certain cases O 21 R 22
- of filing of award made under an order of reference Sch II P 20

Notice
- OF HEARING
  - as to pauperism O 33 R 6
  - of appeal O 41 R 14
- of interim sale or detention, etc., of property O 39 R 8
- of payment into court O 24 R 2
- of payment of decree amounts into court O 21 R 1
- of application for setting aside dismissal for default O 9 R 9
- of application setting aside *ex parte* decree O 9 R 14
- service of O 48 R 2
- to accompany summons in suit against firm O 30 R 5
- TO ADMIT
  - documents S 30 (a); O 12 R 2
  - facts O 12 R 4
  - form of O 12 Rr 3, 5
- to appoint new arbitrator Sch II P 5
- to attach decree O 21 R 53 (1) (b)
- to be in writing S 142
- to defendant of adjourned hearing O 9 R 6 (1) (c)
- to Government, of suit against it S 80
- to judgment-debtor, prohibiting him from transferring his share in movables O 21 R 47
- to legal representative, before executing decree against him O 21 R 22
- TO NEXT FRIEND
  - of application to have plaint taken off file in suit filed without next friend O 32 R 2 (2)
  - when minor elects to proceed with suit O 32 R 12 (5)
- TO OPPOSITE PARTY
  - before issuing injunction O 39 R 3
  - of application for review O 47 R 4 (2) (a)
  - to appoint new umpire Sch II P 5
- to parties—of date of judgment O 20 R 1
- to partners, of process O 30 R 5
- TO PRODUCE DOCUMENTS O 11 R 16; O 12 R 8
  - costs of O 12 R 9
  - for inspection O 11 Rr 15, 16
  - form of O 11 R 16, O 12 R 8
- to public officer, of suit against him S 80
- to purdanashin lady, to withdraw, at seizure of property in a dwelling house S 62 (3)
- to Secretary of State, of suit against him S 80
- to set aside decree O 9 R 14
- to show cause against execution in certain cases O 21 R 22
- to surety, before enforcing liability S 145 Prov

Nuisance
- private S 91 N 2
- PUBLIC S 91
  - acts offending particular class of persons is not S 91 N 2
  - constructive S 91 N 2
  - meaning of S 91 N 2
  - obstruction to public highway S 91 Nn 2, 3
  - proceedings in respect of, in England S 91 N 4
  - relator's name, purpose of inserting S 91 N 4
  - remedies as to S 91 N 5

Nuisance—PUBLIC
  - right of suit, independent of S. 91 S 91 N 9
  - suit by private person S 91 N 1
  - suit in respect of—claim for special damages S 91 N 8
  - suit in respect of—consent of Advocate-General S 91
  - suit in respect of, relators need not have personal interest S 91 N 4
  - suit in respect of—
    - sanction—plea as to S 91 N 4
      - storage of inflammable material S 91 N 2
      - waterways—pollution of S 91 N 2
- suit for declaration about nuisance S 91 N 6
- suit for injunction S 91 N 7
- suit in respect of Ss 91, 93
  - special damage S 91 N 1

Oath
- AGREEMENT TO TAKE
  - effect O 23 R 3 N 10
  - suit by or against minor—agreement by next friend or guardian to take oath, whether amounts to compromise O 32 R 7 N 10
- by whom to be administered S 139

Office
- RELIGIOUS
  - fees appurtenant to—suit for S 9 Nn 35, 38
  - fees attached to—suit for S 9 N 38
  - fees not attached to—suit for S 9 N 38
- secular—suit for S 9 N 35
- suit for—if of civil nature S 9 N 35

Officer
- arrest, judicial officer, when exempt from S 135(1)
- Chartered High Court—appointment of officers of Ch A Cl 8
- in charge of court sale not to bid or buy O 21 R 73
- who are public officers S 2 (17)

Officer of Court
- amendment of memorandum of appeal to be signed by O 41 R 3 (3)
- costs incurred by, as guardian *ad litem* O 32 R 4 (4)
- court may appoint, as guardian *ad litem* O 32 R 4 (4)
- delegation to, of judicial, quasi-judicial, and non-official duties S 128 (2) (i)
- execution of documents by, on failure of judgment-debtor O 21 R 34
- registration of documents by O 21 R 34 (6)
- registry by, of appeal on admission O 41 R 9

Officer of the regular corps
- not public officer S 2 (17) N

Official Assignee
- insolvency of plaintiff O 22 R 8 (2)
- security for costs by, on plaintiff's insolvency O 22 R 8

Official Liquidator
- discovery—order for O 11 R 13 N 22
- if can sue as pauper O 33 R 1 N 12
- if can sue on behalf of company O 29 R 1 N 6

Official Trustee
- is an officer S 2 (17) Notes

Old Codes
- references to S 158

Onus
- party need not plead any fact as to which onus lies on other side O 6 R 13
- several issues O 18 R 3

Opinion
- affidavit as to O 19 R 3

Order
- amendment of S 152

Orders
- APPEAL FROM S 104; O 43 R 1
  - cross-objections in O 41 R 22 N 8
  - forum S 106
  - procedure in S 108; O 43 R 2
  - security for costs whether can be required O 41 R 10 N 2
- APPEALABILITY OF S 104 N 19
  - principles of L P Cl 15 N 2
- appealable orders S 104; O 43 R 1
  - instances of O 43 R 1
- appealable to Privy Council S 109
- by Presidency Small Cause Courts Judge, modifying award—is not decree passed on award Sch II P 12 N 8
- defined S 2 (14)
- error, defect or irregularity in, when can be questioned S 105 N 5
- error in order, may be ground of objection in appeal from final decree S 105
- execution of O 21
- execution of orders, provisions relating to S 36
- execution of—rules relating to S 36
- filing agreement to refer, is appealable Sch II P 17 N 15
- filing or refusing to file award without intervention of court, if appealable S 104 N 15
- for affidavit of documents O 11 R 12
- for attachment for contempt—appealability of S 104 N 18
- for discovery of documents—non-compliance of O 11 R 21
- for dismissal for default, is not a decree S 2 (2) (*b*)
- for further security or payment in Privy Council Appeal O 45 Rr 10, 14
- for impounding documents, O 13 R 8
- for inspection of documents O 11 R 18
- for issue of commission O 26 R 2
- for producing documents O 11 R 14
- granting review—appealability of S 105 N 11
- IN EXECUTION
  - appeal from O 41 R 8
  - by collector, is decree Sch III P 6
  - of P. C. decree—appeal from O 45 R 16
- INTERLOCUTORY ORDERS
  - appealability of S 104 N 4
  - allowing party to draw money paid into court pending decision O 39 R 7 N 6
  - costs awarded by set-off O 21 R 19 N 4
  - order for deposit for money or other thing in court pending decision of suit O 39 R 10

Orders—INTERLOCUTORY ORDER
  - order for detention, preservation, inspection, etc. of subject-matter of suit O 39 R 7
  - order for immediate possession of suit land O 39 R 9
  - order for inspection, etc. of suit property by parties—appeal O 39 R 7 N 7
  - order for inspection of suit property by parties—application for, when to be made O 39 R 8
  - order for interim sale, application for, when to be made O 39 R 8
  - order for inventory of suit property O 39 R 7 N 4
  - power to order interim sale O 39 R 6
  - right to question in appeal from final decree—order allowing application to sue in *forma pauperis* whether may be questioned in appeal from suit O 33 R 7 N 10
- imposing fine—examples of S 104 N 18
- in appeal under S. 104—review, whether lies S 104 N 9
- meaning of S 2 (14)
- modifying or correcting award, is appealable S 104 (1) Cl (*a*)
- non-appealable orders S 104 N 4
- not affecting the decision of the case—examples of S 105 N 6
- not appealed against—if can be questioned in appeal from decree S 105 N 2
- OF REFERENCE TO ARBITRATION Sch II P 3
  - to provide for difference of opinion Sch II P 4
- of remand in appeal S 105
- on award stated in form of special case is appealable S 104 (1) Cl (*b*); Sch II P 11 N 2
- overruling objections to award whether appealable Sch II P 15 N 14
- refusing arrest under O. 39, R. 2—appealability of S 104 N 18
- refusing attachment—appealability of S 104 N 18
- refusing imposition of fine—appealability of S 104 N 18
- REFUSING TO REMIT AWARD FOR RE-CONSIDERATION IS NOT
  - appealable Sch II P 14 N 9
  - revisable Sch II P 14 N 10
- refusing to set aside award not revisable Sch II P 15 N 15
- refusing to stay, owing to agreement to refer, is appealable S 104 (1) Cl (*e*)
- rejecting memo. of appeal, whether decree S 2 (2) N 13
- rejecting plaint, whether decree S 2 (2) N 13
- REMITTING AWARD FOR RECONSIDERATION
  - not appealable Sch II P 14 N 9
  - not revisable Sch II P 14 N 10
- returning plaint to be presented to the proper court O 7 R 10
- revoking reference to arbitration, on agreement to refer, not appealable Sch II P 17 N 15
- second appeal, none from orders S 104
- service—mode of O 48 R 2

Order
- SETTING ASIDE AWARD
  - for misconduct, etc. if and when revisable Sch II P 15 N 15
  - when appeal lies S 104 (1) Cl (*a*)
- staying suit, owing to agreement to refer, is appealable S 104 (1) Cl (*e*)
- superseding arbitration—appeal, whether lies from S 104 N 10
- superseding arbitration when award is not made in time whether appealable Sch II P 8 N 6
- to answer further interrogatories O 11 R 11
- to be in writing S 142
- under appeal—compliance with, whether bar to appeal S 105 N 7
- under S. 47 (execution proceedings) is a decree S 2 (2)
- under S. 95—appealability of S 104 N 17
- under S. 144 (restitution) is a decree S 2 (2)

Original decree
- appeal from S 96

Orissa Tenancy Act
- decree under—execution of—application for—form and contents of O 21 R 11 N 2 A

Oudh Chief Court
- evidence—mode of taking O 18 R 5 N 1

Oudh Laws Act
- S. 19—case under—evidence, notes of —interpretation of, to witness O 18 R 6 N 1

Oudh Rent Act
- decree under—execution of—application for—form and contents of O 21 R 11 N 2 A
- execution—money decree—execution by ejectment of tenant O 21 R 30 N 7
- proceedings under—set off—claim of O 8 R 6 N 12

Panchayatdar
- exemption from coercive provisions applicable to witnesses O 16 R 10 N 4

Pardanashin lady
- application by, for leave to sue in *forma pauperis*—presentation in person whether necessary O 33 R 3 Nn 3, 4
- arrest of, in execution of civil process in certain cases S 132
- arrest of person in a room in occupation of S 55
- commission, examination on O 26 R 1
- delivery of possession, when property in occupation of O 21 R 35
- examination of, not to be in open court Ss 132, 133
- exemption from personal appearance in court S 132; O 26 R 1 N 3
- process—service of, on O 5 R 12 N 3
- seizure of property, where room is in occupation of S 62 (2)

Parties
- ADDITION OF O 1 R 10
  - addition, altering nature of suit O 1 R 10 N 29
  - addition introducing new cause of action O 1 R 10 N 28
  - amendment of plaint, on O 1 R 10
  - appeal S 107 N 16; O 1 R 10 N 11

Parties—ADDITION OF
  - application by party, if necessary O 1 R 10 N 12
  - consent of added parties O 1 R 10 N 38
  - defendant newly added service of
    - summons and plaint on, O 1 R 10 (4)
    - limitation against O 1 R 10 (5)
    - when added, plaint to be amended, O 1 R 10 (4)
  - due to devolution of interest, pending suit O 22 R 10 N 19
  - effect of O 1 R 10 N 12
  - improper addition O 1 R 10 N 31
  - limitation O 1 R 10 N 41
  - or substitution or striking out of parties O 1 R 10
  - person claiming adversely to both plaintiff and defendant O 1 R 10 N 27
  - plaintiff, no person to be added as, without his consent, O 1 R 12 (3)
  - (in) representative suit O 1 R 8 N 18
  - respondent O 41 R 20
  - second appeal O 1 R 10 N 11; O 41 R 20 N 12
  - stage at which parties may be added O 1 R 10 N 32
  - unnecessary parties O 2 R 3 N 15
- ADMINISTRATOR
  - joinder of O 31 R 2
- APPEAL
  - *See also* APPEAL
  - common ground, and reversal of decree in appeal O 41 R 4
  - decree against several plaintiffs or defendants—right of one to appeal against whole decree O 41 R 4
  - non-joinder of necessary party—effect O 41 R 1 N 2
  - parties to O 1 Gen. N 1; O. 1 R 1 N 10
- ARBITRATION, REFERENCE TO
  - agreement to refer must be by all parties Sch II P I N 7
  - application for order of reference Sch II P 1
  - interested, meaning of, within Sch II Sch II P 1 N 7
- COMPROMISE OR CONSENT
  - compromise decree—parties to compromise O 23 R 3 N 20
  - consent on behalf of, under disability S 147
- CONDUCT OF SUIT
  - power of court O 1 R 11
- CONSTRUCTIVE PARTIES
  - who are, S 11
- contract
  - joinder of parties liable on same contract O 1 R 6
- COURT, POWER OF
  - to give judgment for or against one or more parties O 1 R 4
  - to order separate trials O 1 R 2 N 1
- DEATH OF
  - abatement of suit O 22
  - after hearing and before decree—effect O 22 R 1
  - before hearing of case—power of court to pass judgment O 22 R 6; O 20 R 1 N 3

Parties—DEATH OF
- death after preliminary decree in mortgage suit—legal representatives, impleadment of O 34 R 3 N 7
- effect O 22
- right to sue, survival of, in personal actions O 22 R 1 N 5
- suit or appeal against O 1 R 10 N 40; O 22 R 1 N 19
- survival of right to sue in suit to establish right to personal office O 22 R 1 N 6
- when right to sue survives O 22 R 1 N 4

DEFENDANT
- addition of parties as—limitation, O 1 R 10
- appearance by one, for others, O 1 R 12
- as pauper O 33 R 1 N 9
- examination of, on commission O 26 R 4 N 4
- *ex parte* decree setting aside in favour of one—when setting aside operates in favour of all O 9 R 13 N 23
- if can be compelled to give security for costs O 25 R 1 N 13
- joinder of O 1 R 3; O 1 R 6
- contract, defendants liable on same, O 1 R 6
  - contribution, suit for O 1 R 3 N 9
  - defendants need not all be interested in all reliefs O 1 R 5
  - Hindu reversioner, suit by, to set aside alienation by widow O 1 R 3 N 9
  - power of court to order separate trials O 1 R 3 N 13
  - revenue sale, suit to set aside— O 1 R 3 N 9
  - same hundi, persons liable on O 1 R 6 N 1
  - same promissory note, persons liable on O 1 R 6 Nn 1, 2
  - same defendants residing outside jurisdiction O 1 R 3 N 4
  - when plaintiff in doubt from whom redress is to be sought O 1 R 7
- joint defendants, court may give judgment against one or more of, O 1 R 4 (b)
- joint tortfeasors O 1 R 3 N 8
- one may appear for others O 1 R 12
- reliefs claimed, all defendants need not be interested in all, O 1 R 5
- right of, to apply for execution of decree in partition suit O 21 R 10 N 2
- same contract, persons liable on O 1 R 6 Nn 1, 2
- who may be joined as O 1 R 3

DISCOVERY
- against whom may be ordered O 11 R 13 Nn 13, 21
- impleadment of, party for purpose of getting O 11 R 1 N 13

EXAMINATION OF O 10
- commissioner, O 26 R 16 (a)
- evidence, refusal to give, when required by court O 16 R 20
- at first hearing O 10 R 2
  - by court—with reference to allegations in pleadings O 10 R 1
  - rule as to substance of examination being written O 10 R 3

Parties—EXAMINATION OF
  - applicability of — to High court O 49 R 3
- inability of pleader to answer questions—consequence of O 10 R 4
- interrogatories, O 11 R 11 N 4
- oral examination of party or companion of party O 10 R 2
- in order to frame issues O 14 R 1 (5)
- party, summoned as a witness—procedure O 16 R 21
- party summoning of as witness O 16 R 1 N 4
- refusal of party to answer question at examination at first hearing of suit—effect of O 10 R 4
- witness
  - rules as to, to apply to parties O 16 R 21

failure of to produce evidence O 17 R 3
- decision on—remedy of aggrieved person O 17 R 3 N 7
- order on, is appealable or reviewable but not revisable O 17 R 3 N 7
- to perform necessary acts O 17 R 3

firm, suit by or against
- partnership suit O 1 R 10 N 15
- who are necessary parties O 30 R 1 N 1

insolvency of
- insolvent plaintiff and continuance of suit by official assignee O 22 R 8
- insolvent, suit against—official assignee—if necessary party O 1 R 10 N 27

interpleader suit O 35 R 4

intervenor
- suit between lessor and lessee O 1 R 10 N 18

JOINDER OF O 1 Gen. N 1
- caste, suit on behalf of members of O1 R 8 N 3
- community, suit on behalf of O 1 R 8 N 3
- fluctuating body of persons—suit on behalf of O 1 R 8 N 3
- inhabitants of town or village, suit on behalf of O1 R 8 N 3
- misjoinder and non-joinder (O 1) O 1 R 1
- misjoinder, effect of O 1 R 9
- misjoinder, meaning of O 1 R 9 N 3
- necessary and proper parties, non-joinder of—effect O 1 R 9 N 5
- non-joinder—effect of O 1 Rr 9, 10
- objection as to non-joinder or misjoinder O 1 R 13
- parties whose presence before court is necessary for complete adjudication of matters in controversy O 1 R 10
- parties who ought to have been joined as parties O 1 R 10
- persons suing or defending on behalf of all having same interest O 1 R 8
- plaintiff O 1 R 1
- power of court to order separate trials O 1 R 2 N 1; O 1 R 3 N 13
- public right, suit to establish or negative O 1 R 8 N 7
- public—suit on behalf of O 1 R 8 N 3
- representative suit O 1 R 8

Parties—JOINDER OF
representative suit for damages O 1 R 8 N 9
suit by a member of community, on his own behalf to enforce common right O 1 R 8 N 6
trust property, alienation of—suit to set aside O 1 R 8 N 8
unnecessary parties—joinder of—costs of such parties O 1 R 10 N 14
JOINT PARTIES
judgment for or against O 1 R 4
LEGAL REPRESENTATIVES
of defendant, when to be brought on record O 22 R 4
plaintiff, when to be brought on record O 22 R 3
misdescription O 1 R 10 N 37
MIS-JOINDER
if ground for reversal—*See* APPEAL
mortgage suit O 34 R 1 N 21
negotiable instrument,
joinder of parties liable on same negotiable instrument O 1 R 6
suit on O 1 R 10 N 23
NECESSARY AND PROPER PARTIES
application to set aside execution sale on ground of judgment-debtor's want of title O 21 R 91 N 4
attachment, suit to set aside—who should be joined O 1 R 10 N 27
benamidar
suit by or against O 1 R 10 N 27
suit relating to mortgage O 34 R 1 N 8
beneficiaries
not necessary parties to suit concerning property vested in trustees, executors or administrators O 31 R
execution proceedings—transferee of mortgagee's interest after final decree whether necessary party to the execution proceedings O 34 R 5 N 20
executors, joinder of O 31 R 2
firm—suit by or against O 30 R 1 N 1
foreclosure, suit for, and parties O 34 R 1
government when necessary party O 1 R 10 N 25
Hindu joint family suit on mortgage O 34 R 1 N 12
Hindu reversioner suit by, to set aside sale by widow O 1 R 10 N 27
Mahomedan co-heirs, mortgage suit O 34 R 1 N 11
meaning of O 1 R 9 N 5; O 1 R 10 N 13
mortgage
parties to suits on, O 34 R 1
mortgage suit—effect of non-joinder O 34 R 1 N 19
parties who ought to have been joined O 1 R 10 N 13
parties whose presence necessary before the court, meaning of O 1 R 10 N 14
possession, suit for—assignee *pendente lite*, if necessary party O 1 R 10 N 18
pre-emption suit O 1 R 10 N 17
prior mortgagees, when necessary parties O 34 R 1 Expln

Parties—NECESSARY AND PROPER PARTIES
proceeding for setting aside execution sale O 21 R 92 N 4
redemption, parties to suit for, O 34 R 1
registration, suit to obtain O 1 R 10 N 27
rent sale—suit to set aside O 1 R 10 N 27
sale of mortgaged property, parties to suit for O 34 R 1
specific performance, suit for O 1 R 10 N 24
suit against joint tortfeasors O 1 R 10 N 21
suit by or against joint promisees O 1 R 10 N 19
suit concerning property vested in trustee—beneficiary may be joined but not necessary party O 31 R 1
suit for ejectment—sub-tenant O 1 R 10 N 18
suit for possession of property attached under Cr P C—Government if necessary party O 1 R 10 N 18
suit for rent O 1 R 10 N 20
suit under S 92—*See* TRUST
trustee, executor or administrator—suit concerning property vested in—beneficiary not a necessary party O 31 R 1
trustees, joinder of O 31 R 2
non-joinder
of defendant, objection as to, when to be taken, O 1 R 13
numerous parties having same interest O 1 R 8
objection as to mis-joinder or non-joinder
waiver of O 1 R 13
when to be taken O 1 R 13
parties not being at issue
disposal of suit at first hearing O 15 R 1
some not being at issue with each other—procedure—judgment may be pronounced immediately as between such parties O 15 R 2
parties ranged on same side
co-defendants—issues between O 14 R 1 N 3
right to examine co-defendants O 18 R 4 N 1
"parties to suit" within S. 47 S 47
execution, questions in, between parties to suit S 47
Government and parties to suit in proceedings for payment of court-fee to Government in pauper suit O 33 R 13
Government application by, for payment of court-fees in pauper suit—questions in dispute between Government and any party to suit are questions arising between parties to the suit within S 47 O 33 R 13
partition suit O 1 R 10 N 16
party meaning of O 1 N 2
person carrying on business in name other than his own O 30 R 10
PLAINTIFF
O 1 R 8
co-trustees, suit by O 1 R 1; O 1 R 1 N 7
creditor's suit to set aside alienation O 1 R 1 N 7; O 1 R 8 N 5
examination of, on commission O 26 R 4 N 3
having different causes of action if can join in same suit O 1 R 1; O 1 R 1 N 1
having different interests O 1 R 1; O 1 R 1 N 3

Parties—PLAINTIFF

- joint executors, suit by O 1 R 1; O 1 R 1 N 7
- joinder of common question of law or fact O 1 R 1; O 1 R 1 N 6
- joint owners of property—suit by— O 1 R 1 N 7
- joint promisees, suit by O 1 R 1 N 7
- persons entitled to relief in alternative O 1 R 1 N 9
- persons entitled to relief severally O 1 R 1 N 8
- poverty of—as ground of security for costs O 25 R 1 N 7
- power of court to order separate trials where several persons joined as plaintiff O 1 R 2 N 1
- residents out of British India—security for costs, demand of O 25 R 1
- resident in foreign territory, O 26 R 5 N 2
- suit by members of Hindu joint family to recover family property O 1 R 1 N 7
- suit for removal of trustee of religious endowment O 1 R 1 N 7
- who may be joined as O 1 R 1
- woman—as plaintiff—security for costs—power of court to require O 25 R 1

PRESENCE OR ABSENCE

- absence of parties—power of commissioner to proceed in O 26 R 18
- adjourned hearing, procedure where parties failed to appear at, O 17 R 2
- appearance O 3 R 1
  - before commissioner O 26 R 18
  - in Allahabad and Oudh, when sufficient O 17 R 2 N 5
  - of one of several plaintiffs or defendants for others, O 1 R 12
  - of one on behalf of others O 1 R 12
  - of parties O 9
  - some of them alone—procedure O 9 Rr 10, 11
  - on day fixed for defendant to appear and answer O 9 R 1
- collector, attendance of, before Sch III P 13
- commissioner, appearance of parties before, O 26 R 18 (1)
- consequence of non-appearance O 9
- failure of party to appear before commissioner—power of court to proceed under O 17 R 2 O 26 R 18
- failure to appeal
  - decision on—if operates as *res judicata* O 17 R 3 N 7
  - distinction between O 17 Rr 2 and 3 O 17 R 3 N 3
  - on day fixed O 17 R 2
  - on day fixed, relation between O 9 and O 17 R 2 O 17 R 2 N 1
  - order on, whether appealable and revisable O 17 R 2 N 9
- parties to appear on the day fixed in summons O 9 R 1

PERSONAL APPEARANCE BY

- company—power of court to require appearance of officer of company in suit by or against O 29 R 3
- failure to appear personally despite court's order—dismissal of suit, for O 10 R 4

Parties—PERSONAL APPEARANCE BY

- power of court to direct personal appearance of parties O 5 R 3
- rules as to attendance of witness apply to parties O 16 R 20
  - when can or cannot be ordered O 5 Rr 3, 4, 5

- pro forma parties
  - decree in favour of O 7 R 7 N 2
- promissory note, suit on
  - defendants to O 1 R 6 N 1
- ranged on opposite sides S 2 (2) N 6
- RECEIVER
  - not a necessary party to suit for declaration of title—*See* DECLARATION
  - when may be appointed as—*See* RECEIVER
- refusal to give evidence—effect of O 16 R 20
  - to produce document O 16 O 20
- RELATORS
  - as parties to charity suits S 92
  - as parties to suits relating to public nuisance S 91
- representative of party appearance by O 3 R 1
- representative suit O 1 R 8
  - common interest, of several persons suit to enforce O 1 R 8
  - damages—suit for O 1 R 8 N 9
  - one person may sue or defend on behalf of all having same interest O 1 R 8
  - suit on behalf of creditors—plaintiff not being a creditor—effect O 1 R 8 N 19
- rights and privileges
  - to apply for coercive process to compel attendance of witness O 18 R 2 N 1
  - arrest, exemption from, while going to and returning from court S 135
  - party on whom burden of proof lies may begin evidence O 18 R 3
  - witnesses, right to examine all O 18 R 4 N 1
  - witnesses, right to select and to examine O 18 R 2 N 1
- striking out of O 1 R 10 N 33
  - power of appellate court O 1 R 10 N 33
  - power of successor of judge O 1 R 10 N 33
- substitution of O 1 R 10
  - power of appellate court S 107 N 16
- temporary injunction
  - against whom may be granted O 39 R 1 N 13
- transposition of O 1 R 10 N 34
  - appellate court—powers of O 1 R 10 N 34
- WHO MAY BE JOINED AS
  - as defendants O 1 R 3
  - as plaintiff O 1 R 1
  - contract
    - joinder of parties liable on same O 1 R 6
    - suit on—defendants to O 1 R 6
  - liability joint and several, on contracts O 1 R 6
  - promisors O 1 R 6
  - promisors, joint, O 1 R 6
  - wrong party
    - mistake in instituting suit in name of wrong plaintiff O 1 R 10 (1)
    - representative suit O 1 R 8 N 19; O 1 R 10
    - suit in name of wrong plaintiff O 1 R 10 (4)

Parties

MISCELLANEOUS
airman—suit by or against—procedure O 28
marriage of female party, no abatement of suit by O 22 R 7
military men—suits by or against—procedure O 28
same person
if can be both plaintiff and defendant O 1 N 2
whether can be plaintiff and defendant—mortgage suit O 33 R 1 N 20

Partition

commission for S 75; O 26 Rr 13, 14
appointment of, whether proceeding in execution of decree O 26 R 14 N 9
commissioner's report—objection to O 26 R 14 N 6
duty of—allotment of shares or giving possession O 26 R 14 N 5
final decree on commissioner's report O 26 R 14 N 9
DECREE FOR
contents of O 20 R 18
final decree—time for O 26 R 14 N 10
whether can be passed by court *suo motu* O 26 R 14 N 9
IMMOVABLE PROPERTY
partition of—decree for O 20 R 18
separation of share in execution S 54
joint family dwelling house, partition of O 26 R 14 N 4
movable property, partition of—decree for O 20 R 18
REVENUE PAYING ESTATE
partition of O 26 R 14 N 3
decree for—execution, mode of S 54
when and how may be passed S 54 N 9
separate possession of share, suit for—decree in O 20 R 18
SUIT FOR
decree in, form of O 20 R 18
frame of
splitting of claim O 2 R 2 Nn 10, 17
and claims—separate defendants O 2 R 2 N 21
whole claim to be included O 2 R 1 N 3
land partly within jurisdiction and partly without—partition of L P Cl 12
movables and lands, the land being outside jurisdiction—partition of L P Cl 12
place of suing S 16 (b)
receiver, appointment of in—*See* RECEIVER

Partners

See also (1) FIRM; (2) EXECUTION; (3) PARTNERSHIP
appearance of O 30 R 6
under protest O 30 R 8
ATTACHMENT
of a partner's share in partnership property O 21 R 49
partnership property when liable to O 21 R 49
copartners, suit between O 30 R 9

Partners

DISCLOSURE OF
names of partners in defendant's firm O 30 R 1 (1)
names of partners in plaintiff's firm O 30 R 2 (1)
failure to disclose—stay of suit on O 30 R 2
dissolution of partnership, decree in suit for O 20 R 15
EXECUTION
in suits between co-partners O 30 R 9
of decree against a firm O 21 R 50
of decree against partner O 21 R 49
firm name, partners may be sued in O 30 R 1
LEAVE OF COURT
to execute decree against a partner personally O 21 R 50 (2)
to execute decree in suits between co-partners O 30 R 9
legal representative of deceased partner not necessary party O 30 R 4
manager not to appear though served unless he is a partner O 30 R 7
notice to accompany summons in suits against firm O 30 R 5
pleadings by firm—signature and verification of O 30 R 1 (2)
receiver, on attachment of a partner's share O 21 R 49
suits between O 30 R 9
by, in name of firm O 30 R 1
SUMMONS TO FIRM
service of—(on) dissolved firm O 30 R 3 proviso
mode of O 30 R 3
notice in what capacity served O 30 R 5
SUIT FOR
appointment of receiver—*See* RECEIVER
dissolution and accounts, decree in O 20 R 15
relating to—practice and procedure in S 9 N 32

Patents and Designs Act

application for revocation of patent—costs, security for, if can be required O 25 R 1 N 1

Pauper appeal O 44

APPLICATION FOR LEAVE FOR
for O 44 R 1
(to be) accompanied by memorandum of appeal O 44 R 1
dismissal of, where appellate court does not see any reason to think that the decree is erroneous in law or unjust O 44 R 1
inquiry into pauperism O 44 R 2
rejection of O 44 R 1
rejection of—power to grant time for payment of court-fee O 44 R 1 N 7
cross objection *in forma pauperis* O 41 R 22
dispaupering, O 9 O 33 R 9
meaning of O 33 R 1
Privy Council, appeal to whether can be in *forma pauperis* O 44 R 1 N 12
pauper suits, provisions as to applicability of, to O 44 R 1
rejection of O 44 R 1

Pauper appeal
- security for costs if may be ordered O 41 R 10 N 3
- who may appeal as pauper O 44 R 1

Pauper suit O 33
- adjournment—costs O 17 R 1 N 6
- agreement by plaintiff with third person giving latter interest in the subject matter of suit—effect—dispaupering O 33 R 9
- agreement, champertous by O 33 R 5
- amendment—costs O 33 R 16 N 1
- APPLICATION FOR LEAVE O 33 R 2
  - applicability O 33 R 7 to High Court O 49 R 3
  - acceptance of O 33 R 8
  - amendment of O 33 R 5 N 3
  - applicant having entered into agreement with third person whereby such person gets an interest in the suit—effect O 33 R 5
  - applicant's pauperism, evidence of O 33 R 5
  - attachment before judgment—whether permitted O 38 R 5 N 5
  - cause of action, existence of enquiry as to O 33 R 5 N 5
    - when none shown in application O 33 R 5
  - contents of O 33 R 2
  - costs of application and inquiry into pauperism O 33 R 16
  - death of applicant—impleadment of legal representative O 22 R 3 N 6
  - death of party—survival of right— O 22 R 1 N 10
  - dismissal for default—effect—whether fresh application barred O 33 R 15 N 3
  - dismissal of, for failure of both parties to appear at hearing—fresh application if barred O 9 R 4 N 5
  - examination of applicant O 33 R 4
  - examination of applicant by commission, O 33 R 4 (2)
  - fresh one barred, if one disallowed O 33 R 15
  - granted—effect O 33 R 8
  - hearing of application O 33 R 7
  - insolvency of pauper applicant O 22 R 8 N 8
  - leave refused,—subsequent payment of court-fee whether relates back S 149 N 10
  - order allowing, if can be questioned in appeal from the decree in suit O 33 R 7 N 10
  - order rejecting—whether appealable O 33 R 7 N 9
  - presentation of O 33 R 3
  - procedure on granting of O 33 R 8
  - procedure—when application is not rejected—fixing day for receiving evidence of applicant's pauperism O 33 R 6
  - refusal of application to sue as pauper, effect of O 33 Rr 5, 15
  - refusal of, bars fresh pauper application O 33 R 15
  - rejection of
    - effect—whether fresh application maintainable O 33 R 15

Pauper suit—APPLICATION FOR LEAVE—Rejection of
    - suit on same cause of action if barred O 33 R 15
  - splitting of claims and reliefs O 2 R 2 N 33
  - subsequent application when not allowed O 33 R 15
  - when application is to be rejected O 33 R 5
- by whom to be presented—"authorised-agent"—meaning of O 33 R 3 N 4
- collector, when copy of decree to be sent to O 33 R 14
- compromise—whether ground for dispaupering O 33 R 9 N 4
- costs of O 33 R 16
  - award of, against pauper O 33 R 1 N 16
  - of successful defendant O 33 R 11 N 5
  - order for, against guardian of minor O 33 R 11 N 4
  - where pauper succeeds in suit O 33 R 10
- COURT FEES
  - to be first charge on subject-matter of suit O 33 R 10
  - payment
    - of to Government—copy of decree to be sent to Collector O 33 R 14
  - realisation of, where pauper is dispaupered or fails in the suit O 33 R 11
  - realisation of, where plaintiff succeeds in suit O 33 R 10 N 1
  - recovery of, where plaintiff has succeeded O 33 R 10
  - in respect of
    - appointment of pleader, plaintiff exempt from O 33 R 8
    - petition in connection with suit—plaintiff is exempt from paying O 33 R 8
- defendant as pauper O 33 R 1
- DISMISSAL OF
  - for failure of plaintiff to appear at hearing—effect—payment of court-fee O 33 R 11
  - suit—for failure of plaintiff to pay process fees—effect—payment of court-fees O 33 R 11
- DISPAUPERING OF PLAINTIFF O 33 R 9
  - effect O 33 R 11
  - grounds for O 33 R 9
  - limitation for suit O 33 R 7 N 7
- evidence, pending suit, that plaintiff is not pauper—effect—dispaupering O 33 R 9
- executor, administrator or legal representative, suit by O 33 R 1 N 11
- fraudulent disposal of property by pauper O 33 R 5
- GOVERNMENT
  - a party O 33 R 13
  - application by, for payment of court-fees O 33 R 12
  - charge of, for court-fees, on subject matter of suit O 33 R 10
  - right of, to apply for payment of court-fees O 33 R 12
  - to be deemed a "party" O 33 R 13
- LIMITATION
  - when application for leave to sue as pauper is granted O 33 R 7 N 4

Pauper suit—LIMITATION
- when application to sue as pauper is converted into plaint on payment of court-fee O 33 R 7 N 6
- when application is refused O 33 R 7 N 5
- where plaintiff is dispaupered O 33 R 7 N 7

lis pendens, doctrine of, applicability of O 33 R 8 N 6
meaning of O 33 R 1
minor plaintiff O 33 R 1 N 8

PAUPERISM
- enquiry as to—procedure O 33 Rr 6, 7
- evidence as to O 33 R 6

plaint, return of, for presentation to proper court—effect—payment of court-fees O 33 R 11 N 3

PLAINTIFF
- adjudged insolvent, pending suit—continuation of suit by official receiver O 33 R 8 N 5
- exempted from paying court-fees O 33 R 8

probate proceedings—whether probate can be obtained *in forma pauperis* O 33 R 1 N 1

PROCESS FEE
- payment of, plaintiff not exempt from O 33 R 8

rule relating to O 33

SECURITY FOR COSTS
- if may be demanded from plaintiff O 25 R 1 N 10
- order for—against pauper O 33 R 1 N 16

stamp duty or penalty—plaintiff whether exempt from, in respect of document sought to be admitted in evidence O 33 R 8 N 4
suit under S 92, if maintainable *in forma pauperis*—*See* TRUST
transfer of interest by pauper in subject matter of proposed suit O 33 R 9 (c)
vexatious or improper conduct of plaintiff—dispaupering O 33 R 9
when may be instituted O 33 R 1
when suit not originally instituted in *forma pauperis* may be allowed to be continued in *forma pauperis* O 33 R 1 N 2
who can sue as pauper O 33 R 1
- company or association of individuals whether pauper O 33 R 1 N 10

withdrawal of O 23 R 1 N 18
- effect—payment of court-fee O 33 R 11

Payment into Court O 24
- acceptance—of deposit by plaintiff O 24 R 4
- costs, where amount claimed deposited in court O 24 R 4
- debt—suit for—payment of amount of claim, into court O 24 R 1
- deposit by defendant in court, of amount in satisfaction of claim O 24 R 1
- deposit may be paid to plaintiff O 24 R 2
- interest on deposit not allowed to plaintiff after notice O 24 R 3
- notice of deposit to plaintiff O 24 R 2
- of money
  - admitted to belong to another O 39 R 10
  - held as trustee of or for another O 39 R 10
  - under decree O 21 R 1
- procedure where plaintiff accepts deposit in full or part satisfaction of his claim O 24 R4

Payment into Court
- property admitted to belong to another, deposit in court of O 39 R 10
- satisfaction—costs, where deposit accepted in part or full O 24 R 4

Pecuniary jurisdiction
- of courts S 6

Penal Code
- S 174—witness—failure to comply with summons O 16 R 18 N 1
- S 188—non-compliance with order for discovery etc O 11 R 21 N 1

Penalty
- for disobeying summons S 32

Pending suit
- when a bar to trial of, subsequently instituted suit S 10

Pension
- High Court Judges, pension of, Ch A S 6
- political, not attachable S 60 (g)

Persons under disability
- consent how given S 147 N 2
- consent by guardian or next friend—
  - leave, form of S 147 N 5
  - to what proceedings necessary S 147 N 4

Persona designata
- district judge acting under scheme for public trust S 92 N 36

Place of suing Ss 15 to 20
- acquiescence of defendant, and S 20 (b)
- actually and voluntarily resides, meaning of S 20 N 3
- arrest, wrongful—suit for S 19 N 2
- benefit to arise out of land, suit for—meaning of, S 16 N 4
- CARRYING ON BUSINESS
  - business through agent S 20 N 9
  - meaning of S 20 N 8
  - Secretary of State, applicability to S 20 N 10
- CAUSE OF ACTION
  - accounts, suit against agent for S 20 N 20
  - administration suits S 20 N 28
  - banker and customer, suit between S 20 N 22
  - contract, suit on S 20 N 16
  - custody of minor, suit for S 20 N 25
  - debtor's duty to find the creditor, rule as to S 20 N 19
  - decrees, suit to set aside on the ground of fraud S 20 N 29
  - divorce, suit for S 20 N 27
  - documents, suit to set aside on the ground of fraud S 20 N 30
  - meaning of S 20 N 14
  - negotiable instruments, suit on S 20 N 23
  - partnership cases S 20 N 21
  - place of breach or non performance of contract S 20 N 18
  - place of making the contract S 20 N 17
  - place, where money is payable S 20 N 19
  - restitution of conjugal rights, suit for S 20 N 26
  - torts, suit on S 20 N 24
  - when wholly or in part arises S 20 N 15
- charge, suit to establish, validity of valuation of plaint S 15 N 25

Place of suing

Chartered High Courts
- property partly within and partly without jurisdiction, suit for S 17 N 9
- suits cognizable by, H C Cl 12

claim, plaintiff subsequently found entitled only to part of—place of suing not affected S 15 N 3
compensation for wrong
- to immovable property, suits for S 16 (e)
- to person or movables, suit for S 19

contracts, suits on, S 20
courts in which suits should be instituted, S 15
court of higher grade—effect of instituting suit in S 15 N 3
court of lowest grade meaning of S 15 N 4
- suit to be instituted in S 15
- nature of rule S 15 N 1

defendant resides or cause of action arises, where S 20
dwelling of defendant—"dwell," meaning of S 20 N 3
equity acts in *personam*—meaning of S 16 N 11
foreclosure, suit for S 16 N 7
foreigner—jurisdiction of court in suit against S 20 N 32
general powers of transfer and withdrawal S 24
grades of courts S 15 N 4

IMMOVABLE PROPERTY
- meaning of S 16 N 4
- situated in jurisdiction of different courts
  - different causes of action, suit on S 17 N 5
  - forum, selection of S 17 N 4
  - separate suits, maintainability of S 17 N 6
- suit for compensation for wrong to S 17 N 2
- suit for recovery of S 16 (a)
  - after setting aside decree S 16 N 5
- suit to set aside decree affecting S 16 N 5
- withdrawal of part of claim, effect of S 17 N 7

injunction, suit for—if suit for compensation or movable property S 19 N 3
interest in immovable property, suit for determination of—illustrations of S 16 N 8

JURISDICTION
- decision on the question of—revision if lies S 20 N 33
- existing at the time of the suit—jurisdiction subsequently ceasing, effect of S 20 N 2
- incidental question in respect of, determination S 16 N 2
- *in personam*, exercise of S 16 N 11
- objection to, when to be taken S 21
- of different courts, where land is situated within S 17
- of court trying a remanded case S 21 N 10
- property situate outside British India S 16 N 2

LAND
- situate within jurisdiction of different courts S 17
- suits for determination of any right to or interest in S 16 (d)
- suit for, meaning of O 16 N 4

Place of suing

LEAVE OF COURT
- some defendant residing outside jurisdiction S 20 N 12
- under Code and under Letters Patent—distinction between S 20 N 12

limitation, prescribed by law S 16 N 3

LOCAL LIMITS OR JURISDICTION OF COURTS UNCERTAIN S 18
- jurisdiction, when objection to be taken to S 18 N 4
- uncertainty, allegation of S 18 N 2
- uncertainty, effect of, not recording statement as to S 18 N 2

MORTGAGE
- of immovable property, suit on——property partly outside British India—jurisdiction of court to order same S 17 N 3
- suit on—territorial jurisdiction, transfer of, before final decree—effect of S 16 N 7
- suit, valuation of plaint in S 15 N 11

MOVABLE PROPERTY
- suit for compensation for S 19 N 1
- under distraint or attachment, suit for recovery of S 16 N 10

NON-ACQUIESCENCE
- in institution of suit S 20 N 13
- leave, absence of—effect of S 20 N 13

non-resident foreigner, suit against in British Indian courts—jurisdiction, objection if must be taken at the earliest opportunity S 21 N 9

OBJECTION TO JURISDICTION S 21
- when to be taken S 21

partition of immovable property, suit for S 16 N 6
partition suit for S 16 (b)
pecuniary and territorial jurisdiction, want of—exception to general principle S 21 N 1
pecuniary jurisdiction, want of, effect of S 21 N 1
personal action—forum in cases of S 20 N 2
personally works for gain—jurisdiction of court S 20 N 11
place of instituting of suit where local limits or jurisdictions of courts are uncertain S 18
power of Governor-General-in-Council to transfer suits S 25
power to transfer suits which may be instituted in more than one court S 22
redemption, suit for S 16 (c)
relief obtainable through personal obedience, where S 16 N 11

RESIDENCE
- compulsory—if voluntary S 20 N 7
- corporations S 20 N 31
- defendant having several places of S 20 N 5
- Government of India, if a corporation S 20 N 31
- home, non-existent or abandoned S 20 N 6

Place of suing—RESIDENCE
- [illegible] of defendant S 20
    - permanent residence and temporary residence, defendant having S 20 N 4
    - reside, meaning of S 20 N 3
    - temporary and occasional jurisdiction of court S 20 N 4
- restitution of conjugal right, suit for S 15 N 7
- right to or interest in immovable property, rules for determination of S 16 N 8
- sale of mortgaged property, suit for S 16 (c)
- sale, suit for S 16 N 7
- Secretary of State, suit against for tort S 19 N 5
- seizure of movable property, wrongful—suit for S 19 N 2
- several causes of actions joined, jurisdiction over all causes of action necessary S 20 N 2
- share-holder, suit by to set aside sale of property—valuation of plaint S 15 N 25
- specific performance of agreement to sell land, suit for S 16 N 13
- subject-matter of suit—suit to be instituted, where it is S 16
- SUITS
    - for compensations for wrongs to persons or movables S 19
    - for immovable property situate within jurisdiction of different courts S 17
    - to be instituted where subject-matter is situate S 16
- TERRITORIAL JURISDICTION S 16 N 2
    - absence of—failure of justice S 21 N 5
    - absence of Provincial Insolvency Act, objection as to jurisdiction to proceedings under S 21 N 7
    - objection as to
        - appellate or revisional court, conditions for taking objections in S 21 N 4
        - not raised before decree—execution proceedings, objections if can be taken in S 21 N 6
        - not raised in proper time—collateral proceedings, objections if can be raised in S 21 N 8
    - transferred after decree—execution proceeding, objections to jurisdiction when to be taken S 21 N 6
    - want of—effect of S 21 N 1
- things attached to earth, suit for S 16 N 4
- unpaid purchase-money of land sold, suit for S 16 N 13
- wrong court, suit filed in, procedure S 21 N 11
- WRONG TO IMMOVABLE PROPERTY
    - suit for compensation for S 16 N 9
    - property held by or on behalf of defendant S 16 N 12
- WRONG
    - to person, suit for compensation for S 19 N 1
    - to personal property 'Wrong', meaning of S 19 N 2
    - to personal movable property, suit for compensation—British India,
        - [illegible] applicability to wrongs committed outside S 19 N 4

Plaint
- *See also* PLEADING—PLAINT O 7
- admission of, procedure on O 7 R 9
- AMENDMENT O 6 R 17
    - on addition of parties O 1 R 4
    - amended copy of plaint to be served on newly added defendant O 1 R 10 (4)
    - failure to amend within time specified by court, effect of O 6 R 18
- breach of trust, allegation of, in O 6 R 4
    - concise statement O 7 R 9 (1)
- condition precedent, specification of in O 6 R 6
- CONTENTS
    - defendant's liability to be specified O 7 R 5
    - documents not in party's possession—statement of O 7 R 15
    - facts which law presumes in plaintiff's favour need not be stated in O 6 R 13
    - fraud, allegation of, in O 6 R 4
    - fraudulent intention, how to be pleaded O 6 R 4
    - further or other relief need not be claimed O 7 R 7
    - general relief need not be asked for O 7 R 7
    - ground for exemption from limitation law O 7 R 6
    - immovable property, where suit is for O 7 R 3
    - implied contract, allegation of O 6 R 12
    - inconsistent allegations of facts adding of, in plaint O 6 R 7
    - relief claimed, general relief need not be asked for O 7 R 7
    - relief claimed, plaint must state specifically O 7 R 7
    - relief claimed, when founded on separate grounds O 7 R 8
    - where plaintiff sues as representative O 7 R 4
- copy of, to accompany summons O 5 R 2
- DOCUMENT
    - if in possession, must accompany O 7 R 14
    - (s) inspection of, mentioned in plaint O 11 R 15
    - (s) list of relied on O 7 R 14 (2)
    - (s) list of to be annexed to O 7 R 9 (1)
    - not accompanying, not admissible later on O 7 R 18
    - (s) not in possession of plaintiff, statement in plaint as to O 7 R 15
    - not produced, when plaint filed, inadmissibility of O 7 R 18
    - production of, on which plaintiff sues O 7 R 14
    - relied upon, in O 7 Rr 14-18
- exemption from limitation—plaint should state grounds for O 7 R 6
- forms of, and their uses O 6 R 3
- in money suit O 7 R 2
- in interpleader suit, contents O 35 R 1
- in representative suits O 7 R 4

Plaint
institution of suits S 26; O 4 R 1
IN SUIT
  by corporation to be signed by director or secretary O 29 R 1
  by firm, may be signed by one partner O 30 R 1
  by or against government, contents of O 27 R 3
  on lost negotiable instrument O 7 R 16
  on negotiable instrument (summary suit) O 37 R 2
  relating to immovable property O 7 R 3
interpleader suits O 35 R 1
knowledge, how to be pleaded O 6 R 10
liability of defendant, plaint must disclose O 7 R 5
limitation law, plaint must show grounds of exemption from O 7 R 6
list of documents to accompany O 7 R 14
malice, how to be pleaded O 6 R 10
material facts only, plaint to contain O 6 R 2
misrepresentation, allegation of, in O 6 R 4
negotiable instrument, suit on lost O 7 R 16
new ground of claim in plaint, raising O 6 R 7
notice, how to be pleaded O 6 R 11
particulars to be contained in O 7 R 1
prayer and relief claimed in plaint O 7 R 7
PROCEDURE
  after rejection of O 7 R 12
  on admission O 7 R 9
REJECTION OF O 7 R 11
  does not bar fresh plaint O 7 R 13
  effect—presentation of fresh plaint not precluded O 7 R 13
  is decree S 2 (2)
  power of appellate court in regard to S 107 N 21
  procedure on O 7 R 12
RELIEF
  should be stated specifically O 7 R 7
  when founded upon separate grounds O 7 R 8
RETURN OF
  for presentation to proper court O 7 R 10
  order, whether appealable O 43 R 1 Cl (a)
  procedure on O 7 R 10 (2)
  shop-book, production of, at time of filing plaint O 7 R 17
SIGNATURE O 6 R 14
  suit by
    corporations O 29 R 1
    firm O 30 R 1
    Government O 27 R 1
striking out of unnecessary, scandalous or embarrassing matter from O 6 R 16
undue influence, allegation of, in O 6 R 4
verification of O 6 R 15
wilful default, allegation of, in O 6 R 4

Plaintiff
abandonment of part of claim O 23 R 1
appearance of one of several plaintiffs for others O 1 R 12
appearance of plaintiff in person, when may be ordered O 5 R 3
assignment by, of interest in suit O 22 R 10
becoming major during suit O 32 R 12
consent of person added as plaintiff O 1 R 10 (3)
consequence of non-attendance of, when ordered to appear in person O 9 R 12
cost of postponement through not serving summons in due time O 9 R 6 (2)
DEATH
  if right to sue survives O 22 R 1
  when right to sue does not survive O 22 R 3
dismissal of suit when plaintiff fails to appear at the hearing O 9 R 8
fresh suit, decree against plaintiff due to default bars O 9 R 9
insolvency of O 22 R 8
joinder of O 1 R 1
judgment for one or more of the plaintiffs O 1 R 4 (a)
legal representative of deceased, when to be brought on record O 22 R 3 (1)
marriage of female, suit not abated by O 22 R 7
name, description and residence of, must be stated in plaint O 7 R 1 (b)
non-attendance of one of several O 9 R 10
numerous plaintiffs having same interest O 1 R 8
of unsound mind O 32 R 15
OMISSION TO SUE
  for all reliefs O 2 R 2 (3)
  in respect of portion of a claim O 2 R 2 (2)
one may appear for others O 1 R 12
order for personal appearance O 5 R 3
personal appearance of O 5 R 3; O 10 R 4 (1)
procedure, when only plaintiff appears at the hearing **O 9 R 6**
relinquishment of part of claim O 2 R 2 (2)
representative character, suit brought in O 7 R 4
right to begin O 18 R 1
"same interest" O 1 R 8
security for costs, when may be required from O 25 R 1
substitution of plaintiff O 1 R 10 (1)
withdrawal of suit O 23 R 1
wrong plaintiff, suit in name of O 1 R 10 (1)
pleader—appearance of party by O 1 R 10 (1)

Plea
NEW PLEA
  appellate court not to order remand of issues newly raised before it O 41 R 25 N 10
  in appeal O 41 R 1 N 12
    point as to limitation O 41 R 2 N 5
  in revision O 21 R 90 N 51
  is not ground for remand O 41 R 23 N 15
  new defence allowed O 8 R 8
  setting aside execution sale on ground not taken in application to set aside O 21 R 90 N 43

Pleader O 3
admission by—effect of O 10 R 1 N 2

Pleader

- advocate—appearance and pleading in High Court S 119 N 2
- appearance and acting, meaning of O 3 R 1 N 3
- appearance by O 3 R 1
- appointment of O 3 R 4
- death of client determines O 3 R 4 (2)
- arrest when exempt from S 135 (2)
- AUTHORITY OF O 3 R 4
  - to abandon issue or claim O 3 R 4 N 4
  - advocates, vakils, attorneys L P Cls 9, 10 N 2
  - to act on behalf of another pleader O 3 R 4
  - to compromise O 3 R 4 N 7
  - to control and conduct suit O 3 R 4 N 10
  - to make admissions O 3 R 4 N 5
  - to refer to arbitration O 3 R 4 N 8; Sch II P 1 N 18
  - to withdraw suits O 3 R 4 N 6
- commission to examine witness—issue of, to pleader O 26 R 4
- COSTS
  - liability for, in suit for minor without next friend O 32 R 2 (1)
  - liability for—obtaining order against minor without his being represented by next friend or guardian—liability of pleader for costs of the order when the same is discharged O 32 R 5
  - lien for O 3 R 4 N 12
  - order for, against pleader when he has filed suit on behalf of minor without next friend O 32 R 2
- defendant may appear, by O 5 R (1) (2)
- definition of S 2 (15)
- delegation of authority O 3 R 4 N 9
- duties of O 3 R 4 N 13
- duty of, to examine witnesses cited by his party O 18 R 2 N 1
- exemption from arrest of S 135
- pleading, engaged only for O 3 R 4
- GOVERNMENT PLEADER
  - if recognised agent of Government O 27 R 2 N 2
  - whether agent of government to receive process O 27 R 4
- High Court Judgeship, when pleader eligible for Charter Act S 2
- how appointed O 3 R 4
- leave of court for discharge of O 3 R 4 (2)
- lien of, for costs, and set-off O 8 R 6 (2)
- meaning of S 2 (13); O 3 R 4 N 3
- memo. of appearance O 3 R 4
- misconduct—liability for O 3 R 4 N 11
- pleadings, when to be signed by O 6 R 14
- Presidency Small Cause Courts, right of vakil to practice in S 119 N 4
- refusal or inability of, to answer questions relating to suit O 10 R 4
- removal or suspension of—reasonable cause, meaning of L P Cl 9, 40 N 4
- rights and privileges of O 3 R 4 N 12
- right of party to be represented by O 18 R 2 N 4
- service of process on O 3 R 5

Pleader

- set-off for costs—solicitors' lien for costs O 8 R 6 N 16
- to be appointed by person authorised by military men O 28 R 2
- vakalatnama—fresh vakalatnama whether necessary for applying to set aside *ex parte* decree O 9 R 13 N 14
- vakils—right to appear, plead or act on original side of High Court S 119 N 3
- withdrawal of suit, by O 23 R 1 N 20

Pleadings

- allegations—ascertainment whether pleadings are admitted or denied O 10 R 1
- allegation of contract—bare denial, not a denial of the legality or sufficiency of contract under law O 6 R 8
- AMENDMENT O 6 R 17
  - adding new plea of fraud O 6 R 17 N 8
  - addition of new ground of relief O 6 R 17 N 10
  - failure to amend pleading after order O 6 R 18
  - limitation O 6 R 17 N 19
  - made to greater extent than permitted by court—effect of O 6 R 17 N 18
  - necessary for determining real questions in controversy O 6 R 17 N 11
  - new case—introduction of O 6 R 17 Nn 3, 4
  - new cause of action, introduction of O 6 R 17 N 12
  - not to be allowed when opposite party cannot be compensated by cost O 6 R 17 N 6
  - O 6, R 17—applicability of rule O 6 R 17 N 1
  - opportunity to opposite party to amend his pleadings O 6 R 17 N 14
  - ousting court's jurisdiction O 6 R 17 N 18
  - power of court to impose terms on party allowed to amend O 6 R 17 N 15
  - procedure to be followed in making the amendment O 6 R 17 N 16
  - refusal of, when application not made in good faith O 6 R 17 N 7
  - stage at which to be allowed O 6 R 17 N 13
  - taking away right, accrued to party by lapse of time O 6 R 17 N 5
  - time within which pleadings should be amended O 6 R 18
  - who can apply for amendment O 6 R 17 N 17
- appellate court, power of, to expunge O 6 R 16 N 6
- APPLICATIONS
  - for leave to sue in *forma pauperis*—contents of O 33 R 2
  - for particulars O 6 R 5 N 2
  - for return of, for presentation to proper court O 7 R 10 N 6
- ASCERTAINMENT
  - of pleadings O 10 R 1
  - of opposite parties O 10 R 1
  - whether allegations in, are admitted or denied O 10 R 1
- breach of trust, particulars of, to be stated in O 6 R 4

Pleadings
company—corporation—suit by or against—pleading by whom to be signed and verified O 29 R 1
concise statement O 7 R 9 (1)
condition precedent, when to be distinctly specified in O 6 R 6
CONSTRUCTION OF O 6 R 2 N 10
  description of immovable property—conflict between description by boundaries and by area O 7 R 13 N 3
  containing denial of contract, effect of O 6 R 8
CONTENTS
  account—suit for O 6 R 4 N 7
  allegation of contract by letters—general reference sufficient O 6 R 12
  alternative and inconsistent allegation O 6 R 2 N 5
  claim for sum of money paid on several occasions O 6 R 4 N 10
  condition precedent, when to be pleaded O 6 R 6
  contract, suit on O 6 R 4 N 8
  defamation, suit for O 6 R 4 N 9
  denial of contract O 6 R 8
  effect of document to be stated O 6 R 9
  evidence not to be stated O 6 R 2
  facts presumed by law in plaintiffs favour need not be alleged O 6 R 13
  facts to anticipate opponent's answer O 6 R 2 N 4
  fraud, particulars of, to be stated in O 6 R 4
  fraudulent intention, how to be pleaded O 6 R 10
  highway, claim as to O 6 R 4 N 15
  implied contract, averment of O 6 R 12
  knowledge, how to be pleaded O 6 R 10
  malice, how to be pleaded O 6 R 10
  malicious prosecution, in suit O 6 R 4 N 11
  material facts—only pleading to be stated and not evidence O 6 R 2
  matter tending to prejudice, embarrass or delay trial O 6 R 16 N 4
  matters affecting damages O 6 R 2 N 6
  misconduct—allegations of O 6 R 4 N 12
  misrepresentation, particulars of O 6 R 4
  negligence—allegation of O 6 R 4 N 13
  notice, how to be pleaded O 6 R 11
  notice—imputation of—of any matter O 6 R 11
  notice, only to be alleged O 6 R 11
  nuisance—action for O 6 R 4 N 13
  omission to give particulars—effect of O 6 R 4 N 1
  onus and facts, which need not be pleaded O 6 R 13
  order for further particulars O 6 R 5
  particulars, further and better statement of O 6 R 5
  presumptions of law, need not be stated O 6 R 13
  right of way—claim as to O 6 R 4 N 15
  rules as to, bind defendant O 6 R 4 N 16

Pleadings—CONTENTS
  signature of, by parties or agent O 6 R 14
  suit for land O 6 R 4 N 14
  undue influence particulars of O 6 R 4
  unnecessary matter O 6 R 16
    particulars of, to be stated in pleadings O 6 R 4
CONTRACT
  denial of O 6 R 8
  implied, how to be pleaded O 6 R 12
departure in pleadings by new ground or inconsistent allegation O 6 R 7
departure in—to be by amendment O 6 R 7
discovery before particulars O 6 R 5 N 3
document, effect only, of to be stated O 6 R 9
embarrassing pleadings O 6 R 16
examination of parties—at first hearing of suit with reference to allegations in pleadings O 10 R 1
forms of O 6 R 3; Sch 1 App A
firm, suit by or against partners suing or defending in name of firm—by whom pleading to be signed and verified O 30 R 1
FURTHER PARTICULARS
  amendment of O 6 R 5 N 7
  cost O 6 R 5 N 5
  when need not be given O 6 R 5 N 4
government, suit by or against, pleading by whom to be signed and verified O 27 R 1
inconsistent pleadings O 6 R 7
inspection of documents referred to in O 11 R 15
interrogatories—distinction from O 11 R 1 N 3
judgment upon, admission in O 12 R 6
meaning of O 6 R 1; O 6 R 1 N 1
memorandum of appeal O 41 R 1
not to be varied O 6 R 7
object of O 6 R 1 N 2
  rules as to O 6 R 1 N 1
particulars—failure to give after order therefor—effect of O 6 R 5 N 6
PLAINT
  amendment of alternative relief conversion into additional relief O 7 R 7 N 3
  amendment by adding portion of claim originally omitted, amendment if barred O 2 R 2 N 35
    or addition of parties O 1 R 10 N 39
    joinder of claims in contravention of O 2, R 5 O 2 R 5 N 5
    new case, introduction of O 6 R 17 N 3
  concise statement of claim O 7 R 9
  concise statement of plaint to be given to defendant O 7 R 9
  contents of O 7 R 1
    accounts, suit for O 7 R 2
    cause of action O 7 R 1 N 6
    damages, suit for O 7 R 2 N 4
    defendant's interest and liability—to be stated in plaint O 7 R 5
    defendant's name, description and residence to be put in O 7 R 1 (1)

Pleadings—PLAINT

- description of, immovable property—subject-matter of suit O 7 R 3
- facts showing—that court has jurisdiction O 7 R 1 N 8
- ground of exemption from Limitation Law O 7 R 6
- inter-pleader suit O 35 R 1
- liability of, plaint must disclose O 7 R 5
- mesne profits, suit for O 7 R 2
- money suits O 7 R 27
- particulars—to be contained in, O 7 R 1
- portion of claim by plaintiff relinquished O 7 R 1 N 10
- relief founded on separate grounds O 7 R 8
- relief to be specifically stated O 7 R 7
- rules as to, summarised O 7 R 1 N 2
- set-off allowed by the plaintiff O 7 R 1 N 10
- suit against several defendant—liability of each to be shown O 7 R 5 N 1
- valuation of suit O 7 R 1 N 11
- when plaintiff sues as representative O 7 R 4

copies of, to be given to defendants O 7 R 9

form of O 4 R 1

list of documents relied on to be given O 7 R 9

presentation of O 4 R 1 Nn 3-7

procedure, on admission of O 7 R 9

rejection of O 7 R 11
- effect of O 7 R 13
- grounds of—miscellaneous O 7 R 11 N 8
- in part O 7 R 11 N 9
- procedure on O 7 R 12
- under O. 7, R. 11—applicability of rule to High Court O 49 R 3

return of
- for presentation to proper court—High Court—applicability of O. 7, R. 10 to High Court O 49 R 3
- for presentation to court outside British India O 7 R 10 N 1
- for presentation to proper court, after decree O 7 R 10 N 1
- for presentation to proper court—power of court to re-entertain suit O 7 R 7 N 1

signature and verification of pleadings in ordinary cases O 6 R 14

stamp on—rejection for deficiency O 7 R 11

title of suit—suit by or against Government O 27 R 3

valuation of—rejection of plaint for under-valuation O 7 R 11

scandalous matter in—striking out of O 6 R 16

SIGNING AND VERIFICATION OF PLEADINGS
- corporation O 29 R 1

Pleadings

- in suits by or against
  - firms O 30 R 1
  - Government O 27 R 1
- in ordinary cases O 6 R 14
- omission of—effect O 6 R 14 N 3

STRIKING OUT O 6 R 16
- as unnecessary, scandalous or embarrassing O 6 R 16
- of matter in—stage when this may be done O 6 R 16 N 5

subsequent pleadings, when allowed O 8 R 9

to allege implied contracts O 6 R 12

to allege malice, knowledge, etc. O 6 R 10

to be signed O 6 R 14

variation between pleading and proof O 6 R 2 N 9

VERIFICATION O 6 R 15
- contentious probate proceedings O 6 R 15 N 1
- effect of O 6 R 15 N 1
- effect of defective verification O 6 R 15 N 4
- false verification—effect of O 6 R 15 N 7
- mode of O 6 R 15 N 3
- objection as to O 6 R 15 N 6
- omission of—effect O 6 R 15 N 5
- pardanashin ladies O 6 R 15 N 1
- who can verify O 6 R 15 N 2

WRITTEN STATEMENT O 8 R 1
- additional written statement O 8 R 9
- amendment of—new case—introduction of O 6 R 17 N 4
- contents O 8 R 2
  - damages, defendant need not plead to O 8 R 3
  - defence or set-off founded on separate grounds O 8 R 7
  - denial of plaintiff's allegations
    - defence—distinct grounds of, to be stated separately O 8 R 7
    - to be specific O 8 R 3
  - defence—new ground of, how raised O 8 R 8
  - evasive denial of allegation O 8 R 4
  - facts to be specially pleaded in O 8 R 2
  - grounds of defence arising subsequent to the institution of the suit O 8 R 8
  - performance to be specially pleaded in defence O 8 R 2
  - plaint allegations should be specifically denied O 8 R 5
  - payment—to be specifically pleaded in defence O 8 R 2
  - release—release to be specifically pleaded O 8 R 2
  - set off O 8 R 6
  - undue influence—particulars of, to be stated in pleadings ..O 6 R 4
- defence
  - founded on separate grounds O 8 R 7
  - new ground of, allowed O 8 R 8
- defendant to present written statement O 8 R 1
- failure to file effect of O 8 R 10
- failure to present written satement ..O 8 R 10

Pleadings—WRITTEN STATEMENT
    when to be filed O 8 R 1

Political Agent
  if agent of princes O 3 R 2 N 7
  service of summons through O 5 R 26

Political questions
  suits relating to, if lie S 9 N 56

Possession
  DECREE FOR O 20 R 12
    and for rents and mesne profits O 20 R 12
    mode of execution O 21 R 35
    symbolical delivery of, in—where decree is for joint possession O 21 R 35 (2)
  DELIVERY OF O 21 R 35
    actual delivery, where decree is for exclusive possession O 21 R 35 (1)
    actual delivery where property is in occupation of judgment-debtor O 21 R 95
    resistance to
      complaint on O 21 R 97
      by judgment-debtor O 21 R 98
      by person claiming in good faith to be in possession O 21 R 99
      by transferee *pendente lite* from judgment-debtor O 21 R 102
    symbolical delivery—where property is in tenant's occupation O 21 Rr 36, 96
  DISPOSSESSION
    of person claiming to be in possession on his own account O 21 Rr 100, 101
    of transferee *pendente lite* from judgment-debtor O 21 R 102
    regular suit to establish right of possession O 21 R 103
  immediate delivery of—order for, of certain lands O 39 R 9
  JOINT POSSESSION
    decree for—mode of execution O 21 R 35
    delivery of—execution O 21 R 35
  paper possession and symbolical possession—distinction between O 21 R 96 N 5
  splitting of reliefs O 2 R 2 Nn 15, 16, 24
  symbolical possession—delivery of—execution O 21 R 35

Post
  corporations, service of summons by post in suit by or against O 29 R 2 (*b*)
  letter substituted for summons, sending of O 5 R 30
  payment of—chargeable on notice, summons, etc. S 143
  service of summons by O 5 R 25

Power-of-attorney
  meaning of O 3 R 2 N 3
  recognized agents O 3 R 2

Practice
  Privy Council—concurrent findings of fact S 110 N 18

Precedents
  American decisions S 107 N 10
  English decisions S 107 N 10

Precept S 46
  application for, is not one in execution under S. 73 S 46 N 3

Precept
  attachment under S 46
  conditions for issuing S 46

Pre-emption
  by contract O 20 R 14 N 5
  by custom O 20 R 14 N 4
  DECREE FOR O 20 R 14
    failure to deposit price within time fixed—effect O 20 R 14 N 7
    form of O 20 R 14
    payment into court O 20 R 14 N 9
    right to rents and profits O 20 R 14 N 12
    set-off of costs against purchase money O 20 R 14 N 14
    tender of purchase money O 20 R 14 N 10
  meaning of O 20 R 14 N 2
  movable property—bid of co-sharer O 21 R 77
  right of, on foreclosure of mortgage O 34 R 3 N 7
  right to sue for—survival of, on death of parties O 22 R 1 N 9
  sale of share in immovable property and bid of co-sharer O 21 R 88
  SUIT FOR
    frame of—whole claim to be included O 2 R 1 N 3
    plaintiff's title, when accrues O 20 R 14 N 8
    rival pre-emptor O 20 R 14 N 15
    vendor's title in O 20 R 15 N 13
  under Mahomedan law O 20 R 14 N 3
  where there are rival pre-emptors O 20 R 14

Preliminary decree
  ACCOUNT SUIT O 20 R 16
    between principal and agent O 20 R 16
  administration suit O 20 R 13
  appeal from S 97
  defined S 2 (2)
  foreclosure suit O 34 R 2
  mortgage suit—sale of mortgaged property O 34 R 4
  partnership suit O 20 R 15
  partition suit O 20 R 18
  possession and mesne profits, suit for O 20 R 12
  redemption suit O 34 R 7

Preliminary point
  meaning of—for purposes of remand O 41 R 23 N 3

Prescribed
  meaning of S 2 (16)

Presidency Small Cause Courts
  application of Code to S 8; O 51 R 1
  attachment of immovable property—power of O 38 R 13
  ex parte decrees O 9 R 13 N 4
  judge's order modifying award is not decree passed on award Sch II P 12 N 8
  transfer of certain decrees for execution to O 21 R 4

Presidency Towns Insolvency Act
  order for delivery of property under s. 36, cl. 5 O 21 R 31 N 2

Prerogative of Crown
  Privy Council appeal S 109 N 9; S 112

Prince
- agent of O 3 R 2 N 7
- discovery of documents O 11 R 13 N 18
- execution of decree against S 86
- exemption from arrest of S 86 (3)
- provisions of Code as to—suit by or against minors or persons of unsound mind—applicability of to princes and chiefs O 32 R 16
- recognized agents of S 85
- suit by or against Ss 86, 87

Principal and agent
- decree for accounts between O 20 R 16

Privacy
- rights of—suit for S 9 N 42

Privilege
- from arrest S 135; O 21 R 11 N 3
- of documents O 11 R 13 Nn 3, 4
  - inspection by court when privilege is claimed O 11 R 19
  - waiver of privilege O 11 R 14 N 5

Privy Council appeal Ss 109-112, O 45
- abatement—applicability of provisions of Code as to O 22 R 11 N 9
- additional evidence—admission of, by O 41 R 27 N 19
- ADMISSION OF
  - procedure thereon O 45 R 8
  - notice to respondent O 45 R 8 Nn 2, 3
- "affirmance", meaning of S 110 N 13
- amount of money payable under order of Privy Council, how estimated O 46 R 15
- applicability of S 105 (2) S 105 N 9
- application for leave—S. 6 Limitation Act does not apply O 45 R 2 N 3
- bar of S 111 N 3
- decree from which no second appeal lies S 111
- estoppel of party not appealing to High Court O 41 R 31 N 15
- failure to appeal to High Court O 41 R 33 N 17
- on award, without intervention of court Sch II Para 21 N 17; S 104 N 8
- CERTIFICATE OF FITNESS S 109 N 10
  - cannot be granted after final decision by the Judicial Committee O 45 R 3 N 4
  - discretion of court S 109 N 10
  - form of S 109 N 11
  - grant of—abandonment of portion of claim after—effect of S 110 N 10
  - matter of great public importance S 109 N 10
  - no appeal under Cl. 15, Letters Patent lies O 45 R 3 N 7
  - preliminary objections to the certificate open to the respondent before Judicial Committee O 45 R 3 N 4
  - question of—valuation, lower court's decision not lightly interfered with O 45 R 3 N 4
  - review O 45 R 3 N 8
  - when not granted S 109 N 10
- CONSOLIDATION
  - of appeals—object of O 45 R 4 N 1

Privy Council appeal—CONSOLIDATION
  - of suits—for purposes of valuation O 45 R 4
  - conditions of O 45 R 4 N 1
    - inherent powers of, for saving expenses and for purposes of security O 45 R 4 N 2
- costs—rules as to S 112 N 8
- "court immediately below", meaning of S 110 N 15
- criminal cases S 109 N 12; L P Cl 41
- cross-appeals S 110 N 14
- decree affirming lower court's decree S 110
- decree of single Judge of High Court S 111
- decision under Income-tax Act L P Cl 39 N 12
- enforcement of Privy Council order—procedure for O 45 R 15
- EXECUTION OF PRIVY COUNCIL ORDER O 45 R 15; O 45 R 16
  - application to be to the court from which appeal made O 45 R 15 N 5
  - certified copy of Privy Council decree to accompany petition for execution O 45 R 15 N 4
  - dismissal of Privy Council appeal for default—limitation for execution of High Court decree when begins O 45 R 15 N 17
  - High Court's power in execution is only ministerial O 45 R 15 N 7
  - limitation O 45 R 15 N 18
  - money payable under decree, rate of exchange, how calculated O 45 R 15 N 15
  - on appeal from Calcutta High Court—Patna High Court no jurisdiction to execute O 45 R 15 N 6
  - order of executing court appealable in same way as usual execution order of that court O 45 R 16
  - order for costs O 45 R 15 N 14
  - order against surety O 45 R 15 N 10
  - recognition of assignment of decree—court of first instance has power O 45 R 15 N 9
  - refusal of single judge of High Court to transmit record—appeal lies under Cl 15, L P O 45 R 15 N 16
  - restitution of interest O 45 R 15 N 13
  - restitution of mesne profits O 45 R 15 N 12
  - restitution, when and how granted O 45 R 15 N 11
  - stay of, if High Court has power to order O 45 R 15 N 8-A
  - transmission of record
    - application for, essential O 45 R 15 N 3
    - to lower court, if necessary at instance of each party seeking execution O 45 R 15 N 2
    - to what court O 45 R 15 N 8
- EXPENSES
  - deposit for, balance if any to be refunded after transmission of records O 45 R 12
  - deposit of O 45 R 7
  - on grant of certificate O 45 R 7

Privy Council appeal—EXPENSES
    out of time not one to the satisfaction of the court O 45 R 8 N 1
      refund of to appellant O 45 R 12
  final order—
    meaning of S 109 N 4; O 45 R 1 N 1
      S 109 N 4; O 45 R 1 N 1
    order for review, if a—*See* REVIEW
  from High Court L P Cl 39
  High Court's power pending appeal O 45 R 13
    to add parties after grant of leave O 45 R 13 N 12
    to amend decree under appeal O 45 R 13 N 12
    to appoint receiver, pending O 45 R 13 N 11
  impounding of movable property, pending appeal O 45 R 13
  in *forma pauperis* O 45 R 2 N 2
  insolvency matter O 41 R 11 N 18
  interlocutory judgments of High Courts L P Cl 40

LEAVE TO APPEAL
    certificate of S 109; O 45 R 3
      form of O 45 R 3 Nn 4, 9
      order must state grounds O 45 R 3 N 4
      petition for—contents of O 45 R 3
      petition for grant of O 45 R 3
        refusal of O 45 R 6
      refusal by a court—other than a High Court, appeal lies under O 43 O 45 R 6 N 3
      refusal of—grounds of refusal to be stated O 45 R 6 N 1
      security for costs, conditions and procedure O 45 R 7 N 2
    dismissal of petition for O 45 R 6
    effect of refusal of O 45 R 6
    granted *ex parte*—liable to be rescinded O 45 R 3 N 5
    in *forma pauperis*—power of High Court to grant O 44 R 1 N 12
    limitation for application for O 45 R 2 N 3
    petition for—non-prosecution of, liable to be struck off O 45 R 3 N 6
    petition to be made to the court whose decree is complained of O 45 R 2 N 1
    refusal of certificate—review O 45 R 3 N 8
    two decrees and a common judgment, two separate applications necessary O 45 R 2 N 1
  limitation S 109 N 8

NOTICE TO RESPONDENT
    form of App. G. 13
    when dispensed with O 45 R 9-A

ORDER
    dismissing appeal for failure to give costs, whether appealable O 41 R 10 N 14
    granting certificate L P Cl 39 N 16
    in insolvency L P Cl 39 N 9
    of remand O 41 R 23 N 24
    on application under L P Cl 13, is appealable to Privy Council L P Cl 13 N 8

Privy Council appeal—ORDER
    passed on appeal—appeal to Privy Council from S 109
    refusing to quash proceedings by a writ of *certiorari* L P Cl 39 N 14
    setting aside or refusing to set aside sale O 21 R 90 N 50
    to stay execution of decree O 41 R 5 N 20
    whether appealable S 104 N 8

PAPER BOOK
    delaying preparation and transmission deprecated O 45 R 7 N 9
    Registrar of High Court, first to determine contents of O 45 R 7 N 8
  powers of court pending O 45 R 13

PRACTICE S 112 N 5
    additional evidence S 112 N 10
    concurrent findings of facts S 110 N 18; S 112 N 6
      grounds not justifying interference with S 112 N 6
      not to be disturbed generally S 112 N 6
      when interfered with S 112 N 6
    new point before Privy Council not allowed generally .. S 112 N 7
    order as to costs S 112 N 8
    re-hearing of appeals S 112 N 9
  question of law S 110
  record—material records to be printed O 45 R 7 N 8
  right of, under the Charter L P Cl 39—43
  Royal prerogative S 112
  rules made by Judicial Committee—saving of App IV S 112

SECURITY
    execution of decree under O 45 R 13 N 4
    execution of period for O 45 R 7 N 7
    failure to furnish O 45 Rr 11, 14
    for each of consolidated appeals, to be given O 45 R 7 N 5
    for costs O 45 R 4 N 4
    form of O 45 R 7 Nn 4, 6
    from appellant, where execution stayed O 45 R 13

    FROM RESPONDENT
      after execution, special cause to be shown O 45 R 13 N 9
      where decree to be executed O 45 R 13
    further security O 45 R 14
      can be ordered O 45 R 10
      for costs—default—effect of O 45 R 11
      pending appeal to Privy Council O 45 R 14
    in case of special leave High Court cannot demand O 45 R 7 N 2
    on grant of certificate O 45 R 7
    refusal of extension of time for, is not a judgment within Cl 15, L P O 45 R 7 N 10
    revocation—of acceptance of O 45 R 9
    stay of execution on security from appellant O 45 R 13 N 5
    time for furnishing, starting point O 45 R 7 N 3

Privy Council Appeal—SECURITY
time within which to be given O 45 R 7
single decree, several appeals from S 110 N 9
SPECIAL LEAVE
prerogative of King in Council not affected S 112
application for
contents of S 112 N 12
invariably granted *ex parte* S 112 N 12
misstatements in S 112 N 12
practice—petition first to court below for certificate, necessary O 45 R 3 N 2
STAY OF EXECUTION O 45 R 13
after special leave, power of High Court to grant O 45 R 13 N 7
in view of application for special leave—whether High Court can grant O 45 R 13 N 6
or refusing stay—if open to appeal O 45 R 13 N 13
pending appeal High Court can grant only after certificate O 45 R 13 N 3
refusal by High Court—Privy Council may grant O 45 R 13 N 8
when ordered O 45 R 13
stay of further proceedings—High Court's inherent power O 45 R 13 N 10
SUBJECT-MATTER
claim or question respecting property S 110 N 11
dispute as to amount or value of O 45 R 5
valuation S 110; S 110 Nn 2, 7, 8
date of S 110 N 4
dispute as to, may be remitted to court of first instance O 45 R 5 N 1
in court of first instance S 110 N 3
involving of claim or question of given value—"involve", meaning of S 110 N 16
market value S 110 N 3
sum actually at stake—how far true test S 110 N 6
SUBSTANTIAL QUESTION OF LAW S 110
when must be invoked S 110 Nn 12, 17
TRANSMISSION OF RECORD O 45 R 7 N 8
by High Court to L P Cl 42
documents which need not be translated or transmitted O 45 R 7
rules as to copies of evidence, etc. L P Cl 42
under Letters Patent L P Cls 39, 40
when lies Ss 109, 110; L P Cl 39

Probate and Administration Act
probate proceedings—applicability of O. 9 O 9 R 9 N 6

Proceedings
consolidation of O 2 R 6 N 4
procedure of suits applies to S 141
STAY OF O 41 R 5 (2)
appeal whether operates as stay O 41 R 5
by appellate court O 41 R 5 N 4

Proceedings—STAY OF
effect O 41 R 5 N 4
inherent power to stay O 41 R 5 N 21
on removal of next friend O 32 R 10
order staying operations of—*ad interim* injunction O 39 R 3
power of High Court O 39 R 1 N 24

Procedure
after application for transfer of suits S 24
after notice of execution of decree O 21 R 23
AS TO SUITS
applicability to appeals S 141 N 8
applicability to execution proceedings S 141 N 3
applicability to other proceedings, and extent of S 141 N 9
applicability to restitution proceedings S 141 N 4
not applicable to Letters Patent appeals S 141 N 5
execution of decree of foreign courts S 44 N 6
hearing of pauper application O 33 R 7
in execution S 51
of collector, in special cases Sch III P 2
judge vacating office before signing decree O 20 R 8
miscellaneous proceedings S 141
on appearance of judgment-debtor, upon notice or after arrest O 21 R 40
on application for execution O 21 R 17
payment into court—acceptance of, by paintiff O 24 R 4
rules of the 1st schedule—effect of S 121
SUITS BY OR AGAINST
lunatics O 32 R 15
minors O 32
summary suits O 37 R 7
when defendant is suing plaintiff in interpleader suit O 35 R 3
when summons delivered for service O 5 R 29
witness, failure of, to appear O 16 Rr 10-13
where insufficient, sum paid in court for expenses of O 16 R 4
written statement, when party fails to present O 8 R 10

Process
cost of—to be borne by party on whose behalf it is issued O 48 R 1
court-fee on—time for the payment of O 48 R 1
endorsement on, for execution O 21 R 25
for execution—contents of O 21 R 24
forms of App B
of Chartered High Court—who may serve O 49 R 1
of High Court, original side O 49 R 1
process fee—failure to pay—dismissal of suit O 9 R 2
return of, with endorsement, to court O 21 R 25
SERVICE
by post O 5 R 9 Nn 3, 4
on company—mode of O 29 R 2
on corporation to be on secretary or director O 29 R 2
on firms O 30 R 3

Process—SERVICE
on Government to be received by Government pleader O 27 R 4
on person authorised by military men O 28 R 3
on person authorised to sue or defend or plead on behalf of soldier or airmen O 28 R 3
on recognized agent O 3 R 3
on respondent or his pleader O 41 R 14
on pleader O 3 R 5
on Secretary of State, agent to receive process O 27 R 4
on special agent O 3 R 6
SUMMONS
See also SUMMONS
by whom to be signed O 5 R 1 (3)
warrant for delivery of possession of immovable property O 21 R 35
witnesses, issue of process to, on application of commissioner O 26 R 17

Proclamation
for requiring attendance of witness O 16 R 10
of delivery of property in occupation of tenant O 21 R 36; O 21 R 96
of order of attachment of immovable property O 21 R 54
OF SALE BY PUBLIC AUCTION
costs and interest not covered by proclamation, liability for O 21 R 89
examination of persons to ascertain matters for proclamation O 21 R 66
matters to be specified in O 21 R 66
mode of making proclamation of sale O 21 R 67
result in default of payment of purchase money, and fresh proclamation O 21 R 87
sale, adjournment of, and fresh proclamation O 21 R 69
separate proclamation unnecessary where sale of property is in lots O 21 R 67
on re-sale O 21 R 87

Production
of additional evidence in appeal O 41 R 27
OF DOCUMENTS S 30; O 13
before Collector Sch III P 13
notice for O 11 R 16
order for O 11 R 14
of evidence, failure in production O 15 R 4
of shop book O 7 R 17

Promissory note
costs, recovery of, of noting non-acceptance of dishonoured cheques O 37 R 6
joinder of parties liable on same O 1 R 6
suit on, by firm O 30 R 1 N 9

Property
ancestral, liability of, in execution S 53
attachment, what property liable to S 60
injunction, temporary, when to be granted—in regard to property in dispute O 39 R 1
meaning of S 9 N 17

Property
private transfer of, pending attachment in execution S 64
SUBJECT TO DECAY
sale of O 21 R 43; O 39 R 6
suit for—civil nature S 9 N 17
temple and religious—suit for, if of civil nature S 9 N 19

Provincial Small Cause Courts
application of code to S 7
application of order and rules to O 50 R 1
attachment of immovable property, power to order O 38 R 13
ex parte decrees O 9 R 13 N 5
power to appoint receiver of immovable property S 7
See ATTACHMENT
power to issue injunction S 7
power to refer to High Court question as to jurisdiction O 46 Rr 6, 7
second appeal, in suits cognizable by S 102

Public Demands Recovery Act
sale under—setting aside—on deposit of account due O 21 R 89 N 6

Public nuisance
suit for—pleading, contents of O 6 R 4 N 13
suit in respect of Ss 91, 93

Public officer
attachment of allowances (being less than salary) not allowed S 60
attachment of property in custody of O 21 R 52
attachment of property of S 81; O 27 R 8
body of individuals, if included in S 2 (17) Notes
commissioned officer is public officer S 2 (17) (*c*)
cantonment committee if included in S 2 (17) Notes
DECREE AGAINST
execution, how to be effected S 82
time for payment to be specified S 82
EXECUTION AGAINST
jurisdiction S 82; O 21 R 48
salary of public officer beyond jurisdiction how to be attached O 21 R 48
exemption from arrest S 81; O 27 R 8
exemption from arrest except in execution of decree S 81 (*a*)
exemption from personal appearance in certain cases S 81(*b*)
extension of time to enable him to make reference to Government O 27 R 7
meaning of S 2 (17)
notice before suit S 80
official receiver, suit against—notice when necessary S 80 N 5
person doing public duty, when public officer S 2 (17) Notes
personal attendance of public officer not necessary S 81
procedure in suit against O 27 R 8
security for restitution in case of execution, when cannot be required from O 41 R 7
security for stay of execution, when cannot be required from public officer O 41 R 7

Public Officer

- service of summons on O 5 R 27
- SUIT AGAINST
  - act purporting to be done in his official capacity, meaning of S 80 N 5
  - amendment of plaint—notice if necessary for S 80 N 16
  - condition precedent, notice is S 80 N 10
  - on contract—notice, necessity S 80 N 11
  - death of intending plaintiff after notice—effect of S 80 N 20
  - defence of suit against public officer undertaken by Government O 27 R 8
  - expiry of period of notice, S 80 N 18
  - extension of time fixed in summons to appear, to enable him to obtain necessary orders through proper channel O 27 R 7
  - for act done in official capacity—arrest and attachment, in execution, exemption from S 81
  - for act done in official capacity—personal appearance in court, exemption from S 81
  - injunction—notice, necessity of S 80 N 11
  - Government pleader's authority to appear and answer O 27 R 8
  - Government pleader—failure of, to apply, appear and defend—effect O 27 R 8
  - in official capacity O 27; Ss 79, 80
  - in official capacity—title of suit O 27 R 7 N 1
  - liability of defendant to arrest or attachment of property O 27 R 8
  - notice and plaint, variance between S 80 N 19
  - notice—for act purporting to be done in his official capacity S 80 N 5
  - notice, form and sufficiency of S 80 N 13
  - notice given—facts to be mentioned in plaint S 80 N 17
  - notice, object of S 80 N 2
  - notice, objection as to want of—waiver of objection S 80 N 15
  - notice of suit S 80
  - notice, service of S 80 N 14
  - notice, special acts making notice not necessary S 80 N 3
  - procedure in suit O 27 R 8
  - when suit is to proceed as between private parties O 27 R 8
  - without notice—rejection of plaint S 80 N 10
- village sanitation punchayat, whether included in S 2 (17) Notes

Railway

- interpleader suit by—as regards goods consigned for transportation O 35 R 5 N 2
- railway administration—suit against notice S 80 N 9
- RAILWAY SERVANT
  - arrest of, procedure as to S 55
  - attachment of—allowances (being less than salary) of, not liable to S 60

Railway

- ATTACHMENT
  - mode of attachment of salary of O 21 R 48
  - salary of, when liable to S 60
- service of summons on O 5 R 27

Rateable distribution S 73

- applicability of S 73—condition for S 73 N 3
- application for—if step-in-aid of execution S 73 N 23
- APPLICATION FOR EXECUTION
  - claimant for rateable distribution, must have made S 73 N 8
  - in inferior court S 73 N 8
  - must be for execution in form and substance S 73 N 8
  - should be pending at the time of receipt of assets S 73 N 8
  - what are not S 73 N 8
- ASSETS
  - administrative distribution of assets by court—determination of right of parties, not conclusive S 73 N 2
  - distribution of S 73 N 4
  - failure to participate in—effect of S 73 N 2
  - held by court meaning of S 73 N 4
  - if necessary to be realised by process of S 73 N 4
  - meaning of S 73 N 4
  - money deposited in court by garnishee O 21 R 46 N 16
  - money deposited into court in pursuance of attachment before judgment O 38 R 5 N 19
  - money paid to stop sale, if O 21 R 69 N 14
  - money payable under private transfer of attached property O 21 R 83 N 9
  - receipt of, and application for execution on the same day—presumption as to priority, if there is S 73 N 11
  - receipt of—application should have been made before S 73 N 11
  - receipt of, subsequent to adjudication of judgment-debtor as insolvent—effect of S 73 N 14
  - receipt of, when deemed to be received S 73 N 11
  - REFUND OF
    - suit for S 73 N 18
    - suit for, from person not entitled to receive same S 73
    - suit for—when barred under S 47 S 73 N 18
  - salary of public officer under attachment O 21 R 48 N 2
  - should have reached hands of court in S 73 N 4
- claim to, not affected by transfer after attachment S 64
- DECREE FOR PAYMENT OF MONEY
  - claimant must be holder of S 73 N 6
  - decree for money, meaning of S 73 N 6
  - same judgment-debtor, decree should have been obtained against S 73 N 7
- effect of substantive rights of decree-holders, if affected S 73 N 2

Rateable distribution

- mode of S 73 N 22
- object of S 73 N 2
- ORDER FOR
  - adjudication in insolvency of judgment-debtor subsequent to—effect of S 73 N 14
  - conclusiveness of S 73 N 18
- PERSONS ENTITLED TO
  - decree-holder of inferior court—procedure for obtaining rateable distribution S 73 N 8
  - holder of order for attachment before judgment S 73 N 10
  - persons entitled to dividends to insolvency proceedings O 21 R 90 N 7
- PRIORITY OF DEBTS S 73 N 19
  - co-operative society, debts due to S 73 N 19
  - crown, debts due to S 73.N 19
- PROCEEDINGS IN
  - if execution proceedings O 21 R 30 N 7
  - order in—appealability of S 73 N 24
  - order in—revision when lies S 73 N 25
- RIGHT TO
  - decree-holders, when entitled to S 73
  - Government, rights of, S 73
- sale free of mortgage—rights of mortgagee S 73 N 16
- sale in mortgage-decree, sale proceeds, mode of applying S 73 N 17
- SALE, SUBJECT TO MORTGAGE
  - mortgagee cannot get rateable distribution S 73 N 15
  - mortgagee holding money decree also—if entitled to rateable distribution S 73 N 15
- SAME JUDGMENT-DEBTOR
  - all judgment-debtors, if necessary to be identically same S 73 N 7
  - "same judgment-debtor"—meaning of S 73 N 7
- subsisting decree necessary S 73 N 9
- validity of decree—jurisdiction of court to enquire into S 73 N 12
- right of one decree-holder to impeach the decree of another S 73 N 12

Receiver

- ACTS OF
  - attached property seized by collector acting as receiver—act cannot be disputed by way of motion O 40 R 5 N 1
  - person aggrieved by—remedy of O 40 R 1 N 43
- agreement with—contempt of court O 40 R 1 N 34
- APPOINTMENT OF S 94; O 40 R 1
  - application for—how to be made O 40 R 1 N 54
    - may be renewed on restoration of suit dismissed O 40 R 1 N 13
    - order granting or rejecting appeal O 43 R 1
    - to be made promptly O 40 R 1 N 13
  - company O 40 R 1 N 17
  - consent order as to, does not prevent party from attacking administration O 40 R 1 N 48

Receiver—APPOINTMENT of

- declaratory suit O 40 R 1 N 13
- discretion of court should be judicial O 40 R 1 Nn 2, 13, 14
- distinguished from injunction O 40 R 1 N 13
- duration of O 40 R 1 N 40
- effect of
  - is to make property in *custodia legis* O 40 R 1 N 2
  - prior attachment not superseded O 40 R 1 N 29
  - in execution proceeding S 51; O 21 R 11 N 12; O 21 R 30 N 7; O 40 R 1 N 19
- for what property
  - future earnings O 40 R 1 N 5
  - property in the hands of common manager O 40 R 1 N 21
  - rents and profits, for collection of O 40 R 1 N 13
  - grounds O 40 R 1 N 14
    - plaintiff must show strong reasons O 40 R 1 N 13
  - interference with by appellate court S 107 N 26
  - money suit O 40 R 1 N 13
  - mortgage suit O 40 R 1 N 4
  - mortgagee himself, when can make O 40 R 1 N 4
  - notice to opposite side O 40 R 1 N 45
  - proceedings other than suits O 40 R 1 N 3
  - purpose of O 40 R 1 N 2
  - security, failure to take security—effect of O 40 R 3 N 1
- suit relating to
  - maintenance O 40 R 1 N 9
  - mortgage—mortgagee, if in possession, must give up possession to Receiver O 40 R 1 N 4
  - partnership O 40 R 1 N 8
  - partition O 40 R 1 N 15
  - testamentary matters O 40 R 1 N 6
  - suit under Religious Endowments Act O 40 R 1 N 7
  - suits under S 92 O 40 R 1 N 7
  - what court may appoint O 40 R 1 N 12
  - when can be made O 40 R 1 N 13
    - after decree O 40 R 1 N 20
    - pendency of appeal to Privy Council O 45 R 13 (2)
  - when executor is in possession O 40 R 1 N 16
  - where matter has been referred to arbitration O 40 R 1 N 18
  - where receiver has been appointed under S 146 of the Cr P C O 40 R 1 N 10
  - who may be appointed O 40 R 1 N 11
- ATTACHMENT AGAINST
  - attachment of property of receiver in enforcement of his duties O 40 R 4
  - breach of duty O 40 R 4 N 3
  - of property in hands of O 40 R 1 N 30
- contracts by—enforcement of—powers of court O 40 R 1 N 50
- decree against—procedure to be followed by decree-holder O 40 R 1 N 31

Receiver

decree obtained by—attachment of, without leave of court—effect O 40 R 1 N 30
discharge of—pending suit—suit can be continued by true owner O 40 R 1 N 48
DISPOSSESSION OF THIRD PARTY
  claim by third party—enquiry as to O 40 R 1 N 49
  court may remove any person in possession of property O 40 R 1 N 49
duration of office O 40 R 1 N 48
duty of O 40 R 3
  breach of—effect O 40 R 4
  delegation if can be made O 40 R 1 N 27
  enforcement of O 40 R 4
  mode of enforcement O 40 R 4
JOINDER OF
  in declaratory suit O 40 R 1 N 44
  proceedings under S 145, Cr P C O 40 R 1
  suit for declaration in respect of property—receiver not a necessary party O 40 R 1 N 31
  suit for declaration of title O 40 R 1 N 31
  suit for interfering with possession of receiver O 40 R 1 N 44
  suit for money against representatives of deceased person O 40 R 1 N 44
joint receivers—when may be appointed O 40 R 1 N 47
LIABILITY TO
  account O 40 R 1 N 37; R 3
  amount due by him to be paid into court O 40 R 3
  criminal prosecution O 40 R 1 N 39
  debts incurred in the course of business O 40 R 1 N 32
  distinguished from liability of executor or trustee O 40 R 1 N 38
  estate if liable O 40 R 1 N 32
  general O 40 R 1 N 36
  loss caused by receiver's default, person liable O 40 R 1 N 33; R 3
  loss occasioned by gross negligence of O 40 R 3 (*d*)
  loss occasioned by wilful default or negligence O 40 R 3 N 4; O 40 R 4 N 2
  of firm—service of summons on in a suit against firm O 30 R 3 N 4
ORDER APPOINTING
  appeal O 40 R 1 N 51
  revision O 40 R 1 N 53
order for scrutiny of accounts in—appeal O 40 R 1 N 51
order giving directions to receiver—appeal O 40 R 1 N 51
order granting leave to sue, appeal O 40 R 1 N 51
order passing accounts—appeal lies O 40 R 1 N 51
order raising remuneration of—whether appealable O 40 Rr 1, 2
order refusing to appoint—appeal O 40 R 1 N 51
order refusing to remove—appeal O 40 R 1 N 51

Receiver

order that receiver is liable to account—no appeal O 40 R 1 N 51
POSITION OF
  is an officer of the court O 40 R 1 N 28
  when public officer S 2 (17) Notes
POSSESSION OF
  enures for benefit of true owner O 40 R 1 N 29
  interference with is contempt of court O 40 R 1 N 34
POWERS OF O 40 R 1
  assignment of his rights O 40 R 1 N 27
  execution of documents O 40 R 1 N 26
  general O 40 R 1 Nn 22, 23
  realisation of property O 40 R 1 N 24
  rents and profits, collection of O 40 R 1 N 25
POWER OF COURT
  authorisation to enter upon property to make inventory O 40 R 1 N 49
  court can wind up his charge even after disposal of suit O 40 R 1 N 48
  scrutiny of accounts O 40 R 1 N 48
PROPERTY IN THE HANDS OF
  attachment—what court can order O 40 R 1 N 30
  execution of decree against—leave of court is necessary O 40 R 1 N 30
  sale without leave of court—validity O 40 R 1 N 30
purchase of property by, not to be made O 40 R 1 N 28
rateable distribution, right of, against leave of court O 40 R 1 N 30
removal of—claim for restitution on O 40 R 1 N 48
removal of, when to be made O 40 R 1 N 48
RIGHTS OF
  lien on estate O 40 R 1 N 42; O 40 R 2 N 2
  property sold away—receiver has no right to possession O 40 R 1 N 48
  remuneration of O 40 R 1 N 35; O 40 R 2; O 40 R 2 N 1
  right to costs and charges incurred by him O 40 R 2 N 3
SALE BY
  if need be confirmed O 21 R 92 N 10
  setting aside for fraud or material irregularity O 21 R 90 N 2
sapurdar is a O 40 R 1 N 2
SECURITY O 40 R 3
  for costs by receiver on plaintiff's insolvency O 22 R 8
  surety's liability O 40 R 3 N 2
  to be given O 40 R 1 N 41
SUIT BY OR AGAINST
  continuance of, by successor in office O 40 R 1 N 46
  leave of court
    effect of not getting O 40 R 1 N 31
    general O 40 R 1 N 31
    if can be granted subsequent to institution of suit O 40 R 1 N 31

Receiver—SUIT BY OR AGAINST
not necessary in suit under S. 85 of Madras Act VIII of 1865 O 40 R 1 N 31
owner cannot sue *Jagirdar* appointed by receiver for accounts O 40 R 1 N 31
present receiver cannot sue former receiver O 40 R 1 N 31
third person—removal of person from possession or custody of property O 40 R 1
who can apply for—legal representatives of deceased party if can apply O 47 R 1 N 5
who may be appointed—collector, when may be appointed O 40 R 5

Recognized agent
See also AGENT—RECOGNIZED AGENT

Record
of admitted documents O 13 R 7
of evidence in English S 138
of examination of parties O 10 R 3
of points where additional evidence taken O 41 R 29
sending for—power of court O 13 R 10

Redemption
See also MORTGAGE
charges—provisions respecting redemption and sale—apply to O 34 R 15
extension of time—period fixed for payment in decree O 34 R 7
SUIT FOR
compromise decree—whether final decree necessary O 34 R 7 N 3
decree, preliminary and final O 34 Rr 7, 8
default of payment by plaintiff—court to pass final decree debarring his right to redeem O 34 R 8
foreclosure, decree in O 38 R 8
frame of—whole claim to be included O 2 R 1 N 3
of mortgage or charge S 16
parties O 34 R 1
place of suing S 16
possession, claim for, in O 2 R 4

Reference O 46
application for, to High Court O 46 R 1
BAR TO
execution of decree not allowed pending reference to High Court O 46 R 2
existence of appeal O 46 R 1 N 4
conditions for O 46 R 1 N 2
COSTS OF O 46 R 4
how dealt with O 46 R 4 N 1
court to which lies O 46 R 1 N 5
decree contingent upon decision of High Court, court may pass O 46 R 2
distinguished from appeal O 46 R 1 N 2
DISTRICT COURT O 46 R 7
reference by, in certain cases O 46 R 7
referring small cause court decision, reasons to be recorded O 46 R 7 N 4
forms of Sch I App G

Reference
High Court decision not a decree, no review lies O 46 R 3 N 1
High Court decision—procedure thereon O 46 R 3 N 1
High Court—powers of, in O 46 R 5
how made—facts and court's opinion to be stated O 46 R 1 N 8
jurisdiction—doubt as to O 46 R 6
jurisdiction—mistake as to O 46 R 7
order in—decree to conform with O 46 R 3
Presidency Small Cause Courts—powers of O 46 R 1 N 9
procedure after judgment of High Court O 46 R 3
procedure pending High Court decision in referring court O 46 R 2
QUESTION OF FACT
finding not interfered with by the High Court O 46 R 7 N 6
not open to O 46 R 1 N 6
reasonable doubt—question must contain O 46 R 1 N 7
return of case for amendment, etc. O 46 R 5 N 1
SMALL CAUSE COURT
decision of—reference by District Court only if found erroneous O 46 R 7 N 3
procedure of reference by O 46 R 6 N 1
STAY OF PROCEEDINGS
pending O 46 R 2
power of court making reference to O 46 R 2
TO ARBITRATION
power of appellate court, for S 107 N 27
who can make—all interested parties must join Sch II P 1 N 7
to Government—extension of time for O 27 R 7
to High Court S 113; O 46 R 1
to old Codes S 158
when does not lie O 46 R 1 N 3

Register
of appeals O 41 R 9
of suits O 4 R 2

Registered post
service by O 5 R 21

Registrar
delegation of judicial and non-judicial work to S 128
of joint stock company—suit by or against company—Registrar whether can represent company O 29 R 1 N 8

Registration
compromise decree—if necessary to be registered O 23 R 3 N 25
decree directing realisation from non-mortgaged properties, in case of deficiency on sale of mortgaged properties if money decree for purposes of registration O 34 R 6 N 23
mortgage decree—transfer of—registration whether necessary O 34 R 5 N 21
OF DOCUMENTS
by judge or officer of court O 21 R 34

Registration—OF DOCUMENTS
executed under decree of court O 21 R 34
sale certificate O 21 R 94 N 14

Registration Act
section 77 O 20 R 7 N 4

Relators
public charities—suit relating to S 92
public nuisance, suits relating to S 91

Relief
claim for larger relief—effect of—whole suit not to be dismissed O 7 R 7 N 1
frame of suit—all reliefs in same cause of action—to be included in plaint O 2 R 2 N 13
general—need not be claimed O 7 R 7 N 2
refusal of—where not expressly granted S 11
res judicata—relief claimed, in plaint but not granted S 11
right to—upon facts and documents not stated in pleadings O 7 R 7 N 1
SEVERAL RELIEFS
omission to sue for some O 2 R 2 N 14
one beyond jurisdiction—procedure O 7 R 10 N 1
SPLITTING OF
bar due to—not applicable to defence O 2 R 2 N 29
instances O 2 R 2 N 19
when permitted—identity of parties necessary for bar to operate—instances O 2 R 2 N 21
STATEMENT IN PLAINT
alternative relief O 7 R 7 N 3
relief founded on separate grounds O 7 R 8
specific statement necessary O 7 R 1 (*g*); O 7 R 7
SUBSEQUENT EVENTS
court's power to consider in granting relief O 7 R 7 N 4; O 8 R 8 N 1
undervaluation of—rejection of plaint O 7 R 11
useless relief—court's power to grant O 7 R 7 N 1

Religious Endowments Act, 1863 S 92
suit under Ss. 14 and 18 of—abatement—survival of right O 22 R 1 N 16

Religious office
right to exercise of—temporary injunction restraining O 39 R 1 N 9

Religious processions
suit for declaration of right to—if of civil nature S 9 N 24

Religious rites and ceremonies
suits relating to S 9 N 48

Religious trusts
suit in respect of Ss 92, 93

Relinquishment
amount relinquished to be stated in plaint O 7 R 1
of claim O 2 R 2 (2)

Remand
appeal from order of, lies O 43 R 1 (*u*)

Remand
irregularity or error not affecting merits of jurisdiction S 99
issues, remand by appellate court for trial O 41 R 25
of case O 41 R 23
omission to appeal from order of—effect S 105
order for—appeal S 105
power of appellate court to S 107 (*b*); O 41 R 23

Rent
attachment before ascertainment of O 21 R 42
decree for possession and for rent O 20 R 12
decree for property not exempt from attachment and sale S 60
receiver, collection of rents by O 40 R 1
recovery of—non-applicability of C. P. Code to S 4 (2)
suit for
claim for arrears of, may be joined with suit for recovery of land O 2 R 4
frame of—splitting of claim O 2 R 2 N 10
omission to sue for portion of arrears of O 2 R 2
possession and rent—splitting of relief O 2 R 2 N 15
rent for successive years—frame of suit O 2 R 2 N 9

Rent Acts
sale under—setting aside on deposit of decree amount O 21 R 89 N 6

Repeals S 156
continuance of orders under repealed enactments S 157
of enactments S 156
reference to Code of Civil Procedure and other repealed enactments S 158

Representative
application for execution by or against S 146 N 4
application to set aside *ex parte* decree by S 146 N 7
assignee—proceedings by or against S 146
"claiming under a person", meaning of S 146 N 8
continuance of proceedings by S 146 Nn 2, 4
holder of decree to be executed by attachment of another decree O 21 R 53
impleading of under S. 146, unnecessary S 146 N 9
proceedings by or against S 146
question as to, to be decided by executing court S 47 (3)
rights of S 146
appeal by S 146 N 5

Representative suit
advertisement—notice to public, where numerous parties O 1 R 8
parties to O 1 R 8
plaint in O 7 R 4

Residence
British India, residence out of—meaning of—for purposes of security for costs O 25 R 1
company—residence of—for purposes of security for costs O 25 R 1 N 4

Residence
- meaning of O 5 R 9 N 2
  - railway company—"residence"—meaning of, for service of summons O 5 R 13 N 1

Resistance
- to execution S 74

Res judicata S 11
- APPLICABILITY
  - to appeals S 11 N 29
  - arbitration proceedings S 11 N 27
  - refused to file award, when *res judicata* S 11 N 27
  - execution proceedings S 11 N 3
  - prior proceedings, when bar to suit S 11 N 3
  - proceedings S 11 N 3
  - principle not governed by technical considerations of form S 11 N 2
- basis of S 11 N 2
- BAR OF
  - applicable even though the result is sanctioning of illegality S 11 N 6
  - is reciprocal and mutual to parties S 11 N 2
  - must be pleaded and proved S 11 N 6
  - not one of jurisdiction, but could be waived S 11 N 6
  - not provable from plaint S 11 N 6
- CO-DEFENDANTS
  - as between S 11 Nn 46, 47
- co-plaintiffs as between S 11 N 47
- collaterally and incidentally in issue, decision on, is not S 11 N 13
- common right, as to S 11 Expl 6
- competence of court not dependant on right of appeal S 11
- CONSTRUCTIVE
  - grounds of attack, meaning of S 11 N 38
  - ground of attack or defence actually raised but not decided S 11 N 33
    - in subsequent suit might and ought to have been alleged in former suit S 11 N 35
  - grounds of defence, meaning of S 11 N 39
  - matter constructively in issue—if necessary to be heard and decided S 11 N 33
  - meaning of S 11 N 33
  - plea not permitted by law, S 11 N 36
  - plea of facts in existence at the time of former suit S 11 N 36
  - plea of facts, not known at the time of former suit S 11 N 36
  - plea which might have been raised S 11 N 36
  - plea which ought to have been raised S 11 N 37
  - principle of difference from O 2, R 2 S 11 N 33
  - tests of S 11 N 37
- cross decrees—appeal from one if and when barred S 11 N 29; O 41 R 1 N 7
- difference between S 11 and O 2 R 2 S 11 N 2
- DIRECTLY AND SUBSTANTIALLY IN ISSUE
  - matter in decision about, depends on circumstances S 11 N 7

Res judicata — DIRECTLY AND SUBSTANTIALLY IN ISSUE
  - may be actually or constructively S 11 N 7
  - when constructively so S 11 N 33
  - requires allegation and either denial or admission S 11 N 7
  - test for deciding what is S 11 N 7
- effect of S 11 N 2
- essentials of S 11 N 5
- estoppel, distinction from S 11 N 4
- EXECUTION PROCEEDINGS
  - certificate of sale if and when *res judicata* O 21 R 94 N 12
  - construction of decree operates as *res judicata* S 38 N 11
  - constructive *res judicata*, doctrine of, if applicable S 11 N 23
  - general principle confined to decision of substantive rights S 11 N 23
  - if principle applicable to S 11 N 23
  - objection to irregularity of sale proceedings—order as to, when *res judicata* O 21 R 90 N 41
  - order as to irregularity in execution sale whether operates as O 21 R 92 N 6
  - order of executing court declaring one of two rival bidders to be purchaser, if operates as O 21 R 88 N 5
  - proceedings to settle proclamation—application of principle to O 21 R 66 N 22
  - when constitutes *res judicata* S 11 N 23
- exhaustive, section 11 is not S 11 N 3
- EX PARTE DECREE
  - by fraud, suit to set aside, not barred S 11 N 19
  - when *res judicata* S 11 N 19
- FORMER COURT
  - administrative officer, if he is court S 11 N 74
  - civil court decision, if *res judicata* in criminal case S 11 N 99
  - civil court, decision of title is *res judicata* in revenue courts S 11 N 76
  - competency of
    - augmentation of claim in subsequent suit, by accrual of interest—if former decision *res judicata* S 11 N 97
    - concurrence of jurisdiction necessary about subject-matter and pecuniary value S 11 N 83
    - decision of jurisdiction is *res judicata* in subsequent proceedings S 11 N 73
    - foreign court S 11 N 78
    - inability of former court arising not from incompetence but on account of preferential jurisdiction of another court, effect of S 11 N 95
    - must be of trial court and not appellate court S 11 N 94
    - necessary not merely to try issue but whole suit S 11 N 73
    - no reference to territorial jurisdiction of British Indian Courts S 11 N 78

- not affected by facts that appeals lie or do not lie to different courts S 11 N 96
- refers to date of former suit S 11 N 97
- to try former suits S 11 N 73
- to try subsequent suit S 11 N 73
- to try subsequent suit, meaning of S 11 N 78

- concurrent jurisdiction with later, both as regards pecuniary value and subject-matter necessary S 11 N 78
- court, meaning of S 11 N 74
- court of exclusive jurisdiction, *res judicata* in subsequent proceedings S 11 N 75
- criminal court—if decision is *res judicata* in civil court S 11 N 99
- inferior court—subsequent court, superior court—decision on issue, if *res judicata* S 11 N 82
- must have concurrent jurisdiction with that of subsequent court S 11 N 75
- must have pecuniary jurisdiction over subsequent suits S 11 N 79
- pecuniary jurisdiction, nature of S 11 N 79
- rent revenue and settlement courts, of concurrent jurisdiction with civil courts—decision is *res judicata* in civil courts S 11 N 77
- revenue courts—decision *res judicata* in civil courts where jurisdiction of revenue court is exclusive S 11 N 75
  - decision of title when *res judicata* in civil court S 11 N 76
  - decision without jurisdiction—no *res judicata* in civil courts S 11 N 76
  - having exclusive jurisdiction—decision is *res judicata* in civil courts S 11 N 76
- Small Cause Courts' decision if *res judicata* in ordinary courts S 11 N 75

FORMER SUIT
- administration suit, decision in when constitutes S 11 N 28
- arbitration proceedings, if they are suits S 11 N 27
- former decision obtained by fraud or collusion—if and when *res judicata* S 11 N 98
- means previously decided suit S 11 N 20
- parties or parties under whom they claim, must be same S 11 N 41
- small cause suit tried on the original side—decision on title if *res judicata* in subsequent suit S 11 N 83

general principles of—applicability to appeals S 11 N 29

HEARD AND FINALLY DECIDED
- abatement of former suit is no *res judicata* in subsequent suit S 11 N 106
- adverse finding against defendant—suit dismissed—finding if *res judicata* S 11 N 109
  - plaintiff—suit wholly decreed—finding if *res judicata* S 11 N 110
  - successful party, is not S 11 N 7
- amendment of decree—applications for, if barred S 11 N 24
- appealable decisions—finality of S 11 N 111
- appeal against decree—appellate judgment must be looked into to decide *res judicata* S 11 N 111
- appeal withdrawn or dismissed on preliminary point—lower court's decision operates as *res judicata* S 11 N 111
- conditional decree, finality of S 11 N 113
- consent decree—if operates as *res judicata* S 11 N 114
- decision need not be express but may be implied S 11 N 118
- decision need not have been embodied in the decree S 11 N 117
- decision not based upon finding if *res judicata* S 11 N 108
- decision without notice to party, if *res judicata* S 11 N 100
- declaratory decree, effect of, on subsequent suit S 11 N 15
- dismissal for default of former suit—no *res judicata* S 11 N 106
- dismissal for default to do anything ordered by court to be done, no *res judicata* S 11 N 106
- dismissal of appeal for default—whether decree of lower court superseded O 41 R 17 N 9
- dismissal of suit for failure to furnish security for costs ordered O 25 R 2 N 2
- failure of appellate court to pass a decree in favour of non-appealing party O 41 R 33 N 14
- failure to ask for relief under O 41 R 33 O 41 R 33 N 14
- former decision must have been on the merits S 11 N 104
- former suit withdrawn with leave—no *res judicata* in subsequent suit S 11 N 101
- implied decision—no *res judicata* if not raised at all in the previous suit S 11 N 118
- is a necessary condition S 11 N 100
- issue decided in former suit
  - extrinsic evidence not admissible to determine what issues were decided S 11 N 122
  - how to determine what issues were decided S 11 N 119
  - judgment to be looked into to determine what issues were decided S 11 N 120
  - pleadings may be looked into to determine what issues were decided S 11 N 119
- matter decided by first court, but left open by appellate court is not *res judicata* S 11 N 101
- matter excluded from decision in former suit, is not *res judicata* S 11 N 103

Res Judicata—HEARD AND FINALLY DECIDED

- matter left open, court having no power to do so, if *res judicata* S 11 N 101
- matter left undecided—no *res judicata* S 11 N 101
- matter refused to be decided is no *res judicata* S 11 N 103
- merits not gone into in former suit—dismissal on technical grounds is not *res judicata* S 11 N 105
- order rejecting memo. of appeal whether operates as a bar S 11 N 25
- provisional orders, finality of S 11 N 112
- redemption decree—finality of S 11 N 116
- set-off, plea of, decided in former suit is *res judicata* in subsequent suit S 11 N 107
- two or more conflicting former decisions—which operates as *res judicata* S 11 N 100
- unnecessary or irrelevant issue, decision on—no *res judicata* S 11 N 108
- withdrawal of former suit—order granting leave without jurisdiction—decision is *res judicata* S 11 N 101
- withdrawal of suit without permission, effect of S 11 N 128

Income-tax Act proceedings S 11 N 28
Indian Companies Act, proceedings S 11 N 28
insolvency proceedings S 11 N 28

INTERLOCUTORY

- applications are not suits S 11 N 22
- order, when constitutes S 11 N 22

intervenor—decision against, when *res judicata* S 11 N 44
issue of fact, decision on, constitutes *res judicata* S 11 N 9
issue of law, when decision on, is *res judicata* S 11 N 11
judgments in *rem* S 11 N 68
judgment in *personam* difference between S 11 N 68
jus tertii, plea of, decision when *res judicata* S 11 N 43
Land Acquisition Act proceedings S 11 N 28
legal representative, order determining who is O 22 R 5 N 8
lessee—decision against lessor, when binding on lessee S 11 N 57
lessor—decision against lessee, if binds lessor S 11 N 57

MATTER IN ISSUE S 11 N 7

- admitted matter is still in issue S 11 N 12
- and cause of action—identity of S 11 N 72
- in the two suits—cause of action—relation between S 11 N 72
- subject-matter of suit—is not the test of S 11 N 72

matter must be directly and substantially in issue S 11 N 7
matter not in issue, is not S 11 N 12
maintenance suit S 11 N 16
might and ought—meaning S 11
mixed question of law and fact S 100 N 28

- is as much *res judicata* as question of fact S 11 N 10

Res Judicata

MORTGAGE SUIT

- further suits for over-payments or mesne profits whether maintainable O 34 R 9 N 3
- puisne mortgagee, suit by—against mortgagor and prior mortgagee when *res judicata* S 11 N 40
- right to personal decree, decision of, when *res judicata* S 11 N 40

MORTGAGOR AND MORTGAGEE

- decisions against mortgagor when binding on mortgagee S 11 N 55
- sale by mortgagee, when binding on mortgagor S 11 N 55

Oaths' Act—proceedings S 11 N 28
operation of, does not depend on usefulness of the suit S 11 N 5
obiter dicta S 11 N 12
order

- as to who is legal representative, when constitutes S 11 N 28
- on objection or claim to attachment O 21 R 58 N 23

owing to foreign judgment S 13
paramount title, plea of—mortgage suit S 11 N 40

PARTIES

- auction-purchaser in mortgage decree—if claims under judgment-debtor S 11 N 56
- claiming under
  - auction-purchaser in money decree if claims under judgment-debtor S 11 N 56
  - auction-purchaser in mortgage decree, if claims under decree-holder S 11 N 56
  - auction-purchaser in revenue sale, if claims under defaulting proprietor S 11 N 56
  - claim suit—judgment-creditor, if represents judgment-debtor S 11 N 56
- claim of under—party in previous suit—title must have arisen subsequent to the first suit S 11 N 49
- co-heirs, if claim under each other S 11 N 51
- co-owners, if claim under each other S 11 N 52
- co-tenants S 11 N 53
- decision on failure to appeal, if operates as *res judicata* O 17 R 3 N 7
- Hindu son, if claims through father S 11 N 50
- minor, decree against—if and when *res judicata* S 11 N 69
- mortgagor, if claims under co-mortgagor S 11 N 55
- of the same side—decision when *res judicata* S 11 N 42
- official assignee acting for creditors, if representative of insolvent S 11 N 58
- under whom they or any of them claim, meaning of S 11 N 48

PRINCIPLE OF S 11 N 2

- application to mortgage suits S 11 N 40

Res Judicata

- probate proceedings S 11 N 28
- *pro forma* party, decision against or in favour, is not S 11 N 12
- question of fact, what is S 100 N 28
- REDEMPTION
  - and settlement of accounts, suits for, when *res judicata* S 11 N 40
  - suits for
    - by several mortgagors S 11 N 40
    - if bars suit for ejectment S 11 N 40
    - pleas which mortgagee might and ought to raise S 11 N 40
    - on same mortgage S 11 N 40
- RELIEF CLAIMED BUT NOT EXPRESSLY GRANTED S 11
  - discretionary relief S 11 N 125
  - effect of S 11 N 123
  - mesne profits S 11 N 125
  - relief must be substantive and not auxiliary S 11 N 124
- RENT SUITS
  - for successive periods S 11 N 15
  - relating to rate or area S 11 N 17
  - title in, when *res judicata* S 11 N 14
- REPRESENTATIVE
  - capacity, *res judicata* as to S 11
  - creditor of a party, if S 11 N 67
  - official liquidator, if represents debenture-holders and creditors S 11 N 67
- REPRESENTATIVE SUITS
  - administrator, by or against S 11 N 64
  - agent, by or against S 11 N 65
  - benamidar—by or against S 11 N 65
  - decree in O 1 R 8 N 21
  - executor, by or against S 11 N 64
  - Hindu reversioner, by or against S 11 N 63 A
  - Hindu widow, by or against S 11 N 63
  - joint contractors, by or against S 11 N 66
  - joint wrong doers, by or against S 11 N 66
  - karnavan of Malabar tarwad, by or against S 11 N 62
  - legal representatives, decree against one only, if *res judicata* S 11 N 63 B
  - manager of Hindu joint family, by or against S 11 N 61
    - meaning of S 11 N 59
  - municipal board, decision against—when *res judicata* S 11 N 67
  - persons represented in prior suit—decision when *res judicata* S 11 N 59
  - shebaits, by or against S 11 N 60
  - trustees, suits by or against S 11 N 60
  - under O. 1, R. 8 S 11 N 59 (*a*)
  - vatan holder, decree against, if binds successor S 11 N 67
- review, application for, when bars a suit S 11 N 26
- same parties, meaning of S 11 N 42
  - parties under whom they claim—former suit must have been between them S 11 N 41

Res Judicata

- SAME TITLE
  - different titles—litigation under—illustrations of S 11 N 70
  - litigation under—illustrations of S 11 N 70
  - same persons being parties in different characters S 11 N 70
  - title, meaning of S 11 N 70
- strangers, when bound by judgment to which they are not parties S 11 N 68
- "substantially" in issue means of importance and value for decision S 11 N 7
- SUBSEQUENT SUIT
  - additional claim made—if former suit will constitute *res judicata* S 11 N 81
  - jurisdiction of special nature—former decision not *res judicata* S 11 N 84
  - valuation of plaint increased, if and when *res judicata* S 11 N 80
- suit, meaning of S 2 (2) N 5; S 11 N 21
- suit refers to courts of first instance S 11 N 21
- supersession of decree in appeal or otherwise—effect of S 11 N 126
- title derived from party, nature of S 11 N 49
- transferor and transferee—transferee when claiming under transferor S 11 N 54
- two appeals tried together—appeal from one decision only if and when barred S 11 N 29
- two appellate decrees—appeal from one if barred S 11 N 29
- two mortgages in favour of same person—suit filed on one only—suit on the other, if barred S 11 N 40
- two suits tried together
  - separate judgments—appeal from one alone, if barred S 11 N 29
  - appeal from decision in one, if and when barred S 11 N 29

Restitution S 144

- AGAINST WHOM AVAILABLE S 144 N 11
  - auction-purchaser S 144 N 13
  - auction-purchaser under money decree or mortgage decree, no distinction S 144 N 13
  - decree-holder purchaser S 144 N 13
  - joint liability—claim against some only unsustainable S 144 N 11
  - surety S 144 N 14
  - third person, liability to S 144 N 15
  - transferee of decree in appeal S 144 N 11
  - trustee not personally liable S 144 N 16
- APPLICATION FOR S 144
  - court to which to be made S 144 N 17
- compensation in land acquisition cases S 144 N 24
- conditions necessary S 144 N 2
- execution sale—setting aside of—restitution on O 22 R 92 N 2
- extent of S 144 Nn 18, 21
- INHERENT POWER S 144 N 34
  - under S. 144—distinction S 144 N 34
  - order—variance or reversal of S 144 N 3
- INTEREST
  - consequent on Privy Council decision O 45 R 15 N 13

Restitution—INTEREST
not allowed where other party has not had use of money S 144 N 23
not claimed not allowed S 144 N 23
rate of S 144 N 23
should be granted S 144 N 23
JURISDICTION
pecuniary jurisdiction of court in S 144 N 27
revenue court, power of, to grant S 144 N 35
limitation S 144 Nn 30, 33
liability to make—assignee from decree-holder purchaser S 144 N 13
MESNE PROFITS
claimable not by a separate suit S 144 N 22
consequent on Privy Council decision O 45 R 15 N 12
is part of S 144 N 22
mode of estimating S 144 N 22
when can be set of S 144 N 22
MISCELLANEOUS PROCEEDINGS
application of S. 141 to S 144 N 30
order—reversal of—whether S. 144 applies S 144 N 3
mutual restitution—to be simultaneous S 144 N 21
nature of proceedings for—whether execution proceedings S 144 N 30
of property taken in execution—pending application for stay O 21 R 26 (2)
ORDER RELATING TO
appeal S 144 N 31
memo. of appeal, court-fee for S 144 Nn 30, 32
not falling within S. 144—whether decree S 144 N 31
order not within S. 144 whether open to revision S 144 N 36
PERSONS ENTITLED TO
auction-purchaser S 144 N 10
suit for refund of purchase money by S 144 N 10
non-parties to appeal, if can make S 144 N 8
party not in possession, not entitled S 144 N 9
representative of party—application by S 144 N 8
who may apply S 144 N 7
possession of property obtained otherwise than an execution—effect S 144 N 25
possession with receiver—effect S 144 N 9
PRINCIPLE OF S 144 N 2
restoration of *status quo ante* to be aimed at S 144 N 20
Privy Council decree, restitution, consequent on O 45 R 15 N 11
provision mandatory S 144 N 19
reversal of main decree—effect on dependent decrees S 144 N 6
SECURITY FOR S 144 N 28; S 145 (*a*)
in case of order for execution of decree appealed from O 41 R 6
principal alone—interest may yet be allowed S 144 N 28

Restitution
setting aside *ex parte* decree—effect of S 144 N 5
splitting up claim of—when *res judicata* S 144 N 26
SUIT FOR
is barred S 144 (2)
when barred S 144 (2)
uncertified payment of decretal amount—restitution of, on reversal of decree in appeal O 21 R 2 N 31
VARIATION OR REVERSAL OF DECREE
in Privy Council appeal—whether S. 144 applies S 144 N 4
manner of S 144 N 4
necessary S 144 N 3
otherwise than in appeal—applicability of S. 144 S 144 N 4
when discretionary—order outside scope of S. 144 S 144 N 19
Restitution of conjugal rights O 21 R 32
arbitration provisions, applicability of Sch II P 1 N 6
decree for—execution of O 21 R 32
discretion of court in executing decree for O 21 Rr 32, 33
periodical payments in execution of decree for O 21 R 33 (2), (3)
power of court to vary order for periodical payments O 21 R 33 (3)
Restoration
of appeal dismissed for default O 41 R 19
of suit dismissed O 9 R 4
to possession O 21 R 101
Revenue Court
application of C. P. Code to S 5
civil and revenue courts—return of plaint by one to another O 7 R 10 N 5
compromise of suit—provisions of Code as to—applicability of O 23 R 3 N 3
decree of—execution—injunction restraining O 39 R 1 N 11
definition of S 5
presentation of plaint in O 4 R 1 N 9
Revenue Jurisdiction Act
reference under—security for costs if may be required O 25 R 1 N 1
Review S 114 (Part VIII); O 47
adjournment order not rescindable O 17 R 1 N 9
APPLICATION FOR S 47 N 1
appeal filed pending—effect O 47 R 1 N 7
by person other than party appealing, if can make O 47 R 1 N 30
contents of O 47 R 3 N 2
court-fee O 47 R 1 N 29
differences of opinion being equal on review, application to be rejected O 47 R 6
dismissal for default—no appeal O 47 R 7 N 13
district judge to whom application made cannot transfer to additional judge O 47 R 5 N 1
form of O 47 R 3; Sch I App G
hearing of O 47 R 5

Review—APPLICATION FOR
- insufficiently stamped, not valid O 47 R 1 N 29
- limitation O 47 R 1 N 28; O 47 R 3 N 4
- maintainability
  - when appeal filed already O47 R 1 N 6
  - where appeal filed after application O 47 R 1 N 6
  - where appeal is withdrawn O 47 R 1 N 6
- order granting, if and when appealable O 47 R 7 N 4
- order refusing, if a "judgment" under Letters Patent O 47 R 7 N 10
- presentation of, how to be made O 47 R 3 N 2
- rejection of O 47 R 4 (1); O 47 R 6 (1)
- order not appealable O 47 R 7 N 3
- suit in *forma pauperis* O 47 R 1 N 29
- to whom O 47 R 2
- when granted O 47 R 4 (2)
- when lies O 47 R 1
- whether one of several parties against whom judgment sought to be reviewed was passed, can apply for review on behalf of all O 41 R 4 N 11

bar of certain applications for review O 47 R 9

death of party pending, effect O 47 R 4 N 8

DECREE PASSED ON
- appeal against, to Privy Council—when certificate may be granted O 47 R 7 N 4
- appeal, if lies O 47 R 7 N 14
- is a fresh decree O 47 R 1 N 4; R 8 N 3

decision of High Court on reference—no review O 46 R 3 N 1

dismissal for default—if and when can be reviewed O 47 R 1 N 24

EFFECT OF
- questions already decided not re-opened of necessity O 47 R 1 N 3
- re-hearing of suit becomes necessary O 47 R 1 N 4

ex parte decree—if and when can be reviewed O 47 R 1 N 24

final decree—order granting application may be challenged in appeal from O 47 R 7 (1)

general power of S 114 N 1

GROUNDS O 47 R 1
- availability of a piece of evidence if not proper O 47 R 1 N 13
- discovery of matter of law if and when a O 47 R 1 N 11
- discovery of new and important matter or evidence O 47 R 1 (1)
- discovery of new matter—want of knowledge or inability to produce to be shown O 47 R 1 N 13
- due diligence necessary to be proved O 47 R 1 N 12
- error of decision on merits not a valid O 47 R 1 N 17-A
- error on the face of the record
  - meaning of O 47 R 1 N 15
  - when a O 47 R 1 N 15

Review—GROUNDS
  - wrong exposition of the law is not O 47 R 1 N 15
- facts nullifying decree O 47 R 1 N 23
- fraud and undue influence O 47 R 1 N 23
- instances of, when review allowed for sufficient reason O 47 R 1 N 16-A
- instances of, when review not allowed for no sufficient reason O 47 R 1 N 16-A
- may be enough to extend time under S 5 of the Limitation Act O 47 R 1 N 12
- mistake on the face of the record when a O 47 R 1 N 15
- other remedy not availed of, if a O 47 R 1 N 2
- strict proof, meaning of O 47 Rr 1, 4 N 6
- subsequent events if a valid O 47 R 1 N 17
- "sufficient reason"—meaning of O 47 R 1 N 16

inherent power O 47 R 1 N 2

insolvency proceedings-power of court O 47 R 7 N 12

instances in which held permissible O 47 R 1 N 15

jurisdiction—want of—revision O 47 R 7 N 16

miscellaneous proceedings—applicability of O 47, R 1 to O 47 R 1 N 20

non-appealable decree or order O 47 R 1 N 8

none from order or review O 47 R 9

NOTICE TO OPPOSITE PARTY O 47 R 4 N 3
- on granting of application O 47 R 4

none on decree passed on O 47 R 9

objection to grant of O 47 R 7

LETTERS PATENT APPEALS S 117 N 4
- Bombay, Madras, Allahabad and Patna High Courts—section whether applies to S 114 N 1

order dismissing appeal summarily under O 41, R 11 whether reviewable O 41 R 11 N 13

order dismissing suit for failure of both parties to appear at hearing O 9 R 3 N 6

order dismissing suit for non-compliance with order for discovery O 11 R 21 N 4

order for—not a final order—not appealable to Privy Council O 47 R 8 N 3

order for stay of execution whether reviewable O 41 R 5 N 22

ORDER GRANTING
- appeal grounds—application being time barred O 47 R 7 N 8
- appeal—grounds of objection O 47 R 7 N 2
  - lies without steps being taken in regard to decree O 47 R 7 N 4
- effect on original decree O 47 R 8 N 3
- objection to, may be taken in appeal from final decree O 47 R 7 N 11
- second appeal, does not lie O 47 R 7 N 9
- suit of small cause nature—right of appeal O 47 R 7 N 4
- what questions may be gone into after O 47 R 8 N 2

order in appeal under S 104—whether lies from S 104 N 9

Review

- order on application for review, if can be reviewed O 47 R 9
- order rejecting—effect on original decree O 47 R 8 N 3
- order rejecting plaint O 7 R 11 N 13
- order rejecting—revision, if and when lies O 47 R 7 N 3
- procedure S 114 N 1; O 47 R 18 N 1
- reference by Small Cause Court O 47 R 1 N 9
- registry of application granted—and order for re-hearing O 47 R 8
- re-hearing of case—order for O 47 R 8
- re-hearing—Privy Council—practice O 47 R 1 N 31
- rejection of O 47 Rr 4, 6
  - not appealable O 47 R 7
- rejected on equal difference of opinion O 47 R 6
- relief which can be granted by O 47 R 1 N 26
- RIGHT OF
  - distinguished from amendment O 47 R 1 N 4
  - distinguished from appeal O 47 R 1 Nn 2, 3
  - in proceedings under other Acts—illustration of O 47 R 1 N 21
  - limits within which it can be claimed O 47 R 1 N 2
  - not barred by existence of right of appeal O 47 R 1 N 2
- rules relating to S 114; O 47
- SECOND APPEAL
  - dismissed summarily under O 41, R 11—order of dismissal whether reviewable on the ground of discovery of new and important matter of fact O 41 R 11 N 13
  - no review on facts after disposal of O 47 R 1 N 19
- second application for, if lies O 47 R 7 N 15
- Small Cause Court, powers of O 47 R 3 N 1
- where decree passed by two or more judges O 47 R 5
- WHO CAN O 47 R 5
  - commissioner O 47 R 1 N 27
  - court competent to entertain review O 47 R 2
  - judge absent on leave—officiating judge, if can review O 47 R 5 N 2
  - successor in office O 47 R 2 N 2
- WHO CAN APPLY
  - sanction to prosecute attorney granted to public prosecutor—leave to appeal granted to attorney—public prosecutor can apply for review O 47 R 1 N 5
  - legal representatives of parties if can O 47 R 3 N 3
  - minor party, if and when O 47 R 1 N 5
  - non-party if can apply O 47 R 1 N 5
  - person aggrieved—meaning of O 47 R 1 N 5

Revision S 115

- action taken or refused to be taken under O 41 R 33 O 41 R 33 N 18
- applicability of O 22 O 22
- award without intervention of court Sch 2 P 21 N 18

Revision

- by High Court through district court O 46 R 7
- "CASE"
  - application disputing right of next friend to act, whether is S 115 N 5
  - application for
    - leave to sue as pauper whether is one S 115 N 5
    - stay under S 110, C P Code whether is S 115 N 5
    - to restore suit dismissed for default, whether is S 115 N 5
  - interlocutory orders interference in revision—circumstances of S 115 N 5
  - interlocutory proceedings, meaning of S 115 Nn 4, 5
  - what are S 115 N 6
- cross objections in O 41 R 22 N 10
- death of party pending revision—impleadment of legal representative O 22 R 3 N 2
- decree on award when revisable Sch II P 16 Nn 3, 5, 6, 7, 9
- without hearing objections Sch II P 16 N 7
- discretion of court—exercise of jurisdiction—discretionary S 115 N 3
- finding of fact not affected S 115 N 2
- GROUNDS
  - circumstances for interference S 115 N 16
  - conditions for interference in S 115 N 2
  - error of law or fact S 115 N 13
  - error of procedure S 115 N 14
  - exercise of jurisdiction not vested in it by law S 115 N 10
  - "failure to exercise a jurisdiction so vested," meaning of S 115 N 11
  - illegality or irregularity instances not of S 115 N 12
  - "illegality or with material irregularity," meaning of S 115 N 12
  - "jurisdiction" in S 115, meaning of S 115 N 9
  - laches in application for, effect S 115 N 17
  - wrong decision of lower appellate court as to jurisdiction of trial court if S 115 N 15
- new plea in O 21 R 90 N 51
- provisions in S. 115 not exhaustive S 115 N 2
- (*against*) ORDERS
  - adding legal representative without deciding who is legal representative O 22 R 5 N 11
  - adding or refusing to add legal representative O 22 R 1 N 21
  - admitting additional evidence by lower court O 41 R 27 N 20
  - allowing or rejecting application for leave to sue or appeal as pauper O 33 R 5 N 9; O 44 R 1 N 4
  - (as to) application for security for restitution in case of execution of decree appealed from O 41 R 6 N 12
  - (on) application to set aside sale O 21 R 89 N 30
  - (in) appeal under S. 104 S 104 N 9

Revision—(*against*) ORDERS
challenged under S. 105 S 105 N 12
(on) claim and objection to attachment in execution S 115 N 3; O 21 R 58 N 25
compelling or refusing to compel production of documents O 11 R 14 N 8
directing abatement O 22 R 1 N 21
directing security for stay of execution O 21 R 29 N 6
disallowing time for payment of deficit court-fee S 149 N 14
discretionary and final S 115 N 20
(of) dismissal of appeal for appellant's default in paying cost of notice O 41 R 17 Nn 7, 16
(of)—dismissal or failure to dismiss suit for default O 9 Rr 2, 8 N 9
examination of witness on commission O 26 R 1 N 8
executing court postponing sale to enable decree amount to be raised O 21 R 83 N 11
granting or refusing to grant refund of purchase money on sale being set aside O 21 R 93 N 13
for issue of commission O 26 Rr 4, 5
impleading legal representatives of deceased plaintiffs O 22 R 3 N 25
joinder of parties in mortgage suit O 34 R 1 N 22
(that) legal representatives are not necessary parties to application to set aside *ex parte* decree O 22 R 4 N 28
local investigation, commission for O 26 R 9 N 10
misjoinder of causes of action O 2 R 3 N 17
permitting withdrawal of suit S 115 N 25
(for) personal attendance of witness, in case not justifying such order O 16 R 19 N 2
in proceedings for delivery of possession O 21 R 101 N 8
recording or refusing to record compromise O 23 R 3 N 32
refusing adjournment O 17 R 1 N 10
refusing application for summons to witness O 16 R 1 N 9
refusing to release property attached before judgment O 38 R 8 N 2
refusing to set aside award Sch II P 15 N 15
rejecting appeal summarily under O. 41 R. 11 O 41 R 11 N 15
rejecting application to restore suit dismissed for default of both parties in appearing on day of hearing or for plaintiff's failure to pay process fees O 9 R 4 N 9
rejecting plaint O 7 R 11 N 12
relating to service of summons O 5 R 18 N 4
(of) remand O 41 R 23 N 35
proclamation of sale, in respect of O 21 R 66 N 21
(for) restitution under inherent powers S 144 N 36
(for) restitution under S. 144 S 144 N 36

Revision—(*against*) ORDERS
restoring suit dismissed for default or refusing to do so O 9 R 9 N 13
returning plaint O 7 R 10 N 12
(in) revision, review of S 115 Nn 16, 32
(in) revision—appealability of S 115 N 32
sanctioning to prosecute S 115 N 30
separate trials under O. 1, R. 2 O 1 R 2 N 1
setting aside award for misconduct etc. if and when revisable Sch II P 15 N 15
setting aside or refusing to set aside
  abatement of suit O 22 R 9 N 15
  execution sale O 21 R 90 N 51
  ex parte decree O 9 R 13 N 30
  sale O 21 R 92 N 16
(for) substituted service O 5 R 20 N 9
temporary injunction O 39 R 1 N 21
withdrawal of suit O 23 R 1 N 41
under S. 73 S 115 N 22
under S. 148, revisable S 148 N 12
under Ss. 152, 153 S 115 N 21
under O. 1, R. 10 O 1 R 10 N 43
under O. 21, R. 2 O 21 R 2 N 33
under O. 21, Rr. 89, 90 S 115 N 24
under O. 33 S 115 N 26
under O. 40, R. 3 O 40 R 3 N 5
under O. 47 S 115 N 27

POWER
of Bombay High Court under S. 5, Regulation II of 1827 S 115 N 2
under Curator's Act S 115 N 29
of High Court to stay execution or proceedings in lower court pending application for revision O 41 R 5 N 21
under Guardians and Wards Act S 115 N 29
under other Acts S 115 N 29
under Provincial Small Cause Courts Act, S. 25 S 115 Nn 29, 31

RIGHT OF, WHEN BARRED
appeal to High Court is a bar to S 115 N 7
other remedy open, how far a bar S 115 Nn 3, 8

review without jurisdiction, effect O 47 R 7 N 16
security for costs—order for O 25 R 1 N 15
stay of proceedings pending decision in lunacy proceeding against defendant O 32 R 15 N 7

SUBORDINATE COURT
election judge under Madras Local Boards Act comes under S 115 N 6
failure to exercise jurisdiction, instances of S 115 N 11
instances of S 115 N 6
judge holding election inquiry under Madras District Municipalities Act, comes under S 115 N 6
meaning of S 115 N 6
person in administrative capacity not included S 115 N 6

suo motu S 115 N 3
superintendence—High Court's power of S 115 N 28

Revision
- when treated as appeal S 115 N 18

Right
- non-existent—suit if lies S 9 N 41
- of appeal not affected by new code S 154

Right to begin O 18 R 1
- appeal O 41 R 16
- and burden of proof O 18 R 3
- defendant—to begin suit in some cases O 18 R 1
- in case of admissions O 18 R 1 N 3
- meaning of O 18 R 1 N 1
- where burden of proving some of the issues lies on the other side O 18 R 3

Right to sue
- meaning of O 33 R 15 N 4
  - for purposes of O. 22 O 22 R 1 N 3
- SURVIVAL OF O 22 Rr 1, 3, 4
  - *See also* ABATEMENT
  - in personal actions O 22 R 1 N 5
  - in suit for personal office O 22 R 1 N 6

Royalty
- suit for—succession claims—frame of suit O 2 R 2 N 9

"Rules" Ss 121-131 (Part X)
- are part of the code S 121
- Code distinguished from Rules S 2 (1)
- defined S 2(18)
- delegation of judicial duties [S. 128, cl. (*i*)]—rules relating to S 128 N 5
- HIGH COURTS
  - can annul, add or alter Ss 122, 125-131
  - Chartered—power to make rules for proceedings in civil cases under L P Cl 37
  - power of S 122 N 4
    - to frame, for subordinate courts Charter Act S 15
    - to make Ss 122; 125-131
  - rules subject to sanction S 126 N 2; S 127
- of procedure Sch I
- for original side of Chartered High courts, power to make S 129
- originating summons—relating to S 128 N 4
- power of Chief Courts of Punjab and Lower Burma to frame Ss 122; 128
- power of Courts other than Chartered High Courts to frame S 130
- publication of Ss 127, 131
- relating to Provincial Small Cause Courts O 50 R 1
- subject-matter of S 128
- summary procedure—nature of rules for S 128 N 3
- under the old Code, how far continued under the new Code S 157 Notes

Rule Committee S 123
- constitution of S 123
- functions of S 124
- report to be made by S 124

Sale
- adjournment and stoppage of O 21 R 69
- agricultural produce O 21 R 74
  - when exempted S 61

Sale
- appeal from order setting aside or refusing to set aside sale of immovable property O 43 R 1 (j)
- attached property, conduct of sale O 21 R 65
  - power of court to order sale of O 21 R 64
- attachment before judgment no bar to applying for sale, O 38 R 10
- by collector O 21 R 70; Sch III P 7
  - how to be conducted Sch III P 10
- certificate of
  - *See* EXECUTION O 21 R 94
- confirmation of sale of immovable property under attachment O 21 R 92
- co-owner's bid to prevail O 21 R 77
- courts by which sales of immovable property may be ordered O 21 R 82
- decree-holder
  - leave of court necessary to bid O 21 R 72
  - purchase by—setting aside sale O 21 R 72 (3)
- decrees, preliminary and final for sale O 34 Rr 4, 5
- default in payment of purchase money— O 21 R 86
- defaulting witness—sale of property of O 16 R 12
- delivery of
  - movable property, debts and shares, sold in execution O 21 R 79
  - property in occupancy of judgment-debtor O 21 R 95
  - property in occupancy of tenants O 21 R 96
  - property sold O 21 Rr 79, 80, 81
- deposit
  - by purchaser—at sale of immovable property under attachment O 21 R 84
  - of decretal amount, and setting aside sale of immovable property O 21 R 89
- exemption from—under rent decree S 60
- for disobeying summons S 32 (b); O 16 R 12
- fraud in publishing or conducting sale—setting aside for O 21 R 90
- fresh proclamation on resale of immovable property in default of payment in time O 21 R 87
- growing crops, special provisions relating to O 21 R 75
- IN EXECUTION
  - how conducted, O 21 R 65
  - vesting of property, S 65
  - when to become absolute O 21 R 77
- in suit for foreclosure O 43 R 4 (3)
- irregularity in publishing or conducting effect of O 21 R 90
- irregularity in sale on movable property not to vitiate sale, but person injured may sue, O 21 R 78
- leave to bid, to decree holder O 21 R 72
- MORTGAGE SUITS
  - application of sale proceeds O 34 R 13
  - charge, provisions respecting redemption and sale apply to, O 34 R 15
  - final decree for sale O 34 R 5
  - foreclosure suit, power to decree sale in O 34 R 4 (3)
  - interest, where decree is for sale of mortgaged property O 34 R 11
  - parties to suits for O 34 R 1
  - personal decree against mortgagor for balance due after O 34 R 6

Sale—MORTGAGE
preliminary decree for sale O 34 R 4
sale of property subject to prior mortgage O 34 R 12
when mortgaged property not to be sold without suit for sale O 34 R 14
MOVABLE PROPERTY
irregularity in sale does not vitiate O 21 R 78
subject to speedy decay, attachment before judgment—immediate sale O 39 R 6
subject to speedy decay—attachment in execution—immediate sale O 21 R 43
(of) negotiable instruments, O 21 R 76
transfer of O 21 R 80
of attached property O 21 Rr 64-103
of growing crops O 21 R 75
immovable property under attachment—co-owners bid entitled to preference, O 21 R 88
of land—stay of S 72
of movable property under attachment—co-owner's bid entitled to preference O 21 R 77 (3)
(of) share in corporation O 21 R 76
officers not to bid for or purchase. O 21 R 73
order confirming or setting aside O 21 R 92
partner's interest in property, O 21 R 49 (2)
POSTPONEMENT OF SALE
for judgment-debtor to raise decretal amount, O 21 R 83
of immovable property O 21 R 83
pending investigation of claims or objections, O 21 R 58
pending investigation into objections to attachment O 21 R 58 (2)
PROCEEDS
application, of S 73
distribution of, S 73
to be paid to decree-holder O 21 R 64
wrongly paid, refund of, S 73
PROCLAMATION O 21 R 66
mode of making, O 21 R 67
PROPERTY
before judgment O 39 R 6
liable to sale in execution S 60
not liable to sale in execution S 60 (*a*) to (*p*)
subject to decay O 21 R 43
subject to prior mortgage, O 34 R 12
rateable distribution of proceeds of sale S 73
RESALE,
defaulting purchaser, answerable for loss on, O 21 R 71
on default, in payment of deposit by purchaser O 21 R 84
return of purchase money, when sale set aside O 21 R 93
rules regarding its conduct S 67
SETTING ASIDE
judgment-debtor having no interest in property sold O 21 R 91
on deposit of decretal amount O 21 Rr 89, 92
on ground of irregularity or fraud O 21 R 90
stay of sale, pending appeal O 41 R 6 (2)
where execution transferred to collector S 72

Sale—SUIT FOR
suit for
on mortgage or charge, S 16 (*c*)
when property cannot be brought to sale under money decree O 34 R 14
time for payment in full, of purchase money O 21 R 85
time of sale, in execution O 21 R 68
vesting of property sold in purchaser, date of S 65
vesting order in case of movable property not specially mentioned O 21 R 81
when sale becomes absolute O 21 R 92

Salvage
assessors in case of S 140

Savings
from the code S 4

Scheduled Districts
enumeration of S 1 N 2

Scheme
public or religious charities, settling schemes in suits relating to S 92
settlement of, S 92

Scheme suit
See TRUST

Second Appeal
See also APPEAL—SECOND APPEAL Ss 100-103; O 42
appealable orders
no second appeal S 104 N 9
award—when lies from decree on Sch II P 16 N 8
bar to—by failure to appeal to lower appellate court O 41 R 33 N 16
cross objection O 41 R 22 N 7
discretionary matters—admitting or refusing to admit appeals after limitation—interference with discretion of lower apellate court O 41 R 3 N 7
FACT, QUESTION OF
power of High Court to decide issue of fact S 103
undetermined issue of fact, when may be determined in second appeal S 103
"waiver" whether question of fact O 21 R 90 N 41
GROUNDS FOR Ss 100, 101
defect in procedure S 100
law, issue of, when not determined S 100
law, where decision is contrary to, S 100
lower appellate court's judgment not complying with prescribed requirements O 41 R 31 Nn 11, 12
procedure, substantial error or defect in, S 100
question of fact Ss 100, 103
question of law S 100
usage having the force of law S 100
High Court, lies only to S 100
parties—addition of O 41 R 20 N 12
Privy Council, no appeal lies to, when no second appeal lies S 111
procedure
applicable to S 108; O 42 R 1
trial court, judgment of, copy of, whether necessary O 41 R 1 N

Second Appeal

- rejection—summary rejection under O 41 R 11 O 41 R 11 N 16
- REMAND
  - of issues in second appeal O 41 R 25 N 11
  - of issues—findings of lower appellate court—whether can be questioned O 41 R 26 N 5
  - power of O 41 R 23 N 20
- review, decree in second appeal—no review on questions of fact O 47 R 1 N 19
- rules as to O 42 R 1
- SMALL CAUSE NATURE, SUIT OF
  - arbitration in
    - whether second appeal lies S 102 N 1
  - examples of S 102 N 20
  - execution proceedings in S 102 N 4
  - instances S 102 N 2
  - no second appeal S 102
  - order of remand in S 102 N 18
  - order of review in S 102 N 19
  - suit for
    - contribution S 102 N 6
    - damages, S 102 N 7
    - declaration S 102 N 15
    - house rent and suit for other rents—distinction for second appeal S 102 N 13
    - maintenance S 102 N 8
    - mesne profits—when open to second appeal S 102 N 10
    - money S 102 N 11
    - relating to immovable property S 102 N 12
    - relating to marriage, S 102 N 9
    - relating to trust S 102 N 17
    - specific performance of contract S 102 N 16
    - suit transferred to regular side—title S 102 N 14
    - whether second appeal lies S 102 N 4
  - when second appeal barred S 102
- WHETHER LIES
  - application to set aside sale, order on O 21 R 90 N 44
  - none except as provided in Ss 100, 101
  - ORDER
    - admitting or rejecting additional evidence O 41 R 27 N 18
    - disallowing cross objection of respondent O 41 R 22 N 23
    - for issue of commission for local investigation O 26 R 9 N 9
    - on application for deficiency on re-sale in execution O 21 R 71 N 16
    - punishing disobedience of temporary injunction O 39 R 2 N 8
    - rejecting memorandum of appeal for defect therein O 41 R 3 N 5
    - returning memo of appeal for presentation to proper Court O 41 R 3 N 7
    - returning plaint O 7 R 10 N 11
    - setting aside or refusing to set aside sale in execution O 21 R 92 N 13
    - sale in execution, on depositing decree amount O 21 R 89 N 29
  - refusal to admit appeal O 41 R 9 N 3

Second Appeal—WHETHER LIES

- refusal to take action under O 41 R 33 O 41 R 33 N 16
- who can file—party in whose favour decree might have been passed by lower appellate court O 41 R 33 N 16

Secretary of State

- execution of decree against S 82
- pleadings, signature and verification of O 27 R 1
- process against, agent to receive O 27 R 4
- security from, pending appeal, not required O 41 R 7
- suit by or against O 27
  - *See also* GOVERNMENT
  - notice before institution of suit S 80
  - plaint in O 27 R 3

Security

- *See also* SURETY
- APPEAL TO PRIVY COUNCIL
  - appellant, security from, pending appeal to Privy Council O 45 R 13 (2) (*c*)
  - respondant, security from, pending appeal to Privy Council O 45 R 13 (2) (*b*)
- attachment before judgment, removal of, on furnishing of security O 38 R 9
- by guardian or next friend of minor party—for withdrawal of money from court on behalf of minor—enforcement of security O 32 R 6 N 3
- enforcement of decree—surety for the performance of S 145 (*a*)
- FOR APPEARANCE S 55
  - application by surety to be discharged—procedure O 38 R 3
  - of defendant, form of— O 38 R 2
    - when may be called upon to give security O 38 R 2
  - discharge of surety O 38 R 3
  - extent of surety's liability O 38 R 2 N 5
  - failure to furnish security, effect of O 38 R 4
  - when to be called upon S 38 Rr 1, 2
  - when defendant may be called upon to give security O 38 R 1
- FOR COSTS O 25
  - appellant, when to give O 41 R 10
  - defendant, if can be ordered to give security O 25 R 1 N 13
  - enforcement of security bond O 25 R 1 N 18
  - failure to furnish security O 25 R 2
  - from plaintiff O 25 R 1
  - grounds for demanding, in appeal O 41 R 10 N 6
  - in appeal, amount of security O 41 R 10 N 9
  - in case of residents outside British India O 25 R 1
  - insolvency of plaintiff, whether ground for demanding security O 22 R 8 N 13
  - of appeal,
    - appellate court — power of, to order O 41 R 10
    - consequence of not furnishing, O 41 R 10 (2)
    - delay in applying for order for security O 41 R 10 N 7
    - may be for costs of appeal, or of original suit, or of both O 41 R 10
    - registration of security bond O 41 R 10 N 15

Security—FOR COSTS—of appeal
- stamp for security bond O 41 R 10 N 15
- of appeal to Privy Council, O 45 Rr 7-9
  - admission of appeal on furnishing security O 45 R 8
  - appellant to furnish security for costs of respondent O 45 R 7 (1)
  - certificate, security on grant of O 45 R 7 (1) (*a*)
  - failure to give further security O 45 R 11
  - further security before sending of record to Privy Council O 45 R 10
  - further security, pending O 45 R 14
  - revocation of acceptance of security O 45 R 9
- of suit O 25
  - appeal from order refusing to set aside order of dismissal of suit for failure to give O 43 R 1 (*n*)
  - British India, residents out-side O 25 R 1
  - failure to furnish O 25 R 2
    - effect of O 25 R 2
  - insolvency of plaintiff, security for costs to be given on, O 22 R 8
  - next-friend retiring, to give security for costs already incurred, O 32 R 8 (1)
  - official assignee failure of, to give security O 22 R 8 (2)
  - setting aside of order of dismissal for failure to furnish, O 25 R 2 (2)
  - suit for payment of money, O 25 R 1
  - when taken from plaintiff O 25 R 1
  - woman plaintiff O 25 R 1
- stridhanam — suit for—security if may be required O 25 R 1 N 12
- surety—liability of—failure to proceed against principal debtor O 25 R 1 N 17
- whether may be required from pauper plaintiff O 33 R 1 N 16
- for due performance of any decree that may be passed against defendant—discharge of surety O 38 R 3 N 1
- for release of judgment-debtor—pending application for arrest O 21 R 40
- FOR RESTITUTION
  - in case of order for execution of decree under appeal—discharge of surety O 41 R 6 N 4
  - respondent, security from, where execution allowed pending appeal O 41 R 6
- FOR STAY O 21 R 26 (3)
  - appellant, security from, where execution stayed pending appeal O 41 R 5
  - of execution, O 21 R 26 (3)
    - by appellate court O 41 R 5
    - in view of intended appeal O 41 R 5
    - on appeal, O 41 R 5 (3)
- from defendant,
  - for appearance S 94 (*a*); O 38 Rr 1, 2
  - for production of property O 38 R 5; S 94 (*b*)
- from Government or public officer—not to be taken O 41 R 7

Security
- from guardian of minor—for property received under decree for minor O 32 R 6 (3)
- guardian *ad-litem*, when required from O 32 R 6 (2)
- in case of order for payment by instalments O 20 R 11 N 11
- judgment-debtor, when required from O 21 R 26 (3)
- next-friend, when required from O 32 R 6 (2)
- to produce attached property O 21 R 43 N 6
- production of property, O 38 R 5
  - extent of surety's liability— O 38 R 5 N 15
  - extension of time O 38 R 5 N 16
  - failure to give, effect—attachment before judgment O 38 R 6
  - when defendant may be required to furnish security O 38 R 5
- receiver, security from O 40 R 3 (*a*)
- RESTITUTION OF PROPERTY
  - pending application for stay of execution O 21 R 26
  - security for, in case of order for execution pending appeal from decree—when security cannot be demanded O 41 R 7
- security bond—applicability of O 34 R 14
  O 34 R 14 N 4
- Secretary of State, when required from O 41 R 7
- surety—discharge of—maintainability of suit for O 38 R 3 N 1
  - enforcement—of surety's liability S 145
  - extent of, for defendant's appearance O 38 R 2 N 5
  - failure to proceed against principal debtor O 25 R 1 N 17
- summary suit, from defendant on granting leave to defend O 37 R 3 (2)
- when may be demanded—under the code—instances O 25 R 1 N 16
- where order for execution is appealed from O 41 R 8
- witness, security from, for his attendance O 16 R 16 (2)

Service
- *See also* SUMMONS—SERVICE
- of orders, notices and other documents O 48 R 2
- OF PROCESS
  - issued under the code O 48 R 1
  - of Chartered High Courts O 49 R 1
  - on pleader O 3 R 5
  - recognized agent O 3 R 3
  - on special agent, to accept service O 3 R 6
  - on persons authorized by military men to sue or defend for them O 28 R 3

Serving officer
- examination of O 5 R 19

Set-off
- allowed by plaintiff—to be mentioned in plaint O 7 R 1 (*h*)
- CLAIM OF
  - by defendant O 8 R 6
    - omission to—effect of O 8 R 6 N 13
  - lien of pleader for costs O 8 R 6 (2)
  - new grounds of defence arising after O 8 R 8

Set off—CLAIM OF
  - omission of part of claim—effect of O 2 R 2 N 28
  - particulars of, to be given in written statement O 8 R 6
  - withdrawal of—effect—bar of suit to enforce claim withdrawn O 23 R 1 N 9
  - written statement in answer to a claim of set-off O 8 R 6 (3)
- counter claim—difference between O 8 R 6 N 15
- cross claims under same decree O 21 R 19
- cross-decrees O 21 R 18
  - when may be set-off against each other O 21 R 18
- decree allowing—appeal from O 20 R 19 (2)
- effect O 8 R 6 (2)
- equitable set-off O 8 R 6 N 5
  - decree giving effect to O 20 R 19 N 4
- execution—garnishee,—cross debt, O 21 R 46 N 8
- OF COSTS O 20 R 6 N 8
  - against purchase money under pre-emption decree O 20 R 14 N 14
  - award to mortgagor in mortgage suit against mortgage money O 34 R 7 N 6
  - Court may direct O 20 R 6 (3)
- separate grounds, founded on O 8 R 7
- WHEN ALLOWED O 8 R 6
  - decree-holder purchaser, right of, to set-off purchase money O 21 R 72; O 21 R 85
  - jurisdiction, pecuniary limits of, not to exceed O 8 R 6 (1)

Share
- sale of in execution and bid of co-sharer O 21 R 77 (3), 88
- in movables, attachment of O 21 R 47
- share in immovable property, how delivered in execution O 21 R 35 (2)

Shares in a Corporation
- attachment
  - liability of S 60
  - mode of O 21 R 46 (1) (*b*)
- definition of S 2 (19)
- delivery of in execution O 21 R 79 (3)
- meaning of S 2 (19)
- sale of, in execution O 21 R 76
- transfer of, in execution O 21 R 80

Shebait
- whether may sue as pauper O 33 R 1 N 13

Sheristadar
- power of, to sign process for execution O 21 R 24 N 5

Ship
- master of—is agent of owner or charterer for service of summons O 5 R 13 (2)

Shop-book
- evidence, receiving in, copies of entries in O 13 R 5
- production of O 7 R 17

Signed
- meaning of, includes "stamped" S 2 (20)

Sikh Gurdwara Act (VIII of 1925)
- cases under—applicability of O 6 R 17 O 6 R 17 N 1

Simultaneous execution
- *See* EXECUTION

Small Cause Courts
- applicability of Code to Ss 7, 8
- decree of
  - sale under—setting aside appeal O 21 R 89 N 29
  - transfer for execution O 21 R 6 N 5
    - limitation O 21 R 9 N 3
- doubt as to jurisiction—reference to High Court O 46 R 6
- evidence—mode of taking O 18 R 5 N 1
- EXECUTION
  - transfer of certain decrees for execution to O 21 R 3
- *ex parte* decree—provisions as to, in Code—applicability of O 9 R 13 Nn 4, 5
- judgment of O 20 R 4 (1)
- jurisdiction
  - return of plaint to be presented to Civil Court—power of Civil Court to return again the plaint O 7 R 10 N 11
- small cause suit tried as ordinary suit—effect S 102 N 3
- POWERS OF
  - attachment before judgment O 38 R 13
  - attachment, of immovable property of witness O 16 R 10, Pro
  - power of, to allow withdrawal of suit O 23 R 1 N 38
  - review—*See* REVIEW
  - sale of immovable property in execution of decree, O 21 R 82
  - to order sale of immovable property. in execution O 21 R 82
  - to return plaint O 7 R 10 N 4
- PRESIDENCY SMALL CAUSE COURT S 8
  - applicability of Code to O 51 R 1
  - execution—power to direct removal or obstruction to possession O 21 R 98 N 2
- procedure in-summons in small cause suits, to be for final disposal O 5 R 5 Pro
- Provincial Small Cause Courts
  - what provisions of Code, not applicable to O 50 R 1
  - reference to High Court in regard to jurisdiction of O 46 Rr 6, 7
- summary procedure on negotiable instrument, applicability of O 37 R 1 N 3

Society
- *See* COMPANY

Soldier
- service of summons on O 5 R 28
- suit by or against—procedure O 28

Sovereign Prince or Ruling Chief
- appeal from decree against—death of—appeal if abates S 86 N 11
- recognized agent—appointed under S 85, powers of S 85 N 3
- political agent appointed by Government—if recognized under S 85 S 85 N 4
- SUIT AGAINST
  - by tenant of immovable property—consent of Governor-General in Council, if necessary S 86 N 6

Sovereign Prince or Ruling Chief—SUIT AGAINST
- Governor-General in Council, in what cases can give consent S 86
  - validity of—power of court to enquire into S 86 N 9
  - want of, effect on suit S 86 N 10
  - waiver of objection to want of S 86 N 7
- personal privilege S 86 N 2
- suit by or against
- appoinment by government of persons to prosecute or defend S 85
- may be in name of state S 87
- set off, defence by way of—consent if necessary S 86 N 8
- when may be sued S 86
- who are S 85 N 2

Special case O 36
- agreement to be filed and registered as suit O 36 R 3
- agreement to state case for Court's opinion O 36 R 1
  - procedure on O 36 Rr 1-5
- (by) arbitrator or umpire, statement of, Sch II P 11
- opinion of Court, power to state case for S 90; O 36 R 1
- parties in case stated are subject to court's jurisdiction O 36 R 4
- settled by consent—re-opening of S 90 N 2
- statement of, for decision of court—by agreement of parties—hearing and disposal of case O 36 R 5
- value of subject-matter to be stated in certain cases O 36 R 2

Special Law
- procedure in appeals from orders under S 108

Special proceedings Ss 89-93 Part V

Specific performance
- execution of decree for, O 21 R 32
- mode of enforcing decree for
  - ordinary O 21 R 32 (1)
  - special O 21 R 32 (5)
- suit for—parties to O 1 R 10 Nn 20, 24
- suit for, and possession—splitting of reliefs O 2 R 2 N 15
- suit for—splitting of reliefs O 2 R 2 N 19

Specific Relief
- suit for—if of civil nature S 9 N 21

Specific Relief Act
- applicability of—to dispossession in execution S. 9 O 21 R 95 N 1
- exclusion of certain words in S 21 of, Sch II P 22
- provisions—applicability to arbitration provisions Sch 2 P 22 and P 18 N 1

Stamp
- deficiency of court-fees, power to make S 149
- for affidavit O 19 R 1 N 2
- for compromise decree— O 23 R 3 N 26
- for final decree in partition suit O 20 R 18 N 8
- for partition decree O 26 R 14 N 10
- plaint, where insufficiently stamped O 7 R 11 (*c*)

State
- foreign state—discovery of documents when foreign state or Sovereign is party to suit O 11 R 13 N 18
- suits by foreign S 84

Stay
- appeal does not operate as stay of proceedings under decree O 41 R 5
- (of) execution O 21 Rr 26-29
  - before appeal is preferred, or pending appeal O 41 R 5
  - by appellate Court or by court which passed decree O 41 R 5
  - by court
    - pending, appeal to Privy Council O 45 R 13 (2) (*c*)
    - to which decree is sent for execution O 21 Rr 26-28
    - which passed the decree O 41 R 5 (2)
  - pending cross suit O 21 R 29
  - pending suit between decree-holder and judgment-debtor O 21 R 29
  - pending Privy Council appeal O 45 R 13 (2) (*c*) (*e*)
  - pending reference to High Court O 46 R 2
  - security
    - for restitution where stay refused O 41 R 6
    - where order for stay made O 41 R 5 (3) (*c*)
  - summary suit—decree in O 37 R 4
  - to which court application to be made O 21 R 26
- of proceedings,
  - on reference to High Court, O 46 R 2
  - on removal of next friend O 32 R 10 (1)
  - power of appellate court to S 107 N 18
- of public sale of land, S 72
- of sale of immovable property, pending appeal O 41 R 6 (2)
- (of) suit, S 10
  - cross suit in interpleader suits O 35 R 3
  - in firm name, where, names of partners not disclosed O 30 R 2 (2)
  - interpleader suit—stay of suit brought against plaintiff O 35 R 3
  - on agreement to refer to arbitration Sch II P 18
  - pending disposal of previously instituted suit S 10

Subordinate Courts
- language of S 137
- transfer of execution of decree to O 21 R 8

Subordination
- of courts S 3

Succession Act
- legal representative, and O 22 R 4 N 13

Succession Certificate
- when necessary—mortgage suit—personal decree against mortgagor O 34 R 6 N 18
- whether necessary in suit for sale on mortgage O 34 R 4 N 13

Suits
- abatement of O 22
  - *See also* ABATEMENT
- adjustment of O 23 R 3
- BAR OF—*See also* BAR OF SUIT
  - by Criminal Procedure Code, S 9 N 52
  - election of alternative remedy S 9 N 64
  - express S 9 N 50
  - implied S [illegible] 55
  - general remedy of suit—bar by special remedy S 9 N 62

Suits—BAR OF
- illegal and immoral custom, suit based on S 9 N 58
- omission to include part of claim or relief to which plaintiff entitled O 2 R 2
- public policy, on the ground of S 9 N 58
- suits which are not of a civil nature S 9
- summary and concurrent remedy, if bars S 9 N 63
- under other Acts S 9 N 54
- voluntary payments—not based on agreement or prescription, suit for—if lies S 9 N 49

BAR TO FURTHER S 12
- fresh suit after withdrawal of previous one O 23 R 1
- interest subsequent to decree, no separate suit for S 34
- no fresh suit when suit abates or is dismissed under O 22 R 9

barrister, if can sue for fees S 9 N 59
between co-partners O 30 R 9
by or against
- alien enemy S 83
- corporations, O 29
- firms O 30
- foreign states S 84
- government, S 79; O 27
- person carrying on business in name other than his own—procedure O 30 R 10
- public officer S 79; O 27
- Ruling Princes, Chiefs, Ambassadors and Envoys S 86
- Secretary of State S 80
- trustee, administrator or executor O 31

claim suit O 21 R 63
commencement of O 4 R 1
compromise of, O 23 R 3
conduct of O 1 R 11
(s) consolidation of O 2 R 6 N 4
- (s) on appeal to Privy Council O 45 R 4

contract or conveyance or decree obtained by fraud—suit to set aside S 9 N 61
creation of interest, during suit S 22 R 10
cross-suits—decrees in execution O 21 R 18
dead person, suit against—maintainability of S 27 N 1
declaration, suit for—temporary injunction whether may be issued O 39 R 1 N 15
devolution of interest pending suit
- assignee's failure to continue O 22 R 8 (2)
- interest—meaning— O 22 R 10 N 5
- suit—procedure O 22 R 10

DISMISSAL OF
- for being filed on behalf of a minor without a next friend O 32 R 2
- for default
  - after the evidence has been recorded O 9 R 8 N 3
  - effect of O 9 R 4; O 9 R 8 N 8; O 9 R 9
  - restoration of suit O 9 R 4
  - setting aside O 9 R 9
  - when justified—instances— O 9 R 8 N 3
- for failure
  - of both parties to appear when suit is called on for hearing O 9 R 3 N 1
  - of party to appear personally despite court's order O 10 R 4
  - of plaintiff

Suits—DISMISSAL OF
    - to appear at hearing, when defendant appears O 9 R 8
      - to apply for fresh summons on return of previous one unserved O 9 R 5
    - to furnish correct address of defendant O 9 R 2 N 1
    - to give security for costs ordered O 25 R 2
    - to pay expenses of commission O 26 R 15 N 1
    - to pay process fees
      - effect of O 9 R 4
      - restoration of suit O 9 R 4
- for non-compliance with order of discovery or inspection O 11 R 21
- for non-payment of commissioner's fee O 26 R 11 N 5
- for non-service of summons due to plaintiff's failure to pay costs O 9 R 2
  - restoration O 9 R 4
- setting aside—of dismissal, where dismissal is for failure to furnish security for costs ordered O 25 R 2
- under O 22,
- effect O 22 R 9
  - legal representative can apply to set aside order O 22 R 9
  - no fresh suit on same cause of action lies O 22 R 9
- where neither party appears O 9 R 3
- where plaintiff fails to pay costs of summons O 9 R 2
- with liberty to bring fresh suit O 23 R 1 N 29

DISPOSAL OF
- at first hearing O 15
- due to failure to produce evidence O 15 R 4
- where defendants not at issue with plaintiff O 15 Rr 1, 2
- where parties at issue, O 15 R 3

for foreclosure, decrees preliminary and final O 34 Rr 2, 3
for recovery of wife, is for restitution of conjugal rights O 21 R 32 N 4

FRAME OF O 2
- arrears of rent, joinder of claim for, with claim for land O 2 R 4
- foreclosure, suit for and joinder of claim for possession O 2 R 4
- joinder of causes of action O 2 R 3
- joint promisors—separate suit — if maintainable against O 2 R 2 N 21
- jurisdiction, where several causes of action are united O 2 R 3
- land, suit for recovery of, and joinder of claims O 2 R 4
- mesne profits, joinder of claim for, with suit for land O 2 R 4
- omission to sue for one of several reliefs O 2 R 2
- power of Court to order separate trials O 2 R 6
- redemption, suit for, and joinder of claim for possession, O 2 R 4
- reliefs O 2 R 2
- relinquishment of part of claim O 2 R 2
- separate trials of causes of action O 2 R 6

Suits—FRAME OF
  successive, claims arising under same obligation O 2 R 2
  suit by or against executor, administrator or heir, O 2 R 5
  suit for immovable property—joinder of causes of action O 2 R 4
  to be framed with a view to final decision O 2 R 1
  suit to include whole claim O 2 R 1 N 3; O 2 R 2
    maintenance suit O 2 R 1 N 3
    mortgage suit O 2 R 1 N 3
    partition suit O 2 R1 N 3
    partnership suit, O 2 R 1N 3
    pre-emption suit O 2 R 1 N 3
    redemption suit O 2 R 1 N 3
hearing of O 18
party beginning, when to reply O 18 R 2 (3)
how commenced O 4 R 1
in general Ss 9-35 (Part 1)
INSTITUTION OF S 26; O 4
  duly " instituted—meaning of S 27 N 1
  plaint returned for presentation to competent Court—suit when instituted S 27 N 1
  priority of—two suits instituted on the same day presumption as to priority of institution S 26 N 2
inter pleader S 88
jurisdiction—institution of suit in Court of lower grade than one competent to try it, effect S 15 N 3
lost negotiable instrument, suit on O 7 R 16
lunatics, by or against, procedure O 32 R 15
meaning of L P Cl 13 N 2
  appeal included in suit in S 10 S 10 N 7
  execution proceedings when may be treated as suit, S 47
  proceeding is not suit under S 10 S 10 N 7
mesne profits, for—amount sued for statement of, in plaint O 7 R 2
military men, suit by or against O 28
minors and lunatics, O 32
MINOR
  minor plaintiff or co-plaintiff on majority, may repudiate suit O 32 Rr 13, 14
  suit against—when instituted S 26 N 2
  suit by or against O 32
  suit on behalf of without next friend O 32 R 2
miscellaneous proceedings—proceedings in S 141, principle of S 10 applicable S 10 N 7
money for recovery of—amount sued for, statement of, in plaint O 7 R 2
mortgages, suit on—parties to O 34 R 1
native states—judgment of—suit on S 44 N 4
negotiable instruments
  suit on—ordinary procedure to apply O 37 R 7
  summary suit on O 37
of civil nature S 9
on lost negotiable instrument O 7 R 16
parties to O 1
  See also PARTIES
paupers, O 33
person carrying on business in another name, suit against O 30 R 10
place of suing Ss 16-21

Suits
plaint, necessity of S 2 (2) N 5
possession of property to establish right to O 21 R 103
by Princes and Chiefs, S 87
procedure of, applies to miscellanous proceedings S 141
public, suit on behalf of—parties to O 1 R 8 N 3
public nuisances,—suit relating to S 91
rent suit—withdrawal of O 23 R 1 N 4
Register of O 4 R 2
  form of O 4 R 2 N 2
representative character, by plaintiff in a O 7 R 4
representative suit—
  abatement—legal representative, who is O 22 R 3 N 10
  compromise O 1 R 8 N 23
  concise statement of claim—contents of O 7 R 9
  decree in O 1 R 8 N 21
  decree in—who may apply for execution O 21 R 10 N 2
  one defendant may be sued on behalf of all having common interest O 1 R 8
  plaint in—contents of O 7 R 4
  parties—*See* PARTIES
  suit by or against company O 29 R 1 N 3
  survival of right on death of parties O 22 R 1 N 13
  title of suit O 1 R 8 N 17; O 7 R 4 N 14
suit relating to public charities, S 92
sale in execution—suit to set aside O 21 R 92
separate suit,—power of court to order, O 1 R 2; O 2 R 6
STAY OF
  and *res judicata*, distinction between S 10 N 2
  concurrent jurisdiction necessary S 10 N 11
  cross suits, applicability of the principle S 10 N 8
  decree in contravention, not a nullity S 10 N 13
  essential conditions of S 10 N 2
  inherent power S 151 N 3
  interlocutory orders, not barred S 10 N 12
  jurisdiction of
    court does not refer to territorial jurisdiction S 10 N 9
    first Court to grant relief in both suits necessary S 10 N 11
  no discretion when conditions are satisfied S 10 N 2
  on interpleader suit, filed by the defendant regarding subject matter of suit O 35 R 3
  pendency of previous suit necessary S 10 N 5
  power to stay, independent of S 10, S 10 N 3
  revision S 10 N 15
  same parties—all parties on one side need not be parties in other suit S 10 N 9
  same relief, not necessary S 10 N 4
  S 10 bars trial, not institution S 10 N 3
  subject matter in issue *i e* subject matter must be same S 10 N 4
  substantial identity of parties only necessary S 10 N 9
  suit in foreign Court
    no bar S 10 N 6
    power of High Court to stay S 10 N 6

Suits—STAY OF

- subject-matter of, detention, preservation and inspection O 39 R 7
  - immediate possession to be given O 39 R 9
  - to be deposited in Court O 39 R 10
  - preservation of, Courts power to pass interlocutory order for O 39 R 7
- suit for land or other immovable property, meaning of L P Cl 12 N 3
- suit for money—meaning of, for purposes of security for costs O 25 R 1 N 12
- summary suit on negotiable instruments O 37
- to be instituted in Court of lowest grade S 15
- to establish right to possession O 21 R 103
- TRANSFER OF Ss 22-25
  - application for
    - procedure after S 24
  - to which Court to be made S 23
  - by Governor-General S 25
  - evidence taken prior to transfer O 18 R 15
  - re-transfer—of suit, appeal or other proceedings from one Court to another S 24
- transferred suit, evidence in O 18 R 15 (2)
- trial—power of Court to order separate O 1 R 2; O 2 R 6
- WITHDRAWAL AND ADJUSTMENT OF O 23
  - by guardian or next friend on behalf of minor party—whether amount to compromise O 32 R 7 N 12
  - by one plaintiff without consent of others O 23 R 1
  - withdrawal of O 23 R 1
- wrong plaintiff—suit in the name of O 1 R 10

Summary suit

- on negotiable instruments O 37
  - costs of noting non-acceptance or non-payment of promissory note or bill of exchange—recovery of O 37 R 6
  - Courts in which summary suits may be brought O 37 R 1
  - defendant not entitled to defend unless leave obtained O 37 R 2
  - deposit of bill hundi or note, power of Court to order O 37 R 5
  - leave to appear and defend
    - after passing of decree O 37 R 4
    - stay of execution and granting of leave O 37 R 4
    - when granted O 37 R 3
  - summons in O 37 R 2

Summons

- *See also*—PROCESS
- acceptance of O 5 R 6
- appearance of defendant in answer to summons O 5 R 1
- CONTENTS
  - day for appearance of defendant to be specified O 5 R 1
  - defendant to be asked to produce documents O 5 R 7
  - direction to produce documents relied on O 5 R 7
  - fixing day for appearance of defendant
  - summons for final disposal— O 5 R 6
  - direction to defendant to produce his witnesses O 5 R 8

Summons—CONTENTS

- summons to settle issues or for final disposal O 5 R 5
- copy of plaint or concise statement to accompany summons. O 5 R 2
- cost of serving summons O 48 R 1
- day for appearance of defendant, how fixed O 5 R 6
- to defendant S 27
- delivery for service,—procedure O 5 R 29
- disobedience of S 32
  - by witness O 16 R 10
  - penalty for S 32
- documents relied on by defendant to be ordered to be produced O 5 R 7
- duty of persons to whom summons is delivered, or sent for service O 5 R 29
- endorsement as to time and manner of service of summons O 5 R 18
- failure
  - after summons returned unserved to apply for fresh summons for three months O 9 R 5
  - of witness to obey for lawful excuse O 16 R 11
  - to apply for fresh summons O 9 R 5
- for final disposal
  - defendant to produce his witnesses O 5 R 8
  - failure to produce evidence, procedure on O 15 R 4
  - settlement of issues or final disposal, O 5 R 5
- foreign summons,—services of S 29
- FRESH SUMMONS O 15 R 1 N 5
  - failure of plaintiff to apply for O 9 R 5
    - effect of—defendant if discharged from liability O 9 R 5 N 4
  - order for O 5 R 19 N 3
  - when may be ordered O 9 R 6 N 5
- in Small Cause Court suits, to be for final disposal only O 5 R 5
- issue of, for settlement of issues—power of court to dispose suit finally O 15 R 3
- letter, substitution of, for summons O 5 R 30
- manner of service endorsement as to O 5 R 18
- necessary where defendant does not appear and admit claim O 5 R 1
- non-service of summons for plaintiff's failure to pay costs, O 9 R 2
- not issued, if claim admitted by defendant when plaint presented, O 5 R 1
- personal appearance of parties, when can or cannot be ordered O 5 Rr 3, 4
- penalty for default in compliance with S 32
- refusal to accept O 5 R 17
- refusal to receive or sign—whether offence O 5 R 16 N 2
- summons issued through another court O 5 R 23
  - when from any cause service is impossible O 5 R 29
- served but not in sufficient time O 9 R 6 (*c*)
- SERVICE OF
  - absence of, due to plaintiff's failure to pay process fees O 9 R 2
  - acknowledgment of person served to sign O 5 R 16
  - affidavit of O 5 R 17 N 11
  - affixing copy on outer door of defendant's place O 5 R 17
  - agent, on O 5 R 13

Summons—SERVICE OF

- by affixture on outer door of defendant's residence O 5 R 17
- by court to whom summons sent for service O 5 R 23
- by post O 5 R 25 N 1; O 5 R 10 N 2; O 5 R 9 Nn 3, 4
  - on pardanashin ladies O 5 R 19 N 3
  - suit against firm O 30 R 3 N 3
- copy of plaint to accompany summons O 5 R 2
- "defendant cannot be found" meaning of O 5 R 15 N 1; O 5 R 17 Nn 4, 5
- defendant keeping out of way for purpose of avoiding service O 5 R 20
- defendant not duly served procedure O 9 R 6 (1) (*b*)
- defendant not served for failure of plaintiff to pay costs thereof—procedure O 9 R 2
- defendant residing within jurisdiction of another court, O 5 R 21
- delivery of summons for service where defendant within jurisdiction O 5 R 9
- dismissal of suit when plaintiff fails to pay for service O 9 R 2
- dismissal of suit where plaintiff after summons returned unserved fails for three months to apply for fresh summons O 9 R 5
- due service but defendant not appearing—procedure on O 9 R 6 (a)
- duty of court to which summons is sent for service O 5 R 23
- duty of persons to whom summons is delivered or sent for service O 5 R 29
- effect of absence of service—*ex parte* decree, ground for setting aside O 9 R 13 N 18
- endorsement as to time and manner of O 5 R 18
- evasion of service by defendant O 5 R 20 N 3
- examination of serving officer O 5 R 19
- foreign summons S 29
- foreign territory, service in, through Political Agent or Court O 5 R 26
- impossibility O 5 R 20 N 4
- in Presidency Towns, of summons issued by courts outside O 5 R 22
  - prison O 5 R 24
- ,, Rangoon, of process issued by outside courts O 5 R 22
- irregularity in manner of service—effect of O 5 R 9 N 1
- letter substitution of, for summons O 5 R 30
- mode of O 5 R 10
  - affixing copy of summons on door of defendant's house, O 5 R 17
  - defendant
    - in jurisdiction of another court O 5 R 21
    - in prison, O 5 R 24
    - not in British India O 5 R 25
    - residing beyond jurisdiction, service to be on agent O 5 R 13
    - delivery or transmission for service O 5 R 9
    - personal service O 5 R 11
    - service to be on defendant in person or his agent, O 5 R 12

Summons—SERVICE OF

    - several defendants, O 5 R 11
    - signature of person served O 5 R 16
    - when defendant refuses to accept service or cannot be found O 5 R 17
- nazir is the proper officer to effect service O 5 R 9 N 5
- object of O 5 R 9 N 1
- on agent O 5 R 12
  - by whom defendant carries on business O 5 R 13
  - empowered to accept service O 5 R 12
  - in charge of immovable property O 5 R 14
  - in charge, in suits for immovable property O 5 R 14
  - when defendant, is beyond jurisdiction O 5 R 13
- on corporation O 29 R 2
- on defendant in person, necessary when practicable O 5 R 12
- on defendant in prison O 5 Rr 24, 29
- on defendant—option to defendant to appear in person or by pleader O 5 R 1
- on defendant residing in another province S 28
- on defendant residing outside jurisdiction O 5 R 21
- on defendant residing out of British India O 5 R 25
- on defendant—within jurisdiction—mode of O 5 R 10
- on firm O 30 R 3
- on male member of defendant's family O 5 R 15 N 2
- on master of ship, service as agent of owner O 5 R 13
- on member of defendant's family O 5 R 15 N 1
- on minor O 5 R 12 N 2; O 32 R 3 N 10
- on newly added defendant—amended copy, to be served O 1 R 10 (4)
- on pardanashin lady O 5 R 12 N 3
- on public servant or servant of railway company or local authority O 5 Rr 27, 29
- on railway company O 5 R 13 N 1
- on railway servant O 5 Rr 27, 29
- on servant, is not on member of family O 5 R 15 Expl
- on servant of defendant O 5 R 15 N 3
- on servant of local authority O 5 Rr 27, 29
- on several defendants O 5 R 11
- on soldier or airman O 5 R 28; O 28 R 3
- on soldiers, sailors or airmen O 5 Rr 28, 29
- on witness—mode of O 16 R 8
- on witness—time for O 16 R 9
- on witness, to be made in same manner as summons to a defendant O 16 R 8
- presumption as to correctness of process-server's report O 5 R 18 N 3
- proof of service O 5 R 19 N 4
- return of summons where from any cause service is impossible O 5 R 29 (2)
- service in foreign territory O 5 R 26

Summons—SERVICE OF
serving officer, examination of, touching service O 5 R 19
substituted service O 5 R 20
mode of O 5 R 20 N 5
return of O 5 R 20 N 7
when and how allowed O 5 R 20
through another court—procedure O 5 R 23
through Political Agent O 5 R 26
to witness O 16 R 8
when defendant cannot be found O 5 R 17
when defendant is within jurisdiction O 5 R 9
when defendant, not in British India O 5 R 25
when defendant refuses to accept O 5 R 17
when defendant resides in another province S 28
where defendant refuses service or cannot be found—procedure O 5 R 17
within presidency-towns, of, summons from, courts outside O 5 R 22
witness—time for serving summons on O 16 R 9
substitution of letter for summons O 5 R 30
summary suit on negotiable instrument —form of summons O 37 R 2 N 2
TO DEFENDANT
to produce his witnesses O 5 R 8
when to be issued O 5 R 1
to enforce personal attendance S 30 (*b*)
to person present in court to give evidence O 16 R 7
to produce document S 30; O 16 R 6
to strangers as witnesses O 16 R 14
(to) witness S 31; O 16
arbitrator, summoning of witnesses by Sch II P 7
contents of O 16 R 5
costs to be deposited O 16 R 2
court, power of, to summon strangers to suit as witnesses O 16 R 14
expenses of O 16 R 2
failure of witness to comply with —procedure O 16 R 10
form of Sch I Appendix B N 3
mode of service O 16 R 8
personal attendance of witness, when cannot be required O 16 R 19
power of court to issue summons to witness S 30
provisions as to witness to apply to parties O 16 R 21
refusal O 16 R 1 Nn 5, 6
service of O 16 R 8
time for serving O 16 R 9
to appear before arbitrators Sch II P 7
to give evidence O 16 R 1
to give evidence or produce document S 31; O 16 R 1
to produce documents O 16 R 6
to specify time, place and purpose O 16 R 5
witness must appear O 16 R 15
where defendant resides in another province S 28

Supplemental proceedings Ss 94, 95

Surety
See also SECURITY
appeal from orders under S. 145 S 145 N 12
cash deposit security—S. 145 does not apply S 145 N 7
discharge of S 145 N 9
discharge—of surety for defendant's appearance O 38 R 3
enforcement of liability of S 145
for appearance of judgment-debtor, when discharged S 145 N 9
for judgment-debtor S 55
fulfilment of condition imposed on a person by court, surety for S 145
LIABILITY
co-extensive with principal debtor S 145 N 8
personal liability of surety under S. 145 is condition precedent S 145 N 8
surety for receiver O 40 R 3 N 2
limitation for application under S 145 S 145 N 13
notice to surety before execution against him S 145 N 14
order for refund of security under S 151—no appeal lies S 145 N 12
payment of money under order of court—surety for—liability of surety S 145
power under S. 145 discretionary S 145 N 7
security bond strictly construed S 145 N 9
security for fulfilment of condition S 145 N 6
security for payment of money, instances of S 145 N 5
security for restitution of property S 145 N 4
security in proceedings other than suits, enforceability in execution S 145 N 6
security may be given before or after decree S 145 N 3
security taken by attaching officer whether enforceable in execution S 145 N 6
suit by or against S 145 N 11
SURETY BOND
form of S 145 N 10
registration S 145 N 10
surety for one-self—S 145 applies S 145 N 6

Temporary Injunction
See also INJUNCTION S 94; O 39 Rr 1—5
notice to opposite party before granting O 39 R 3
ORDER FOR O 39 R 2 (3)
disobedience of O 39 R 2 (3)
may be discharged, varied, or set aside O 39 R 4
property in danger of being wrongfully sold in execution O 39 R 3 (1)
when granted O 39 R 1; S 94

Tenancy Acts
execution of decrees under O 21 R 17 N 7

Tenant
SUIT BY
against ruling chief or prince S 86 (5)

Tenant
- inter pleader suit—when tenant may institute O 35 R 5

Tender
- of expenses to witness O 16 R 3

Territorial Jurisdiction S 15
- *See also* JURISDICTION, PLACE OF SUING

Time
- EXTENSION OF
  - *See also* EXTENSION OF TIME S 148
  - act prescribed or allowed by code S 148
  - after expiry of period fixed S 148 N 7
  - after final decree, no power S 148 N 11
  - application to which court to be made S 148 N 10
  - discretion of court S 148 N 6
  - effect of appeal preferred S 148 N 9
  - for acts prescribed or allowed by court S 148 N 5
  - for making award Sch II Para 8
  - in consent decree S 148 N 3
  - power of court to enlarge time S 148
  - time fixed for payment in foreclosure decree O 34 R 2
  - to make up deficient court-fee S 149
  - when fixed by award S 148 N 4
  - when fixed by decree S 148 N 2
  - when fixed by law S 148 N 1
  - when fixed or granted by court S 148 N 1
  - when implied S 148 N 8
- (FOR) APPEARANCE OF
  - defendant to be specified in summons O 5 R 1
  - when service substituted O 5 R 20 (3)
  - to be specified in summons O 5 R 1
  - respondent in appeal O 41 R 12
- for attendance of witness to be specified in summons O 16 R 5
- for inspection O 11 R 17
- for payment of purchase money O 21 R 85
- for sale in execution O 21 R 68
- for security and deposit on appeal to, Privy Council O 45 R 7
- for serving summons to witness O 16 R 9
- INTERROGATORIES
  - time for filing affidavit of answer to O 11 R 8
  - time within which application lies to set aside O 11 R 7
- limit of, for execution S 48
- of sale in execution O 21 R 68
- of service of summons—endorsement as to O 5 R 18
- summons served, but not in due time O 9 R 6 (1) (*c*)
- when fixed by law—instances of S 148 N 1

Title of the Act S 1 (1)

Tort
- damages—suit for—frame of—splitting of claim O 2 R 2 N 10
- DEFAMATION, SUIT FOR
  - interrogatories O 11 R 6 N 9
  - pleading—contents of O 6 R 9 Nn 2, 9
- IN RESPECT OF
  - immovable property, place of suing S 16
  - movables, place of suing S 19

Tort—IN RESPECT OF
  - persons—place of suing S 19
- joint tortfeasors—suit against—parties O 1 R 3 N 8
- malicious prosecution, suit for—pleadings—contents of O 6 R 4 N 11
- negligence—suit for—pleading—contents of O 6 R 4 N 13
- SUIT FOR DAMAGES
  - parties O 1 R 10 N 14
  - right to sue survival of on death of parties O 22 R 1 N 7
- suit on—parties O 1 R 10 N 21

Transfer
- by High Court of district court S 24
- by Governor-General in Council S 25
- OF BUSINESS
  - from one court to another S 150
  - meaning of S 150 N 2
  - powers of transferee court in execution S 150 N 1
  - power to demand inventory under the probate and Administration Act S 150 N 1
  - transferee court can punish disobedience of temporary injunctions S 150 N 1
  - transferee court may set aside *ex parte* decree S 150 N 1
  - whether it is same as transfer of business by district judge under Civil Courts Act S 150 N 2
- when S 150 applies S 150 N 3
- OF DECREE
  - application by transferee O 21 R 16
  - for execution S 39
    - attachment under precept, how long to continue S 46 proviso
    - court passing decree, power of to send it to a subordinate court S 39 (2)
    - courts receiving decree to file same without proof O 21 R 7
    - court to which decree is sent to certify result of proceedings S 41
    - decree, filing of, by court to which it is transferred without proofs O 21 R 7
    - decree when may be transferred S 39
    - documents to be sent to court to which decree is transferred O 21 R 6
    - execution by court to which decree is transferred O 21 R 8
    - execution by High Court, of decree transferred by other courts O 21 R 9
    - execution in British India of decrees of Native States S 44
    - execution in foreign territory, of decree of courts in British India S 45
    - jurisdiction of court passing decree, proof of O 21 R 7 N 4
    - mode of transfer O 21 R 5

Transfer—OF DECREE
- powers of courts in executing transferred decrees S 42
- precepts S 46
- Presidency Small Cause Courts, transfer of decrees for execution to O 21 R 4
- rules by local Government, for transfer to Collector S 70
- to Collector, rules as to Ss 68, 70
- to court in another province S 40
- to subordinate court by District Court O 21 R 8

of negotiable instrument or shares after sale O 21 R 80

OF PROPERTY
- after attachment is void S 64
- by judgment-debtor prohibited during management by Collector Sch III Para 11

Transfer of Property Act, S. 57 saving of powers conferred by O 34 R 13 (2)

SUIT
- general power of transfer S 24
- absence of order for transfer, effect of S 24 N 14
  - appeal, if lies against order of S 24 N 17
  - application to be made for S 24 N 3
  - at any stage of suit S 24 N 6
  - court to which it is transferred must be competent to try it S 24 N 11
  - conditions for exercise S 24 N 2
  - court, meaning of S 24 N 9
  - courts which can transfer S 24 N 5
  - grounds of S 24 N 13
  - insufficient grounds for—instances of S 24 N 13
  - notice of application is necessary S 24 N 10
  - of its own motion S 24 N 4
  - power of court to transfer suit pending before it S 24 N 8
  - procedure of court of S 24 N 15
  - revision, if lies against order of S 24 N 18
  - Small Cause Court, effect of transfer from or to S 24 N 15
  - transfer of small cause suit to another court not having small cause power—effect of S 24 N 11
  - sufficient grounds for transfer, instances of S 24 N 13
  - suit if can be transferred if instituted in court without jurisdiction S 24 N 12
  - transfer from courts subordinate to it S 24 N 9
  - who may apply for transfer S 24 N 3
- Governor-General in Council's power to transfer S 25
- Governor-General in Council transfer by—appeal to which High Court lies S 25 N 2

Transfer—Suit
- High Court, suit pending before single judge—transfer to another High Court S 25 N 1
- meaning of S 24 N 7
- transferred suit, evidence in, how dealt with O 18 R 15 (2)
- which may be instituted in more than one court S 22
  - application for transfer S 22 N 2
  - application to be made to common appellate court S 23 N 2
  - application to be made to what court S 23
  - application, when to be made S 22 N 6
  - notice to parties necessary before making application S 22 N 3
  - objections must be heard before making order S 22 N 5
  - original side of High Court, if subordinate to appellate side for purposes of transfer S 23 N 3
  - stay of suit, inherent powers S 22 N 8
  - strong reasons necessary S 22 N 1
  - transfer to court subordinate to different High Court S 23 N 4

Trust

DEDICATION
- necessary S 92 N 5
- not to be vague S 92 N 5

devolution of S 92 N 5

idol—suit on behalf of—contents of plaint O 7 R 4 N 2

private trust—scheme, not to be framed S 92 N 21

PUBLIC TRUST
- administration of—*cypres* doctrine, applicability of S 92 N 22
- decree against—execution—attachment, pending ascertainment of amount due O 21 R 42 N 3
- distinguished from private trust S 92 N 5
- religious or charitable—suits in respect of S 92
- scheme
  - execution of S 92 N 34
  - interpretation of S 92 N 21
  - matters arising under—court's jurisdiction S 92 N 21
  - settlement of S 92
- variation S 92 N 21
- suit relating to S 92
  - abatement **S 92 N 36; O 22 R 1 N 14**
  - addition and striking out of parties, governed by ordinary rules O 1 R 10 N 10
  - appointing new trustee S 92 (*b*)
  - arbitration, reference to S 92 N 35
  - compromise of S 92 N 29
  - effect of O. 1, R. 8 O 1 R 8 N 8
  - if can be brought in *forma pauperis* S 92 N 31
  - jurisdiction S 92 N 38
  - limitation S 92 N 40
  - nature of S 92 N 7
  - need not be contentious S 92 N 32

Trust—PUBLIC TRUST—Suit relating to
- order of District Judge—revision S 92 N 37
- parties S 92 Nn 8, 28
- plaint, contents of O 7 R 4 Nn 1, 2
- relief claimable S 92 Nn 9-14
- valuation of S 92 N 39
- trustee
  - appointment of S 92
  - *de son tort* S 92 N 5
  - manager of mutt S 92 N 5
  - removal, suit for S 92
  - suit against, when will lie S 92 N 6
  - suit by—splitting of claims—Advocate-General is barred from suing for omitted portion O 2 R 2 N 21
  - vesting of property in S 92
- trust property
  - alienation of S 92 N 20
  - allocation of, to any particular object of trust S 92 (1) (*e*)
  - authorizing sale, etc., of S 92

TRUSTEE
- attachment, property held in trust for judgment-debtor, liable to S 60 (1)
- beneficiaries, when may be added as parties O 31 R 1 N 2
- co-trustees—suit by O 1 R 1 N 7
- deposit in court, order for, of moneys, etc., held as trustee O 39 R 10
- husband of married trustee need not join in suit by or against her O 31 R 3
- parties—when there are several trustees, all to be made parties O 31 R 2
- representation of beneficiary by trustee in suit relating to mortgage concerning property vested in trustee O 34 R 1 N 7
- suit by or against O 31
- suit for removal—whether can be filed in *forma pauperis* O 33 R 1 N 15
- whether may sue as pauper O 33 R 1 N 13

TRUST PROPERTY
- alienation of—suit to set aside—parties to suit O 1 R 8 N 8
- suit as to where contention is between beneficiaries and third parties O 7 R 4 N 2
- suit to recover—who can sue O 1 R 8 N 8

U

Umpire
- *See also* ARBITRATION
- appointment of new Sch II P 5
- appointment of Sch II P 4 (1) (*a*)
  - notice for Sch II P 5
- corruption or misconduct of Sch II P 15 (1) (*a*)
- death of Sch II P 5 (*b*) (1)
- leaving British India Sch II P 5 (*b*) (*iii*)
- powers of Sch II P 6
- statement of special case by Sch II P 11
- when may arbitrate Sch II P 9

Unsound mind
- person of—*See* LUNATIC
- plaint, statement in, where party is of unsound mind O 7 R 1 (*d*)

Unsound mind
- suits by or against persons of O 32 R 15

Usage having the force of law
- and pauper appeal O 44 R 1
- and reference to High Court O 46 R 1
- and second appeal S 100 (1)

Vakalatnama O 3 R 4
- consolidated appeals—whether one vakalat enough O 41 R 1 N 15
- defect in—presentation of appeal, effect on O 41 R 1 N 3

Valuation
- appeal S 96 N 18
- claim suit O 21 R 63 N 21
- "competent to try" meaning of S 15 N 5
- declaration and injunction, suit for S 15 N 16
- different subjects included in suits—aggregate value is value of suit S 15 N 27
- document, suit to set aside S 15 N 7
- for jurisdiction and for court-fee S 15 N 9
- foreclosure suit S 15 N 11
- in appeals to Privy Council O 45 R 4
- inquiry into O 45 R 5
- jurisdiction determined by valuation in plaint S 6 Nn 4, 5
- karnavan, suit to remove S 15 N 7
- landlord and tenant, suit between S 15 N 22
- occupancy right, suit to establish S 15 N 25
- of subject-matter—Privy Council appeal S 110 N 3
- OF SUIT
  - improper—consequent change of forum—effect of S 15 N 8
  - improper—jurisdiction if can be objected to in appeal S 15 N 8
  - mode of S 15 N 10
  - Privy Council, appeal to
    - and consolidation of suits O 45 R 4
    - and remitting dispute to lower court O 45 R 5
    - rejection of plaint where relief claimed is undervalued O 7 R 11 (*b*)
  - where satisfactory valuation, not possible S 15 N 7
- plaint, to state value of subject-matter O 7 R 1 (1)
- pre-emption suit S 15 N 12
- redemption suit S 15 N 11
- registration of documents, suit to enforce S 15 N 7
- special case for court's opinion O 36 R 2
- trustees, suit to remove S 15 N 7

Verification
- APPLICATION FOR
  - execution, requires O 21 R 11 (2)
  - leave to sue as pauper O 33 R 2
  - order for sale O 21 R 66 (3)
- OF PLEADING
  - *See also* PLEADING
  - in general O 6 R 15
  - in suits against Government O 27 R 1
  - suits by or against corporations O 29 R 1
  - in suits by or against firm O 30 R 1 (2)

Vice-Admiralty
procedure in cases of—applicability of code S 96 N 2

Village Court
bar of suit due to splitting of relief, if applies to proceedings in O 2 R 2 N 36

Village headman
is public officer S 2 (17) Notes

Village Sanitation Panchayat
whether public officer S 2 (17) Notes

Warrant
See also (1) ATTACHMENT, (2) ARREST, (3) EXECUTION
affixing copy of, and delivery of joint possession O 21 R 35 (2)
endorsement on O 21 R 25
FOR ARREST
  and cancellation thereof S 59 (1)
  contents of O 21 R 38
  for disobeying summons S 32 (*a*)
  of defaulting witness O 16 R 10 (3)
  of defendant, before judgment S 94 (a); O 38 R 1
  of defendant, to enforce appearance S 94 (*a*)
  outside jurisdiction in cases other than execution of decrees S 136
  to direct judgment-debtor to be brought up O 21 R 38

Will
EXECUTOR
  if can obtain probate in *forma pauperis* O 33 R 1 N 1
  representation of beneficiary by, in suit on mortgage concerning property vested in O 34 R 1 N 7
  suit against
    frame of O 2 R 5
    parties to O 1 R 10 N 14
  suit by
    contents of plaint O 7 R 4 N 1
    joint—parties to O 1 R 1 N 7
  who have not proved, not necessary parties O 31 R 2 (pro)
PROBATE PROCEEDINGS
  applicability of rules as to withdrawal of suit O 23 R 1 N 5
  arbitration provisions, applicability of Sch II P 1 N 5
  compromise of O 23 R 3 N 11
  interrogatories O 11 R 1 N 14
  minor, party—appointment of guardian *ad litem* O 32 R 3 N 14
  O 9 provisions, applicability of O 9 R 9 N 6
  temporary injunction, if may be granted O 39 R 1 N 4
  verification of pleading, applicability of rule of O 6 R 15 N 1
  whether probate can be obtained in *forma pauperis* O 33 R 1 N 1

Withdrawal
OF APPEAL
  effect on, cross-objections O 41 R 22 (4)
OF ATTACHMENT
  before judgment O 38 R 6 (2)

Withdrawal—OF ATTACHMENT
  property of defaulting witness O 16 R 11
OF SUIT O 23 R 1
  application for O 23 R 1 N 16
  by guardian or next friend whether amounts to compromise O 32 R 7 N 12
  by High Court from subordinate courts S 24 (1) (b)
  by one plaintiff without consent of others O 23 R 1 (4)
  by pauper payment of court-fees O 33 R 11
  formal defect O 23 R 1
  or of part of the claim O 23 R 1
  subject to Limitation Law O 23 R 2
  with leave to file fresh suit O 23 Rr 1, 2
  without leave O 23 R 1 (3)
provisions of O 23 do not apply to application for final decree O 23 R 1 N 8

Witness
about to leave court's jurisdiction O 18 R 16
appearing and explaining default—attachment may be withdrawn O 16 R11
ARREST OF
  attendance on date enforced by O 16 R 18
  for disobedience to summons O 16 Rr 10, 18
  when exempt from S 135 (2)
ATTACHMENT OF PROPERTY
  of defaulting witness O 16 R 10
  mode of O 16 R 13
  order for O 16 R 10 (3)
  withdrawal of O 16 R 11
ATTENDANCE
  before collector Sch III P 13
  before commissioner O 26 R 17
    examination of O 26 R 17
    provisions of code as to attendance before court, applicability of, to O 26 R 17
  beyond jurisdiction O 16 R 19
  duty of, to attend at each hearing O 16 Rr 15, 16
  in person, when ordered O 16 R 19
  of arrested witness how enforced O 16 R 18
  power to compel to give evidence or produce documents S 30
  rules as to, apply to parties O 16 R 21
  when not required, in person O 16 R 19
commission to examine S 75; O 26 R 1
cross-examination of deponent of affidavit O 19 R 1 N 4
cross-examination—right of court to fix time limit for O 18 R 4 N 1
DEMEANOUR
  commissioner to examine witness, if may note demeanour O 26 R 7
  notes as to O 18 R 12
departure from court without lawful excuse O 16 R 17
detention of O 16 R 4 (2)
discretion of court, to refuse to examine O 18 R 4 N 1
disobedience of summons, effect O 16 Rr 10, 11
duty to give evidence or produce document O 16 R 15

Witness

evidence, taken under S 138, Evidence Act to conform to form prescribed O 18 R 7
EXAMINATION OF
  answer to be taken down O 18 R 10
  before framing issues O 14 R 4
  by commissioner O 26 R 16 (a)
  certain rules of O. 18 applicability of, to High Court O 49 R 3
  conduct of witness, may be recorded by court O 18 R 12
  if infant or old O 18 R 4 N 1
  in absence of opposite party O 18 R 5 N 2
  in particular manner on agreement O 18 R 4 N 2
  not complete without cross examination O 18 R 4 N 1
  on commission—grounds for O 26 R 1 N 1
  particular question or answer to be taken down O 18 R 10
  power to examine witness immediately O 18 R 16
  power to re-call and examine witness O 18 R 17
  remarks on demeanour of witness O 18 R 12
  to be from the witness box O 18 R 4 N 2
  to be in open court O 18 R 4
  when witness fails to attend O 16 R 10 (1)
  witness about to leave jurisdiction of court O 18 R 16 (1)
exemption from arrest S 135
EXPENSES OF
  detained more than a day O 16 R 4 (2)
  giving evidence before commissioner O 26 R 17
  expert O 16 R 2 (2)
  insufficiently paid O 16 R 4
  payment of, to witness O 16 R 3
  scale of O 16 R 2 (3)
FAILURE TO OBEY SUMMONS O 16 Rr 10, 11
  procedure O 16 R 10
  proclamation, to attend, affixing copy of, on outer door of house of witness O 16 R 10 (2)
  when offence O 16 R 18 N 1
immediate examination of witness O 18 R 16
inability to give evidence or produce document—procedure O 16 R 18
infirmity of—examination of witness on commission when may be ordered O 26 R 1
letter of request to examine S 77
objection to question or answer, to be taken down O 18 Rr 10, 11
party, summoning of, as witness O 16 R 1 N 4
payment of expenses, to O 16 R 3
penalty for default of compliance with summons S 32; O 16 R 12
personal attendance, when to be ordered O 16 R 19
POWER OF COURT
  to determine what witnesses to be examined O 18 R 2 N 1
  to examine immediately O 18 R 16
  to fine O 16 R 12

Witness—POWER OF COURT

  to issue summons to witness S 30 (b)
  to order person present in court to give evidence or produce document O 16 R 7
  to order sale of property of witness O 16 R 12
  to summon, of its own accord O 16 R 14
process against, for appearing before commissioner O 26 R 17
proclamation requiring witness to attend or produce document O 16 R 10
questions to be taken down O 18 R 10
re-calling of O 18 R 17
remarks about demeanour O 18 R 12
RESIDING OUT OF BRITISH INDIA
  examination on commission O 26 R 5
  letter of request for examination O 26 R 5
rules as to attendance apply to parties to suit, when required to attend O 16 R 21
sickness of—commission to examine witness when may be issued O 26 R 1
signature of, to deposition O 18 R 5 N 4
strangers, summons by court of its own accord to O 16 R 14
summoning of witnesses, before arbitrator Sch II P 7
SUMMONS TO
  applicability of rule about expenses (O 16, R 2) to High Court O 49 R 3
  application for issue of O 16 R 1
  attachment of property of witness O 16 R 10 (3)
    appeal from order of O 43 R 1 Cl (g)
  contents of O 16 Rr 1, 5
  court may summon stranger to suit as witness O 16 R 14
  directing defendant to produce his witnesses O 5 R 8
  documents, for production of O 16 R 6
  to give evidence, duty of persons O 16 R 15
  examination of serving officer, when witness fails to appear O 16 R 10 (1)
  expenses of witness detained more than a day O 16 R 4 (2)
  how served O 16 R 8
  insufficient sum paid for expenses, procedure O 16 R 4
  party refusing to give evidence—appeal from order pronouncing judgment against party O 43 R 1 Cl (h)
  procedure, when witness apprehended cannot give evidence O 16 R 18
  procedure, where witness fails to comply with summons O 16 Rr 10, 12, 13
  proclamation to attend O 16 R 10 (2)
  refusal by O 16 R 1 Nn 5, 6
  refusal to give evidence when required by court, consequence of O 16 R 20
  remuneration payable to experts O 16 R 2 (2)
  rules as to witness to apply to parties summoned as O 16 R 21
  security for attendance from witness O 16 R 16 (2)
  Small Cause Court, cannot attach immovable property of witness O 16 R 10 proviso

Witness—SUMMONS TO
- tender of expenses, to witness O 16 R 3
- time for serving summons O 16 R 9
- time, place and purpose of attendance to be stated in summons O 16 R 5
- to appear before arbitrators Sch II P 7
- to give evidence or produce document S 31; O 16 R 1
- travelling and other expenses of witness O 16 R 2
- warrant of arrest, issue of O 16 R 10 (3)
- when witness may depart O 16 R 16
- when witness cannot be ordered to attend in person O 16 R 19

summoned by court of its own accord—cross-examination of O 16 R 14 N 2

Woman
- *See also* FEMALE
- decree against wife, when may be executed against husband O 22 R 7 (2)
- exempt from arrest and detention in execution Ss 56; 132 (2)
- exempt from personal appearance S. 132
- marriage of party, suit not to abate by O 22 R 7
- married woman, if can sue as pauper or guardian *ad litem* of minor party O 32 R 4 N 4
- married woman if can sue as pauper O 33 R 1 N 14
- no attachment of certain personal ornaments of S 60 (1) (*a*)
- security for costs from woman plaintiff O 25 R 1 (3)

Words and Phrases
- *any other court of final appellate jurisdiction* S 109 N 6
- *appearance* O 3 R 1 N 3
- *bankers' book* O 7 R 17 N 1
- *bonds* S 2 (19) Notes
- *civil courts* L P Cl 16 N 2
- *civil process* S 135 N 8
- *court of civil jurisdiction* S 141 N 6
- *court which passed a decree* S 37
- *debt* S 60 N 7; O 21 R 46 N 2
  - *salary whether debt* O 21 R 46 N 3
- *decree* for purposes of S. 109 S 109 N 3
- *defendant* for purposes of O. 9 R. 2 O 9 R 2 N 2
- *district* S 2 (4)
- *final order* with reference to S. 109 S 109 N 4
- *first hearing* O 8 R 1 N 3
- *Government pleader* S 2 (7)
- *hearing* O 9 R 9; O 17 R 2 N 6
- *judgment* L P Cl 15 N 2
- *matters in controversy* S 2 (2) N 6
- *matter in difference* in Sch. II Sch II P 1 N 10; P 3 N 4
- *matter in issue* S 11 Expl 3
- *member of family*—servant not included O 5 R 15
- *order passed on appeal* with reference to S. 109 S 109 N 5
- *ordinary jurisdiction* L P Cl 12 N 2
- *person under disability* S 147 N 3
- *powers* S 107 N 10
- *power-of-attorney* O 3 R 2 N 3
- *prescribed* S 2 (16)
- *question arising between parties to suit* within S 47, for pauper suits O 33 R 13

Words and Phrases
- *question of fact* O 21 R 90 N 41
- *question of law* O 21 R 90 N 41
- *reasonable cause* for removing or suspending legal practitioner L P Cls 9&10 N 4
- *recognized agent* O 3 R 2
- *residence* O 5 R 9 N 2
- *right to sue* O 22 R 1 N 3
- *rules* S 2 (18)
- *salary* O 21 R 46 N 3
- *salary* whether debt O 21 R 46 N 3
- *shares in a corporation* S 2 (19)
- *signed* S 2 (20)
- *special case* in Sch II Sch II P 11 N 1
- *stock* **S 2 (19) Notes**
- *subjects in dispute* O 2 R 1 N 3
- *such other order* in O. 17 R2; O 17 R 2 N 8
- *sufficient cause* within Sch II, P 17 **Sch II P 17 N 9**
- *suit* L P Cl 13 N 2
- *suit for immovable property* O 2 R 4 N 3
- *suit for payment of money* for purposes of security for costs O 25 R 1 N 12
- *tribunal* **S 135 N 6**
- *while serving under the Government* S 2 (17) Notes

Written statement
- *See also* PLEADING
- additional O 8 R 9
- amendment of O 6 R 17
- defence founded on separate grounds O 8 R 7
- defence of fraud to be set forth O 8 R 2
- denial of contract, how to be made O 6 R 8
- denial of plaintiff's claim must be specific O 8 Rr 3, 5
- effect of not presenting O 8 R 10
- evasive denial not allowed O 8 R 4
- fact deemed to be admitted—power of court to require proof O 8 R 5 Proviso
- facts not denied to be taken as admitted O 8 R 5
- facts specifically denied are deemed as admitted O 8 R 5
- failure to amend within time fixed by court, effect of O 6 R 18
- failure to present, though called for by court—effect O 8 R 10
- grounds which would take opposite party by surprise, to be stated O 8 R 2
- illegality, defence must be pleaded O 8 R 2
- inspection of documents mentioned in O 11 R 15
- limitation, defence must be pleaded O 8 R 2
- new facts, must be specially pleaded O 8 R 2
- new ground of defence, which has arisen after written statement, may be raised O 8 R 8
- payment or performance, defence of O 8 R 2
- pleading includes O 6 R 1
- presentation of O 8 R 1
- relief claimed by defendant must be specifically stated **O 7 R 7**
- set-off founded on separate grounds, to be separately stated O 8 R 7
- set-off, particulars of, to be given in written statement O 8 R 6
- set-off, when may be claimed O 8 R 6
- signing of O 6 R 14

Written Statement
- striking out unnecessary, scandalous or embarrassing matter O 6 R 16
- subsequent pleadings O 8 R 9
- to be presented by defendant O 8 R 1
- verification of O 6 R 15

Worship
- right of, temporary injunction restraining O 39 R 1 N 8
- suit for, right of, if of civil nature S 9 N 23

Writing
- notices and orders should be in S 142

Wrong
- to immovable property, suit for compensation for—place of suing S 16 (*e*)
- to person or movables, suit for—place of suing S 19
- wrong payment of sale proceeds, refund of S 73 (2)
- wrong plaintiff, suit in the name of O 1 R 10

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